COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

NEW CUMBERLAND POLICE EMPLOYES	:	
	:	
v.	:	Case No. PF-C-10-117-E
	:	
NEW CUMBERLAND BOROUGH	:	

PROPOSED DECISION AND ORDER

On August 5, 2010, the New Cumberland Police Employes (Union) filed with the Pennsylvania Labor Relations Board (Board) a charge of unfair labor practices, under the Pennsylvania Labor Relations Act (PLRA), as read in pari materia with Act 111, and therein alleged that New Cumberland Borough (Borough) violated Section 6(1)(a) and (e) of the PLRA. The Union specifically alleged that the Borough created a Family and Medical Leave Act (FMLA) policy mandating the designation of Family Medical Leave (FML) for leave caused by qualifying injuries and mandating the concurrent use of accumulated paid leave with FML. The Union further alleged that, by designating leave as FML, the Borough has placed a temporal limit on the employment of disabled members without the benefit of due process under the just cause provisions of the parties' collective bargaining agreement (CBA) or the Borough Code.

On August 24, 2010, the Secretary of the Board issued a complaint and notice hearing directing that a hearing be held on December 13, 2010, in Harrisburg. During the hearing on that date, both parties in interest were afforded a full and fair opportunity to present evidence and cross-examine witnesses. Both parties filed post-hearing briefs.

FINDINGS OF FACT

1. The Borough is a public employer and political subdivision under Act 111, as read in pari materia with the PLRA. (N.T. 7).

2. The Union is a labor organization under Act 111, as read in pari materia with the PLRA. (N.T. 7).

3. Sometime in 2004 or 2005, Officer Brian Nailor was on paid sick leave for 6-8 weeks for a non-work-related calf muscle injury. The Borough did not place him on FML. He used his accumulated sick leave during that entire time. (N.T. 51-55).

4. In the spring of 2010, Officer Tracy King began using sick leave intermittently due to a condition in his knee. In May, 2010, he received sporadic injections in his knee that required him to be off work for twenty-four hours after each injection, and one time for two days. He was not required to take FMLA leave, and he used accumulated sick leave during this time. (N.T. 21-22, 31-32, 35-36; Joint Exhibit 2).

5. On June 4, 2010, Officer King underwent arthroscopic surgery. Officer King told the Borough that he expected to return to work in early July, 2010. In July, Officer King's prognosis changed, and he informed the Borough that he needed a knee replacement. As of the date of the hearing (December 3, 2010), he had not returned to work and had not been terminated. (N.T. 34, 36-38).

6. On July 20, 2010, the Chief of Police, Joseph E. Spadaccino issued a letter to Officer King notifying him that the Borough was placing him on FMLA leave for twelve weeks effective July 19, 2010, through October 11, 2010. (N.T. 10-11, 22, 46; Joint Exhibit 2).

7. The Chief's July 20, 2010 letter to Officer King provides as follows:

> Dear Ptlm. King,
>
> You have been on sick leave since March 22, 2010 as the result of a non-work related medical condition. The Borough believes that you may be eligible for leave under the terms of the Family and Medical Leave Act.

> The FMLA guarantees qualified employees up to 12 weeks of medical leave per year. This leave period is unpaid but employees may use their leave time concurrently with that leave. Thus, your FMLA leave will not affect your ability to continue to use your sick leave or other accumulated leave time.
>
> Accordingly, the Borough is granting you a period of FMLA leave effective Monday, July 19, 2010. If you do not return to full duty as a police officer and use the entire 12 week period of FMLA leave for which you qualify, your period of FMLA will expire on or about Monday, October 11, 2010.
>
> If you are able to return to some form of limited light duty (assuming that light duty work is available), then your FMLA leave will be considered intermittent and the time that you actually perform light duty work shall not be counted against your period of FMLA eligibility.
>
> If you intend to return to full duty following the expiration of your FMLA leave period, or earlier if released for full duty by your physician, you may be required to present a fitness for duty certification demonstrating that you are able to resume work. The fitness for duty certification is required to determine that the specific health condition that rendered you eligible for FMLA leave does not prevent you from performing the essential job functions of the position of police officer in the Borough of New Cumberland.
>
> If you are unable to return to full duty and perform the essential job functions of the position of police officer in the Borough of New Cumberland following the expiration of the FMLA leave period, the Borough may be required to re-evaluate your employment status at that time.

