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**Government of the District of Columbia
Public Employee Relations Board**

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| In the Matter of: | |) | |
| | |) | |
| Taiwo Akintolu | |) | |
| | |) | |
| | Complainant |) | PERB Case No. 24-U-42 |
| | |) | |
| | v. |) | Opinion No. 1904 |
| | |) | |
| District of Columbia Department of Corrections | |) | |
| | |) | |
| | Respondent |) | |
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DECISION AND ORDER

I. Statement of the Case

On May 20, 2024, the Board revoked certification of the Fraternal Order of Police/Department of Corrections Labor Committee (FOP) as the exclusive bargaining representative for employees at the District of Columbia Department of Corrections (DOC).¹ That decertification, which FOP has since appealed to the Superior Court of the District of Columbia,² provides the backdrop for the instant dispute.

On September 4, 2024, a terminated DOC Correctional Officer (Complainant), filed an unfair labor practice complaint (Complaint) in the above-captioned matter.³ The Complaint alleges that DOC violated D.C. Official Code § 1-617.04(a)(1) of the Comprehensive Merit Personnel Act (CMPA) by refusing to engage in arbitration over the Complainant’s termination.⁴ The Complaint further alleges that DOC violated D.C. Official Code § 1-617.04(a)(5) of the CMPA by refusing to participate in arbitration proceedings, both before and after the

¹ *Darlene Bryant, et al. v. FOP/DOC Labor Comm.*, Slip Op. No. 1871, PERB Case No. 22-S-05 (2024).

² *FOP/DOC Labor Comm. v. PERB*, Case No. 2024-CAB-003838. On October 22, 2024, the D.C. Superior Court granted the Motion for Temporary Restraining Order and Preliminary Relief which FOP filed in that case. Accordingly, the Board stayed enforcement of Opinion No. 1871. *Darlene Bryant, et al.*, Slip Op. No. 1881.

³ The Complaint includes a Motion for an immediate injunction to bar DOC from refusing to engage in arbitration proceedings which arose prior to FOP’s decertification, or which implicate rights accrued or vested in the CBA between DOC and FOP. Complaint at 13-15. PERB declined to decide that Motion until the conclusion of its investigation. Given the issuance of this decision, the Motion is now moot.

⁴ Complaint at 7-8.

decertification order was issued.⁵ The Complaint contends that post-decertification, the unit members retained the right to arbitration which they accrued or vested under the CBA.⁶ Thus, the Complaint asserts, DOC has a continuing obligation to participate in arbitration proceedings.⁷

On October 1, 2024, DOC submitted an Answer to the Complaint, denying the CMPA violations alleged therein. DOC asserts that it made good faith efforts to arbitrate while the CBA was in effect.⁸ Regarding post-decertification arbitration, DOC argues that grievances which arise after a contract has been nullified are not subject to the arbitration procedures set forth therein.⁹ Thus, DOC argues that it is not legally obliged to arbitrate the matter of the Complainant's termination.¹⁰

On October 22, 2024, the D.C. Superior Court issued an Order in the related appeal, enjoining the Board from enforcing or recognizing the decertification of FOP until the appeal is resolved. The court's Order further established that the noncompensation CBA between DOC and FOP shall remain enforceable during the appeal.

On November 19, 2024, PERB issued a letter to the parties, requesting that they submit briefs addressing the following issues: (1) Whether the Complainant accrued or vested a right to arbitrate his grievance prior to the Board's revocation of FOP's certification as the exclusive bargaining representative; and (2) Whether DOC was obligated to proceed to arbitration after the Board revoked FOP's certification as an exclusive representative. The parties submitted their briefs ("Complainant Brief" and "DOC Brief") on January 7, 2025.

For the reasons discussed herein, the Board finds that DOC has violated D.C. Official Code § 1-617.04(a)(1) and (5) of the CMPA.

I. Background¹¹

At the time of his termination, the Complainant had been a DOC Correctional Officer for over five (5) years¹² and had not been subject to discipline during the three (3) years prior.¹³ On October 2, 2023, the Complainant was assigned to secure an inmate who was undergoing medical treatment at Howard University Hospital (HUH).¹⁴ During this assignment, an HUH staff member

⁵ Complaint at 7-8.

