COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

| | | |
|---|---|---|
| FOP WHITE ROSE LODGE 15 | : | |
| | : | |
| v. | : | Case No. PF-C-17-63-E |
| | : | |
| CITY OF YORK | : | |

**FINAL ORDER**

The City of York (City) filed timely exceptions and a supporting brief with the Pennsylvania Labor Relations Board (Board) on July 20, 2018, from a Proposed Decision and Order (PDO) issued on July 2, 2018, in which the Hearing Examiner found that the City violated Section 6(1)(a) and (e) of the Pennsylvania Labor Relations Act (PLRA), as read in *pari materia* with Act 111 of 1968, by unilaterally implementing a policy restricting employes' use of sick leave while on leave under the Family Medical Leave Act (FMLA). The Fraternal Order of Police, White Rose Lodge 15 (FOP) filed a brief in response to the exceptions on August 22, 2018. Upon review of the exceptions, the response thereto, and all evidence of record, the Board makes the following:

ADDITIONAL FINDING OF FACT

11. Article IV of the CBA governs "Management Rights" and provides, in relevant part, as follows:

> All rights and responsibilities of management not specifically modified by this Agreement shall remain a function of management. Management agrees to meet and discuss policy matters which affect wages, hours and terms and conditions of employment and also to discuss the impact these policy matters may have upon members of the bargaining unit, upon the request of duly authorized bargaining unit representatives. Meet and discuss does not mean that the Contract is being opened up for renewed negotiations. It is merely a means whereby labor and management can discuss the ramifications such new policy matters may have, for the mutual understanding of both parties.

(Union Exhibit 1).

DISCUSSION

On August 25, 2017, the FOP filed a charge alleging that the City committed unfair labor practices by unilaterally changing the use of accrued leave for FMLA contradicting the parties' collective bargaining agreement. On September 11, 2017, the Secretary of the Board issued a Complaint and Notice of Hearing on the Charge of Unfair Labor Practices. An evidentiary hearing was held on April 4, 2018, at which time the parties were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. Based on the evidence presented by the parties, the Findings of Fact relevant to the exceptions, are summarized as follows.

The FOP and the City are parties to a collective bargaining agreement (CBA), which is effective from January 1, 2015 through December 31, 2018. Article IV of the CBA governs "Management Rights" and provides, in relevant part, as follows:

> All rights and responsibilities of management not specifically modified by this Agreement shall remain a function of management. Management agrees to meet and discuss policy matters which affect wages, hours and terms and conditions of employment and also to discuss the impact these policy matters may have upon members of the bargaining unit, upon the request of duly authorized bargaining unit representatives. Meet and discuss does not mean that the Contract is being opened up for renewed negotiations. It is merely a means whereby labor and management can discuss the ramifications such new policy matters may have, for the mutual understanding of both parties.

Article XV of the CBA governs "Sick Leave" and provides, in relevant part, as follows:

> Sick leave is to be used for the illness of the police officer. Should illness in the immediate household require a police officer's presence, sick leave for this purpose may be granted at the discretion of the Police Commissioner or the Chief of Police in accordance with the Family Medical Leave Act (sic).

Prior to June 2017, the police officers were permitted to utilize twelve weeks of sick leave to cover FMLA absences to care for a family member. There was no requirement that the police officers use vacation or personal time to cover this FMLA leave.

By Executive Order dated July 15, 2017, Mayor C. Kim Bracey implemented changes to the FMLA policy, which provides, in relevant part as follows:

Paid Time off Benefits

> If an employee requests leave under the FMLA because of his/her own serious health condition, the employee shall use his/her accrued sick leave, any accrued personal time, or any accrued vacation leave; or to care for an immediate family member, the employee shall first use 120 hours of sick leave and then personal time or any accrued vacation leave for a FMLA qualifying illness in the immediate family member (sic) if needed. Accumulated Compensatory Time is not eligible for FMLA.

The City did not bargain the July 15, 2017, change in the FMLA policy with the FOP.

Following the submission of post-hearing briefs by the parties, the Hearing Examiner issued a PDO on July 2, 2018. In the PDO the Hearing Examiner found and concluded, in relevant part, as follows:

> The contractual language at issue cannot be read as giving management the authority to issue a bargaining unit wide policy capping the use of sick leave for this purpose at 120 hours or approximately three weeks for every single officer, especially where the longstanding past practice was to allow the use of 12 weeks of sick leave in such instances…. By doing so, the City was not merely applying contractual language to permit, deny, or limit a request for sick leave to care for a family member in an FMLA qualifying event. Rather, the City has unilaterally prescribed a certain meaning to the contractual language that is applicable to all bargaining unit members, in violation of its bargaining obligations…. Indeed, the City has implemented a policy, which effectively eliminates discretion for sick leave to cover FMLA absences to care for a family member. As such, the City's contractual privilege defense is rejected, and the City will be found in violation of Section 6(1)(a) and (e) of the PLRA.

(PDO at 5-6).