(Joint Exhibit 2).

8. The Borough did not bargain the designation of Officer King's leave as FML. (N.T. 11).

9. Officer King had enough accumulated sick days to go beyond the end of the twelve weeks of FMLA designated leave (October 11, 2010). (N.T. 34, 49).

10. Prior to July 20, 2010, the Borough did not have a policy requiring that officers returning to work after extended leave submit to a fitness-for-duty evaluation and certification. The Borough did not negotiate this requirement. (N.T. 11-12, 27-28).

11. The CBA in effect at the time provides, in relevant part, as follows:

> (F) Police Officer[]s, under the terms and conditions of the "Family and Medical Leave Act of 1993", shall be permitted to use ten (10) days of accumulated sick leave per year, as described in Sub-Section (B), to be paid at the Officer's straight-time rate of pay.
>
> Police Officer[]s in addition to the above paragraph, shall be permitted to use said days for the care of an immediate family member for any other health/sickness reason. Immediate family member to include; spouse, children, step-children, parent, step-parent, grandparent, mother-in-law, father-in-law.

(Joint Exhibit 1, Article III, § 3.02(F))[1].

DISCUSSION

The Union argues that the Borough unilaterally changed terms and conditions of employment when it changed FMLA procedures. (Union's Post-hearing Brief at 2). The Union contends that police officers utilized sick leave for non-work related injuries and that

[1] The copy of Joint Exhibit 1 that was submitted to me at the hearing contained copies of the even pages only. I contacted the Borough's attorney who immediately provided me with a complete copy via PDF file attachment to an e-mail.

they were not required to fill out FMLA paperwork prior to July 20, 2010. The Union further claims that no other officers were required, at any time prior to July 20, 2010, to utilize FMLA leave and accumulated sick leave concurrently. The Union maintains that the Borough did not negotiate these changes. (Union's Post-hearing Brief at 2-3). The Union further claims that, "[o]n July 20, 2010, Officer King received a letter from the Borough advising him that his FMLA leave and accrued leave would run concurrently." (Union's Post-hearing Brief at 3). The Union contends that "[t]hose are the facts of record, and they are undisputed."

1. Concurrent Use of Sick Leave and FMLA

Contrary to the Union's assertion, the facts of record do not establish that the Borough's July 20, 2010 letter required Officer King to use his sick leave concurrently with FMLA leave. Moreover, the Borough does dispute that it required Officer King to use his accumulated paid sick leave concurrently with his FMLA designated leave. The Borough's July 20, 2010 letter, in relevant part, informed Officer King as follows:

> The FMLA guarantees qualified employees up to 12 weeks of medical leave per year. This leave period is unpaid but employees may use their leave time concurrently with that leave. Thus, your FMLA leave will not affect your ability to continue to use your sick leave or other accumulated leave time.

(F.F. 9)(emphasis added). The emphasized language clearly indicates that the Borough gave Officer King the option of using his accumulated sick leave contemporaneously with his FMLA designated leave. In its post-hearing brief, the Borough stated the following:

> King had the option to have his paid leave time run concurrently with his FMLA leave. See, Section 825.207(a). If he chose to have both leaves run concurrently, he would be paid for his FMLA leave to the extent he had available paid sick leave. If he chose not to have his paid leave run concurrently with his FMLA leave, King's FMLA leave would have been unpaid (but he would have maintained his accrued sick leave).

(Borough's Post-hearing Brief at 6)(emphasis added). The Borough expressly disputes the Union's claims that the Borough required Officer King to use his sick leave concurrently with FMLA designated leave. Moreover, the July 20, 2010 letter factually supports the Borough's position that the option was King's. Therefore, the specific issue of whether the Borough may unilaterally require a police officer to utilize his accumulated sick leave concurrently with FMLA designated leave is not before me in this case. The Borough's July 20, 2010 letter, in designating King's FMLA leave to be effective between July 19, 2010 and October 11, 2010, simply foreclosed King's ability to use accrued sick leave prior to using FMLA leave. It thereby prevented extending FMLA benefits beyond Officer King's accrued sick leave benefits. King's decision to remain in paid status during the period of FML does not support the Union's argument that the Borough required King to use his sick leave concurrently with FML.