⁶ Complaint at 9-10 (citing *Litton Fin. Printing Div. v. N.L.R.B.*, 501 U.S. 190, 209 (1991)).

⁷ Complaint at 9-10 (citing *Litton Fin. Printing Div.*, 501 U.S. at 209).

⁸ Answer at 9.

⁹ Answer at 9-10.

¹⁰ Answer at 10. DOC further contends that the Complainant lacks standing, and argues that the Complaint is procedurally deficient, untimely, and premature. Answer at 11-13.

¹¹ As no hearing was held in this matter, a definitive factual record was not established. The Board indicates herein where the parties' accounts differ and notes that these disagreements do not impact the Board's ultimate disposition.

¹² Complaint at 3; Answer at 2.

¹³ Answer at 2. Three (3) years is the timeframe DOC considered for the purposes of the Complainant's termination. Answer at 2. The Complainant asserts that there was no disciplinary action against him during the entirety of his tenure with DOC. Complaint at 3.

¹⁴ Complaint at 3.

photographed the Complainant leaning back in his chair,¹⁵ allegedly asleep and turned away from the inmate.¹⁶ The HUH staff member provided the photograph to MPD and, on October 23, 2024, the Complainant was served with a proposed 9-day suspension for the incident.¹⁷ On January 12, 2024, the Complainant received a notice rescinding the 9-day suspension and stating that he was on administrative leave, pending disciplinary action.¹⁸ The Complainant received a Notice of Proposed Removal (Notice) on February 2, 2024.¹⁹

In February of 2024, the Complainant submitted a written and oral reply to DOC's internal Hearing Officer, challenging the Notice.²⁰ On March 4, 2024, the Hearing Officer issued a recommendation, advising DOC to require the Complainant to complete remedial training, as opposed to terminating him.²¹ On March 20, 2024, the DOC Director sustained the removal,²² effective March 25, 2024.²³ The Complainant asserts that he responded to the Director's decision by filing a grievance on March 28, 2024, in accordance with the CBA.²⁴ DOC, however, contends that the Complainant merely submitted a draft reply to the Notice, and later rescinded that draft.²⁵ DOC rejected the Complainant's submission on April 9, 2024.²⁶ On April 11, 2024, FOP invoked arbitration on the Complainant's behalf.²⁷ At DOC's request, FOP provided an arbitration panel.²⁸

On May 1, 2024, DOC sent an email to the Complainant, disputing the arbitrability of his termination.²⁹ A meeting to strike the arbitration panel was set for May 7, 2024, but DOC declined to attend, contending that it had not received a valid grievance from the Complainant.³⁰ After the Complainant provided additional documentation, the parties held a meeting on May 10, 2024, to continue the process of striking arbitrators.³¹ An Arbitrator was selected via this process.³²

¹⁵ Complaint at 3.

¹⁶ Answer at 3. While DOC concluded that the Complainant was asleep at his post, the Complainant denies that allegation. Complaint at 3.

¹⁷ Complaint at 3.

¹⁸ Complaint at 3.

¹⁹ Complaint at 4. FOP contends that DOC's service of the Notice was untimely. Complaint at 4. DOC contends that it timely served the Notice. Answer at 3.

²⁰ Complaint at 4.

²¹ Complaint at 4. DOC contends that the Hearing Officer further concluded that lesser disciplinary actions may be appropriate to ensure the Complainant's future compliance with DOC's post orders concerning supervision of inmates. Answer at 4.

²² Complaint at 4.

²³ Answer at 11.

²⁴ Complaint at 4.

²⁵ Answer at 4-5.

²⁶ Complaint at 4.

²⁷ Complaint at 5.

²⁸ Complaint at 5. The Complainant asserts that DOC violated the 10-day arbitrator selection timeline established in the CBA. Complaint at 5. DOC argues that it complied with controlling past practice concerning the arbitrator selection timeline. Answer at 5.

²⁹ Complaint at 5.

³⁰ Complaint at 5-6.

³¹ Complaint at 6.

³² Complaint at 6.