On exceptions, it is undisputed that sick leave entitlement and use are mandatory subjects of bargaining. *See* Chester Upland School District v. PLRB, 150 A.3d 143 (Pa. Cmwlth. 2016). The City argues, however, that the Hearing Examiner erred in failing to find that the City had a sound arguable basis, or contractual privilege defense, for its unilateral change to the use of sick leave for FMLA leave found in Article XV of the CBA.

Generally, an employer may defend a charge of unfair labor practices of a refusal to bargain by establishing a contractual privilege that its actions have a sound arguable basis in conformity with agreed upon language in a collective bargaining agreement. *E.g.* Wilkes-Barre Township v. PLRB, 878 A.2d 977 (Pa. Cmwlth. 2005). The Board recognizes that there is a fundamental distinction between an employer's application of the terms in a collective bargaining agreement in response to a specific contractual claim, which must have a sound basis in the contract, and an action that attempts to unilaterally alter contractual terms through managerial policies that have prospective unit-wide application. Id. Where the employer asserts a contractual right to change a mandatory subject of bargaining or contractual terms, the defense is not a sound arguable basis in the application of the agreement, but one of a waiver of the right to bargain, and the employer must point to specific, agreed-upon contract language which indicates that the union expressly and intentionally authorized the employer to take the precise unilateral action at issue. Commonwealth v. PLRB, 459 A.2d 452 (Pa. Cmwlth. 1983 (Venango County Board of Assistance); Wilkes-Barre Township, *supra.*; Pennsylvania State System of Higher Education (California University) v. PLRB, 2012 WL 3860033, 2159 C.D. 2011 (Pa. Cmwlth., *unreported*, August 15, 2012); Chester Upland School District, *supra.;* Port Authority Transit Police Association v. Port Authority of Allegheny County, 39 PPER 147 (Final Order, 2008); Temple University Hospital Nurses Association v. Temple University Health System, 41 PPER 3 (Final Order, 2010). In the absence of a clear, express and unequivocal waiver of the statutory right to bargain over previously negotiated contract terms or mandatory subjects of bargaining, an employer's unilateral repudiation or

alteration of the terms of the collective bargaining agreement is irrefutably an unfair labor practice. Id.

On exceptions, the City argues that it has a sound arguable basis to unilaterally alter contract terms based on the "Management Rights" clause in Article IV of the CBA. The City relies on language that "[m]anagement agrees to meet and discuss policy matters which affect wages, hours and terms and conditions of employment …" as evidencing a sound arguable basis for the City's unilateral changes to contractual provisions concerning mandatory subjects of bargaining, including the use of sick leave for FMLA leave. The City's argument is that mandatory subjects of bargaining expressly negotiated in the CBA need not be maintained during the life of the contact or re-negotiated, but the City's unilateral changes thereto are only subject to meet and discuss with the FOP upon demand. The City's argument in this regard was definitively rejected over thirty-five years ago by the Board and Commonwealth Court in Venango County Board of Assistance.

> [A] union's waiver of the right to bargain on mandatory subjects during the term of an agreement will not be found in a boiler plate waiver clause alone. Instead, … such clauses may only be employed as a shield by either party to prevent incessant demands during the contract term made by the other party seeking to alter the status quo. Use of the clause as a sword by one seeking to impose unilateral changes without first bargaining is not favored.

Venango County Board of Assistance, 459 A.2d at 457. Thus, to establish the union's waiver of the statutory right to bargain over a mandatory subject of bargaining, there must be specific, agreed-upon contract language negotiated in the collective bargaining agreement in which the union expressly and intentionally authorized the employer to take the precise unilateral action with regard to the specific subject at issue. *E.g.* Id.; Port Authority of Allegheny County, *supra.* Nothing in Article IV of the parties' CBA governing Management Rights refers specifically to the City being authorized by the FOP to take unilateral action to change the mandatory bargaining subject of sick leave use for FMLA leave set forth in Article XV of the CBA. Accordingly, the City has failed to establish that in Article IV of the CBA the FOP waived its statutory right to negotiate over changes to mandatory subjects of bargaining, including the use of sick leave for FMLA set forth in Article XV of the CBA.

Moreover, even if the sound arguable basis defense were applicable to the City's arguments regarding the Management Rights clause, the City's arguments are belied by the express terms of Article IV of the CBA. Indeed, the clause of Article IV upon which the City relies is prefaced by language stating that "[a]ll rights and responsibilities of management not specifically modified by this Agreement shall remain a function of management." There is no dispute that the employes' use of sick leave during family FMLA leave is not a "right and responsibility of management", but is a mandatory subject of bargaining. Moreover, use of sick leave during FMLA is set forth in Article XV of the CBA, and thus is "specifically modified by this Agreement" and therefore did not "remain a function of management" under Article IV. By the express terms, Article IV does not provide a contractual privilege to make unilateral changes to terms negotiated in

the CBA, including the employes' use of sick leave during FMLA as governed by Article XV of the CBA.

The City also argues on exceptions that it has a sound arguable basis under Article XV of the CBA to unilaterally implement a policy limiting the use of sick leave to 120 hours for FMLA leave to care for a family member because Article XV provides that "sick leave for this purpose may be granted at the discretion of the Police Commissioner or the Chief of Police." The City further argues that the Hearing Examiner erred in noting the past practice of the Police Chief to grant employes use of sick leave for the full duration of FMLA leave to care for family members.