2. Placing King on FML As Soon As The Qualifying Injury Was Determined

When the Borough received notice that Officer King's injury/illness was FMLA qualifying, it placed him on FML status. The Borough did not give Officer King the choice to apply for FML or to tack FML onto the end of his sick leave. The Union contends that police officers previously utilized sick leave for non-work related injuries and that they were not required to fill out FMLA paperwork prior to July 20, 2010. The Union maintains that, where the Borough had no written FMLA policy or practice, it unlawfully effectuated a change in terms of employment by designating the status of Officer King's leave for his non-work related knee condition as FML and by forcing King to use FML up front.

a. Past Practice

Officer Nailor's use of six-to-eight weeks of accumulated sick leave for his non-work-related calf injury in 2004 or 2005 did not establish a past practice of not designating leave caused by a non-work related injury as FML. In County of Allegheny v.

Allegheny County Prison Employees Indep. Union, 476 Pa. 27, 381 A.2d 849 (1978), our Supreme Court explained the concept of "past practice" as follows:

> A custom or practice is not something which arises simply because a given course of conduct has been pursued by [m]anagement or the employees on one or more occasions. A custom or a practice is a usage evolved by men as a normal reaction to a recurring type of situation. It must be shown to be the accepted course of conduct characteristically repeated in response to the given set of underlying circumstances. This is not to say that the course of conduct must be accepted in the sense of both parties having agreed to it, but rather that it must be accepted in the sense of being regarded by the men involved as the normal and proper response to underlying circumstances presented.

County of Allegheny, 476 Pa. at 34, n.12, 381 A.2d at 852, n.12 (emphasis original). In Ellwood City Police Wage and Policy Unit v. Ellwood City, 29 PPER ¶ 29214 (Final Order, 1998), aff'd, 731 A.2d 670 (Pa. Cmwlth. 1999), the Board stated that "[t]he definition of past practice requires that the parties must develop a history of similar responses or reactions to a recurring set of circumstances." Id. at 507.

The manner in which Officer Nailor used leave is one occurrence over the past fifteen-plus years that does not constitute a "normal reaction to a recurring type of situation" and therefore the "accepted course of conduct characteristically repeated," as required by the Supreme Court. In Wilkes-Bare Police Benevolent Ass'n v. City of Wilkes Barre, 33 PPER ¶ 33087 (Final Order, 2002), the Board held that the public employer's permission to allow sick leave donations twice over the course of fifteen years and different administrations established a past practice. The Board reasoned that the generous amount of sick leave that officers accumulated rarely resulted in the need for officers to take more leave than they accumulated. Significantly, however, the rare event in Wilkes-Barre occurred more than once, and the Board concluded that "every time that rare event occurred, the City, during different administrations, consistently responded by permitting bargaining unit members to donate sick leave to other officers within the unit." Id. at 193. The leave involving Officer Nailor simply does not establish a "history of similar responses or reactions to a recurring set of circumstances," such that the Borough can be said to have raised the expectations of the bargaining unit that indefinite sick leave use, without involuntary FML designations, would be part of the terms and conditions of employment. Even if more than one occasion had occurred (where extensive sick leave had been used without involuntary FML), "[a] custom or practice is not something which arises simply because a given course of conduct has been pursued by [m]anagement or the employees on one or more occasions." County of Allegheny, 476 Pa. at 34, n.12, 381 A.2d at 852, n.12.

b. Managerial Prerogative

The Board has previously held that changing the discretionary aspects of an existing FMLA policy are mandatorily bargainable, International Ass'n of Firefighters v. City of Reading, 31 PPER ¶ 31057 (Final Order, 2000). Although FMLA policies certainly impact employes' terms and conditions of employment, determining whether an employer's involuntary designation of leave as FMLA leave without the option of switching it out for accrued paid leave (where there is no existing practice, policy or bargained for agreement) has not been addressed by the Board. Under such circumstances, determining whether the change to terms of employment violates Act 111, requires a determination of whether a matter constitutes a mandatory subject of bargaining, which further requires consideration of the employer's interests as well. Our Supreme Court has recently adopted a standard to be applied when making this determination. The Court, in this regard, stated the following:

> In resolving whether a particular topic is an inherent managerial prerogative, no clear test has evolved. Consistent with the history of Act 111, as well as the above-stated policy concerns, when addressing topics which straddle the boundary between ostensibly mandatory subjects of bargaining and managerial prerogatives, we believe once it is determined that, as here, the topic is rationally related to the terms and conditions of employment, i.e., germane to the work environment, the proper approach is to inquire whether collective bargaining over the topic would **unduly infringe** upon the public employer's

essential managerial responsibilities. If so, it will be considered a managerial prerogative and non-bargainable. If not, the topic is subject to mandatory collective bargaining. We find this inquiry regarding subjects of bargaining and managerial prerogatives to embrace both the rights of police and fire personnel and the unique needs of public employers.