On May 20, 2024, the Board issued a decision in *Darlene Bryant, et al. v. FOP/DOC Labor Committee*, decertifying the FOP as the representative of the Complainant's bargaining unit.³³ On July 12, 2024, DOC refused to arbitrate the Complainant's termination, asserting that the Board's decertification order stripped FOP of its status as the accredited representative for the Complainant's bargaining unit.³⁴ The Arbitrator stayed this matter, pending the court's decision concerning FOP's decertification appeal.³⁵

II. Discussion

As a preliminary matter, the Board considers whether the allegations in the Complaint are timely. Under Board Rule 520.4, an unfair labor practice complaint must be filed no later than one hundred twenty (120) days after the date on which the alleged violation occurred or the date the complainant knew or should have known of the alleged violation, if later. DOC contends that the Complaint was filed more than 120 days after the Complainant's removal and thus, it must be dismissed as untimely.³⁶

The Board notes that May 7, 2024, was 120 days before September 4, 2024 (the date the Complaint was filed). As DOC states, the Complainant was terminated on March 25, 2024, which was more than 120 days before PERB received the Complaint.³⁷ However, the Complaint does not allege that the termination itself violated the CMLA. Rather, it alleges that DOC's refusal to bargain with FOP violated the CMLA.³⁸ Under Board Rule 520.4, the allegations concerning DOC's pre-termination refusal to bargain must be dismissed as untimely because they predate the May 7, 2024, cutoff. However, the allegation that DOC refused to engage in arbitration *after* the Complainant's termination solely concerns events occurring on or after July 12, 2024.³⁹ Therefore, the Board declines to dismiss that portion of the Complaint on the basis of timeliness.

Regarding the substantive merits of the Complaint, the Board considers whether the Complainant accrued or vested a right to arbitrate his grievance prior to the Board's revocation of FOP's certification as the exclusive bargaining representative. DOC argues that "[t]he Complainant did not accrue a right to arbitrate his grievance prior to the Board's revocation of FOP's certification as the exclusive bargaining representative."⁴⁰ DOC argues that, under the CBA, the Complainant was permitted to appeal the denial of his grievance to the Office of Employee Appeals (OEA) but failed to do so.⁴¹

The Board has established that it does not have the authority to interpret collective bargaining agreements.⁴² Thus, where the parties have differing contractual interpretations,

³³ *Darlene Bryant, et al.*, Slip Op. No. 1871.

³⁴ Complaint at 6.

³⁵ Complaint at 7.

³⁶ Answer at 11.

³⁷ Answer at 11.

³⁸ Complaint at 7-8.

³⁹ Complaint at 6, 8.

⁴⁰ DOC Brief at 5.

⁴¹ Answer at 11-12.

⁴² *FOP/MPD Labor Comm. v. MPD*, 60 D.C. Reg. 2585, Slip Op. No. 1360 at 4, PERB Case No. 12-U-13 (2013).

resulting in a dispute regarding the arbitrability of a grievance, the Board has consistently found that it does not have jurisdiction.⁴³ Accordingly, the Board declines to decide the issue of whether the Complainant accrued or vested a right to arbitrate his grievance prior to the Board's revocation of FOP's certification as the exclusive bargaining representative.

Under the CMPA, there is no pre-arbitration remedy available to a party claiming that arbitration was invoked over a contractually-inarbitrable grievance.⁴⁴ Thus, the Board has established that questions of arbitrability shall initially be resolved by the arbitrator.⁴⁵ If a party disagrees with the arbitrator's conclusion concerning arbitrability, the party may file an arbitration review request with the Board, appealing the award.⁴⁶ Where a party seeks pre-arbitration relief, it may submit a motion to stay arbitration to the D.C. Superior Court, in accordance with the Arbitration Act.⁴⁷

The Board finds that DOC has not availed itself of the option to seek pre-arbitration relief through the D.C. Superior Court, nor has it engaged in arbitration and exercised its right to appeal the award to the Board. Rather, DOC has summarily refused to arbitrate the Complainant's grievance, thereby precluding an arbitrability determination concerning his termination.

Having established that the arbitrability of a dispute is a question for the arbitrator, the Board must determine whether DOC was obligated to commit the issue of arbitrability to an arbitrator, given the Board's revocation of FOP's certification as the exclusive representative of the Complainant's bargaining unit. DOC contends that this matter must be dismissed because when the Board decertified FOP, it rendered the CBA void and eliminated DOC's duty to bargain with FOP.⁴⁸ DOC further contends that disputes over arbitrability are governed by the CBA and thus, because the Board lacks the authority to interpret the CBA, this matter must be dismissed as outside the Board's jurisdiction.⁴⁹

The Board concludes that, due to the D.C. Superior Court's October 22, 2024, Order in the ongoing related appeal, the CBA between FOP and DOC remains enforceable. Accordingly, the Board finds that, by declining to commit the issue of arbitrability to an arbitrator, DOC has failed to bargain in good faith with FOP, thereby committing an unfair labor practice in violation of D.C. Official Code § 1-617.04(a)(1) and (5) of the CMPA.