First, the City misses the point of the Hearing Examiner's finding regarding a past practice of the Chief of Police granting officers permission to use sick leave for up to the full twelve weeks under the FMLA for care of a family member. The point of this finding is that both the FOP and the City understood that Article XV of the CBA expressly and unequivocally vested the Police Commissioner or the Chief of Police with discretion to grant (or deny) the use of sick leave for up to the full duration of FMLA when used for the care of a family member.

Second, as astutely found by the Hearing Examiner, the City was not merely applying the contractual language in Article XV to have the Police Commissioner or Chief of Police exercise their discretion to permit, deny, or limit a request for sick leave to care for a family member in an FMLA qualifying event. Rather, the City, through the Mayor's uniform policy, unilaterally prohibited the exercise of discretion set forth in Article XV, by capping the use of sick leave for care of a family member under the FMLA at 120 hours for every single officer regardless of circumstances. Indeed, by doing so, the City has unilaterally implemented a policy that eliminates Article XV's contractually agreed upon discretion, that was mutually vested in the Police Commissioner and Chief of Police to grant employes the ability to use sick leave to cover FMLA absences to care for a family member in individualized cases. By unilaterally implementing a bargaining unit wide policy that precluded the contractual exercise of discretion of the Police Commissioner or Chief of Police to grant the use of sick leave for FMLA, the City repudiated the contractual terms in violation of its statutory bargaining obligation under Section 6(1)(a) and (e) of the PLRA. See Wilkes-Barre Township, *supra* (holding that an action that attempts to expand contractual terms through unilateral adoption of managerial policies that are not in response to a specific contractual claim and have unit-wide application is not a sound arguable application of the contract terms, but an unfair labor practice for unilaterally altering the agreed upon contractual provisions); Chester Upland School District, *supra.* (same); Millcreek Education Association v. Millcreek Township School District, 22 PPER ¶22185 (Final Order, 1991), *affirmed sub nom.* Millcreek Township School District v. PLRB, 631 A.2d 734 (Pa. Cmwlth. 1993), *appeal denied*, 537 Pa. 626, 641 A.2d 590 (1994) (a sound arguable basis defense does not extend to a flat repudiation of the terms of a collective bargaining agreement. Repudiation of the provisions of a collective bargaining agreement is an unfair practice).

After a thorough review of the exceptions and all matters of record, the Hearing Examiner did not err in finding that the City did not establish a sound arguable basis in the CBA to unilaterally implement a bargaining unit wide policy prohibiting the use of more than 120 hours of sick leave for the care of a family member under the FMLA, which effectively eliminated the terms of Article XV that "sick leave for this purpose may be granted at the discretion of the Police Commissioner or the Chief of Police." As such, the Hearing Examiner did not err in concluding that the FOP established that the City violated its collective bargaining obligation under Section 6(1)(a) and (e) of the PLRA, as read in *pari materia* with Act 111, by unilaterally implementing a restriction on sick leave for FMLA for care of family members that contradicted the express terms of Article XV of the parties' CBA. Accordingly, the exceptions filed by the City shall be dismissed, and the PDO made absolute and final.

ORDER

In view of the foregoing and in order to effectuate the policies of the Pennsylvania Labor Relations Act and Act 111, the Board

HEREBY ORDERS AND DIRECTS

that the exceptions filed by the City of York are hereby dismissed, and the July 2, 2018 Proposed Decision and Order, be and hereby is made absolute and final.

SEALED, DATED and MAILED at Harrisburg, Pennsylvania pursuant to conference call meeting of the Pennsylvania Labor Relations Board, James M. Darby, Chairman, and Albert Mezzaroba, Member this eighteenth day of September, 2018. The Board hereby authorizes the Secretary of the Board, pursuant to 34 Pa. Code 95.81(a), to issue and serve upon the parties hereto the within order.

MEMBER ROBERT H. SHOOP, JR., DID NOT PARTICIPATE IN THE CONSIDERATION OR DECISION OF THIS CASE.

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

| | | |
|---|---|---|
| FOP WHITE ROSE LODGE 15 | : | |
| | : | |
| | : | |
| v. | : | Case No. PF-C-17-63-E |
| | : | |
| CITY OF YORK | : | |

AFFIDAVIT OF COMPLIANCE

The City of York hereby certifies that it has ceased and desisted from its violations of Section 6(1)(a) and (e) of the Pennsylvania Labor Relations Act; that it has complied with the Proposed Decision and Order and Final Order as directed therein by immediately rescinding the July 15, 2017 FMLA policy as it relates to the bargaining unit of police officers, restoring the status quo ante, and making whole any bargaining unit employes who have been adversely affected due to the City's unfair labor practices; that it has posted a copy of the Proposed Decision and Order and Final Order as directed; and that it has served an executed copy of this affidavit on the Union at its principal place of business.

_____

Signature/Date

_____

Title

SWORN AND SUBSCRIBED TO before me
the day and year first aforesaid.

_____

Signature of Notary Public