Borough of Ellwood City v. PLRB, 606 Pa. 356, 998 A.2d 589 (2010)(emphasis added).

The Borough argues that designating qualifying leave as FMLA leave is mandated by federal law and is therefore non-bargainable. (Borough Post-hearing Brief at 2, N.T. 42). The Borough emphasizes the mandatory nature of federal regulations stating that "unlike the discretionary language in subsections 825.207(a) and (d), the employer's requirement to notify the employee and designate qualifying leave as FMLA eligible is absolutely mandatory. The FMLA and its regulations make clear that a municipality has no discretion as to the designation requirement." (Borough's Post-hearing Brief at 4)(emphasis original).

Section 2601 of the FMLA provides, in relevant part, as follows:

(b) Purposes

It is the purpose of this Act—

(1) to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity;

(2) to entitle employees to take reasonable leave for medical reasons . . .

(3) to accomplish the purposes described in paragraphs (1) and (2) in a manner that accommodates the legitimate interests of employers;

. . . .

29 USC §2601(b)(emphasis added). In determining whether the Borough lawfully placed Officer King on FML between July 19, 2010 and October 11, 2010, both the FMLA, as well as the Supreme Court's pronouncement in Ellwood City, require the weighing of the legitimate interests of the Borough against the rights, protections and interests of Officer King and the police officers of the Borough.

Moreover, Section 2651 provides, in relevant part, as follows:

(b) State and local laws

Nothing in this Act [FMLA] or any amendment made by this Act shall be construed to supersede any provision of any State or local law that provides greater family or medical leave rights than the rights established under this Act or any amendment made by this Act.

29 USC § 2651(b). Similarly, Section 2652 of the FMLA provides that it shall not be construed in a manner that diminishes existing or greater employment benefits. This Section states the following:

(a) More protective

Nothing in this Act [FMLA] or any amendment made by this Act shall be construed to diminish the obligation of an employer to comply with any collective bargaining agreement or any employment benefit program or plan that provides greater family or medical leave rights to employees than the rights established under this Act or any amendment made by this Act.

(b) Less protective

The rights established for employees under this Act or any amendment made by this Act shall not be diminished by any collective bargaining agreement or any employment benefit program or plan.

29 USC § 2652. Accordingly, the FMLA, by its own terms, should not be construed to interfere with or reduce rights established by state or local laws or collective bargaining agreements. Therefore, depending on the facts and circumstances, the collective bargaining laws under Act 111 may require the application of FMLA in a more generous manner than the FMLA alone.

In general, Section 2612 of the FMLA provides that eligible employes shall be entitled to a total of twelve workweeks of leave during any 12-month period for the birth or adoption of a child or to care for certain qualifying family members with a serious health condition or because the employe has "a serious health condition that makes the employee unable to perform the functions of the position of such employee." 29 USC § 2612(1). FML is generally unpaid leave unless another benefit can be substituted to provide pay during the FML period or portion thereof. 29 USC § 2612(c), (d)(1),(2). An employe, who takes leave under Section 2612, is entitled to return to the position that he/she previously held or to an equivalent position with equivalent employment benefits, pay and other terms and conditions of employment. 29 USC § 2614(a)(1).

The Department of Labor's implementing regulations provide as follows:

> The employer is responsible in all circumstances for designating leave as FMLA-qualifying, and for giving notice of the designation to the employee as provided in this section. When the employer has enough information to determine whether the leave is being taken for a FMLA-qualifying reason(e.g. after receiving a certification), the employer must notify the employee whether the leave will be designated and will be counted as FMLA leave within five business days absent extenuating circumstances.

29 CFR § 825.300(d)(1). Contrary to the Borough's argument, although this language permits an employer to designate leave as FMLA and count it as such, it does not mandate or require an employer to do so. "Some courts have interpreted the FMLA's implementing regulations as authorizing an employer to place an employee on FMLA leave 'involuntarily,' that is, even if the employee does not request such leave, as long as the employee is 'eligible' for leave by virtue of having taken a qualified absence from work." Hicks v. Leroy's Jewelers, Inc., 2000 U.S. App. Lexis 17568 (6th Cir. 2000). However, the authorization to place an employe on involuntary FML is not the same as mandating it. Notwithstanding whether the FMLA or its implementing regulations require an employer to involuntarily place an employe on FMLA leave, such action may constitute a managerial prerogative in the collective bargaining context, provided the matter had not been previously bargained.