The Board further finds that, even if the decertification remained in effect, DOC's refusal to commit the issue of arbitrability to an arbitrator would nonetheless constitute an unfair labor practice. Where, as here, the Board encounters an issue of first impression, it may look to

⁴³ *E.g.*, *AFGE, Local 2725 v. DCRA*, 59 D.C. Reg. 5041, Slip Op. No. 969, PERB Case No. 06-U-43 (2012).

⁴⁴ *Washington Teachers' Union, Loc. No. 6, Am. Fed'n of Tchrs., AFL-CIO v. D.C. Pub. Sch.*, 77 A.3d 441, 451 (D.C. 2013).

⁴⁵ *E.g.*, *AFSCME, Council 20 v. D.C. Gen. Hosp. & OLRCB*, 36 D.C. Reg. 7101, Slip Op. No. 227, PERB Case No. 88-U-29 (1989).

⁴⁶ *Washington Teachers' Union, Loc. No. 6, Am. Fed'n of Tchrs., AFL-CIO*, 77 A.3d at 447.

⁴⁷ D.C. Official Code § 16-4407.

⁴⁸ Answer at 5, 9-10, 12; DOC Brief at 7-10.

⁴⁹ Answer at 10; DOC Brief at 10-11.

precedent from the National Labor Relations Board (NLRB) for guidance.⁵⁰ The NLRB has established that after a union is decertified, the employer is nonetheless obligated to arbitrate grievances which were filed prior to decertification.⁵¹ The Board “has primary jurisdiction to determine whether a particular act or omission constitutes an unfair labor practice under the CMPA.”⁵² Thus, the Board concludes that agencies have a duty to process pre-decertification grievances through arbitration and refusal to do so constitutes an unfair labor practice in violation of D.C. Official Code § 1-617.04(a)(1) and (5) of the CMPA.

III. Conclusion

Accordingly, the Board orders DOC to cease and desist from violating D.C. Official Code § 1-617.04(a)(1) and (5) of the CMPA; engage in arbitration with FOP regarding the matter of the Complainant’s termination; and post an appropriate notice to employees.⁵³

ORDER

IT IS HEREBY ORDERED THAT:

1. The District of Columbia Department of Corrections shall cease and desist from violating D.C. Official Code § 1-617.04(a)(1) and (5) of the CMPA;
2. The District of Columbia Department of Corrections shall engage in arbitration with the Fraternal Order of Police/Department of Corrections Labor Committee regarding the matter of the Complainant’s termination;
3. The District of Columbia Department of Corrections shall post the attached notice to employees;
4. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

By vote of Board Chairperson Douglas Warshof and Members Renee Bowser, Mary Anne Gibbons, and Peter Winkler.

February 26, 2025

Washington, D.C.

⁵⁰ See *Doctors’ Council of D.C. v. DHS*, 46 D.C. Reg. 2430, Slip Op. No. 462, PERB Case No. 96-U-06 (1996).

⁵¹ *Antioch Building Materials*, 316 NLRB 647 n.1 (1995) (citing *Arizona Portland Cement Co.*, 302 NLRB 36 (1991); *Missouri Portland Cement Co.*, 291 NLRB 1043, 1044 (1988)).

⁵² *Hawkins v. Hall*, 537 A.2d 571, 574 (D.C.1988).

⁵³ This decision was issued contemporaneously with Opinion No. 1905 in PERB Case No. 24-U-43, which presented the same issues and resulted in the same Board determination.

APPEAL RIGHTS

Pursuant to Board Rule 559.2, a party may file a motion for reconsideration, requesting the Board reconsider its decision. Additionally, a final decision by the Board may be appealed to the District of Columbia Superior Court pursuant to D.C. Official Code §§ 1-605.2(12) and 1-617.13(c), which provides 30 days after a decision file an appeal.