The FMLA not only requires employes to maintain health and other benefits for employes while on FML, it requires employers to save the employe's former position or provide an equivalent position with equivalent pay and benefits. In this case, permitting Officer King to choose when to take FML would allow him to tack the FMLA designated leave on the end of his sick leave. This option would require the Borough to maintain his benefits and his position as an officer in the police department for twelve weeks beyond his accumulated sick leave. The mandatory limitation here is therefore rationally related to Officer King's and the bargaining unit's work environment.

However, in balancing the interests of both the Borough and Officer King (as well as the unit as a whole) as required by Section 2601 of the FMLA and Ellwood City, it is clear that the Borough has a greater interest. The Borough is a public employer operating a police department. The Borough has a managerial interest in determining the appropriate level of police service and protection within the community given its operating budget. Police services are at the heart of a municipality's function to provide for the health, safety and welfare of the community. Because its core managerial function would be unduly infringed upon (if the Board required the Borough to bargain the decision of when an employe's FMLA qualifying leave could or should be taken), this matter constitutes a managerial prerogative.

In this case, the record shows that Officer King had accumulated enough paid sick leave to exceed the twelve-week FMLA period which ended on October 11, 2010. Requiring the Borough to bargain over when or if to designate FMLA leave and/or give the choice to the employe would unduly infringe on the public employer's responsibilities to provide adequate police protection and services. The Borough cannot compromise its duty to fill

Officer King's position and provide optimal, budgeted police coverage as soon as possible. Although Officer King would remain in paid status with medical benefits by using accumulated sick leave after the FMLA period, he would not be entitled to return to his position at that time. The Borough, on behalf of its citizens, has a real interest in knowing when it can replenish its police complement with a new officer or welcome Officer King back into the police department as a capable officer. Either way, the Borough has a legitimate interest in limiting the amount of time it maintains a police vacancy when it needs to fill the position with a capable and healthy officer.

The core managerial functions of a public employer to provide adequate police protection requires the conclusion that the Borough had a managerial prerogative to unilaterally place Officer King on FMLA leave as soon as it was determined that his leave resulted from a condition that qualified him for such leave. This managerial decision protected the Borough's ability to plan either for Officer King's return or his replacement such that the previous and expected level of police services could again be provided to the citizens of the Borough.

The substitution provisions of the FMLA and the regulations recognize that employes may be simultaneously charged for accumulated paid leave and FMLA leave, if the employe so chooses. Section 2612(d)(2)provides, in relevant part, as follows:

> (A) In general
>
> An eligible employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal leave, or medical or sick leave of the employe for leave provided under subparagraph (C) or (D) [relating to a serious health condition that makes the employee unable to perform the functions of the position of such employee] of subsection (a)(1) for any part of the 12-week period of such leave under such subsection.

29 USC § 2612(d)(2)(B). Section 825.207 of the regulations further explains as follows:

> (a) Generally, FMLA leave is unpaid leave. However, under the circumstances described in this section, FMLA permits an eligible employee to choose to substitute accrued paid leave for FMLA leave. If an employee does not choose to substitute accrued paid leave, the employer may require the employee to substitute accrued paid leave for unpaid FMLA leave. The term "substitute" means that the paid leave provided by the employer, and accrued pursuant to established policies of the employer, will run concurrently with the unpaid FMLA leave. Accordingly, the employee receives pay pursuant to the employer's applicable paid leave policy during the period of otherwise unpaid FMLA leave.

29 CFR § 825.207(a)(emphasis added).

In Strickland v. Water Works and Sewer Board of the City of Birmingham, 239 F.3d 1199 (11th Cir. 2001), the Court of Appeals for the Eleventh Circuit held that "an employer cannot escape liability under the Act [FMLA] for the period during which the employee, whose leave qualifies under the FMLA, is receiving his wages in the form of sick (or other pay)." Strickland, 239 F.3d at 1205. The Court further explained that, "[i]n other words, suppose an employee is paid for the first 6 weeks of a 12-week FMLA-qualifying leave. The Act [FMLA] covers not only the last 6 weeks of unpaid leave, but the first 6 weeks of paid leave as well." Id. n.5. Accordingly, an employe, by exercising his/her right to receive other paid leave during an FMLA-qualifying leave, is not empowered to suspend the FMLA leave by switching FMLA for accumulated paid leave and banking the FMLA leave, unless agreed to by the employer. As noted by the Borough, permitting an employe to bank his/her FML could "lead to a situation where an employer would not be required to hold the employee's position open (and in fact allow the employer to terminate the employe) during the initial portion of the employee's leave covered by paid sick leave and then, upon exhaustion of such paid leave, be required to restore the employee to his or her prior position during the subsequent leave period covered by the FMLA," unless the employer provided assurances that the employe's position would be protected during the non-FML absence. (Borough's Post-hearing Brief at 6).

The Department of Labor and the federal courts have recognized that suspending or switching FML for other leave exposes the private employer to liability under the FMLA because the employe is not in protected status. It also requires the public employer to hold the vacancy for a longer period of time interfering with operations. Absent bargained for provisions to the contrary, a public employer has a significant and legitimate interest in limiting this exposure to liability as well as the interference with the efficiency of its operation and public service by placing an employe on FMLA leave when it becomes aware of an FMLA qualifying injury or illness.

In Brotherhood of Maintenance of Way Employees v. CSX Transportation, 478 F.3d 814 (7th Cir. 2007), the Court of Appeals for the Seventh Circuit held that railroad employers could not unilaterally require employes to use accumulated paid leave concurrently with FMLA leave, voluntarily applied for by the employe, without bargaining under the National Railway Labor Act. Also, in Verizon North, Inc., 325 NLRB 1022 (2008), abrogated by, New Process Steel v. NLRB, 130 S.Ct. 2635 (2010) (abrogating National Board decisions made when the National Board lacked a quorum), the National Board affirmed an ALJ's decision concluding that the private employer violated the National Act by changing an existing practice permitting the stacking of accrued paid leave with FML. In other words, the employes who called off for FML reasons had the option of switching FMLA leave with accumulated paid leave and thereby banked FML until later.

Both CSX Transportation and Verizon are distinguishable from the facts in this case. In Verizon there was an established practice and in CSX there was a bargained for leave policy. In both cases, the Court and the National Board concluded that the prior practice and bargained-for policy prohibited unilateral changes. If such were the facts here, the same result may obtain. However, there is no practice or bargained for policy regarding the ability of an employe to switch accumulated paid leave with FMLA leave thereby banking the FMLA leave for a later time. Moreover, the special considerations previously discussed, regarding the unique needs and interests of a police employer, further distinguish this case from private sector precedent.[2]

3. Fitness-For-Duty Certification

The July 20, 2010, letter also required Officer King to obtain a fitness-for-duty certification should he desire to return to work as a police officer in the Borough. The Union does not specifically complain about this requirement in its charge or post-hearing brief. However, the Union broadly challenges the Borough's alleged enactment of a Family Medical Leave policy in its charge and generally challenges those procedures in its post-hearing brief. Also, the Union's attorney addressed the fitness-for-duty requirement through questioning at the hearing. I conclude that the Union has preserved a challenge to the Borough's requirement that Officer King obtain a fitness-for-duty certification upon returning to his position as a police officer.

Section 2614(a)(4) of the FMLA, provides that an employer may uniformly apply a policy or practice that requires an employe returning from FML to provide a certification from his/her health care provider that he/she is able to resume the work of his/her former or equivalent position. Any such policy, however, shall not supersede local or state law or a collective bargaining agreement governing the return to work of FMLA employes. 29 USC § 2614(a)(4). The regulations further provide as follows:

> An employer may seek a fitness-for-duty certification only with regard to the particular health condition that caused the employee's need for FMLA leave. The certification from the employee's health care provider must certify that the employee is able to resume work. Additionally, an employer may require that the certification specifically address the employee's ability to perform the essential functions of the employee's job.

[2] The Verizon ALJ stated that he found nothing in the FMLA "that specifically goes to the issue of double-charging employes for paid leave and for FML time. Verizon, 2007 NLRB LEXIS 261at 4. However, as noted above employes may choose to substitute accrued paid leave for FMLA leave and "the term 'substitute' means that the paid leave provided by the employer, and accrued pursuant to established policies of the employer, will run concurrently with the unpaid FMLA leave." 29 CFR § 825.207(a). Accordingly, absent a bargained-for agreement or established policy to the contrary, double charging is permitted under the regulations.

29 CFR § 825.312(b)(see also § 825.100(d)). The import of this provision is that "[i]f an employer provides the notice required, an employee who does not provide a fitness-for-duty certification or request additional FMLA leave is no longer entitled to reinstatement under the FMLA." 29 CFR § 825.312(e). Again, the language is discretionary and not mandatory. Because the Borough has no FMLA policy or procedure in place, the Ellwood City test again applies to determine whether requiring a fitness-for-duty certificate for Officer King to return to work is a managerial prerogative or a mandatory subject of bargaining. On these facts, I conclude that the Borough had a managerial prerogative to unilaterally require Officer King to provide a fitness-for-duty certification upon returning to work, which demand was made in compliance with the notice requirements of the FMLA regulations. The Borough has an obligation to supply qualified capable police officers to the community. Officer King was unable to perform the rigorous duties of a police officer with his knee condition. Requiring bargaining would unjustly infringe on the Borough's core managerial function by compromising its right to demand and expect the most qualified and capable police personnel to protect its citizens, where light duty may not be available. Accordingly, the fitness-for-duty certification for a police officer is a non-bargainable managerial prerogative.

4. Independent violation of Section 6(1)(a)

The Union argues that the Borough committed an independent violation of Section 6(1)(a) of the PLRA by implementing FMLA procedures that were not in place before. (Union's Post-hearing Brief at 5-6). However, the Union did not allege an independent violation of Section 6(1)(a) in the charge, and it is therefore waived. Teamsters Local Union No. 384 v. Kennett Consolidated Sch. Dist., 37 PPER 89 (Final Order, 2006). The Union has thereby attempted, in its post hearing Brief, to add a cause of action beyond the six-week statute of limitations in the PLRA.

5. Due Process Under the CBA and the Borough Code

In its charge of unfair labor practices, the Union alleged that the Borough unlawfully changed terms and conditions of employment by placing a "temporal limit on employment of disabled members without the benefit of due process under the Collective Bargaining Agreement or the Borough Code." (Specification of Charges, ¶s 6 & 9(d)). The Union, however, did not support this allegation with facts at the hearing or with legal argument in its post-hearing brief. Nothing in this record indicates that Officer King was denied an opportunity to pursue contractual or other statutory remedies as a result of the Borough's new FMLA policies. Accordingly, this allegation is dismissed.

6. Contractual Privilege Defense

The Borough argues that, although it did not mandate that Officer King take his sick leave concurrently with his FMLA leave, it was contractually privileged to give him that option. The parties' CBA provides as follows:

> Police Officer[]s, under the terms and conditions of the "Family and Medical Leave Act of 1993", shall be permitted to use ten (10) days of accumulated sick leave per year, as described in Sub-Section (B), to be paid at the Officer's straight-time rate of pay.
>
> Police Officer[]s in addition to the above paragraph, shall be permitted to use said days for the care of an immediate family member for any other health/sickness reason. Immediate family member to include; spouse, children, step-children, parent, step-parent, grandparent, mother-in-law, father-in-law.

(F.F. 13). I agree that this provision demonstrates at least a sound arguable basis that the parties have negotiated the issue of using accumulated sick leave concurrently with FMLA leave. A reasonable reading of this provision reveals that the parties arguably agreed to place the decision to use sick leave concurrently with FMLA leave with the police officers and not the Borough. The record in this case shows that the Borough complied with this provision by giving Officer King the opportunity to decide whether he wanted to use his accumulated sick leave while on FMLA or defer the use of his sick leave until his FMLA

leave expired. Officer King was not forced to use paid accumulated sick leave while he was on involuntary FMLA leave. He was simply prevented from switching the leave and banking the FMLA leave. Although the CBA limits the concurrent use of sick leave to 10 days, the Borough allowed Officer King to utilize sick leave for his entire FMLA period.

CONCLUSIONS

The hearing examiner, therefore, after due consideration of the foregoing and the record as a whole, concludes and finds as follows:

1. The Borough is a public employer within the meaning of Act 111 as read in pari materia with the PLRA.

2. The Union is a labor organization within the meaning of Act 111 as read in pari materia with PLRA.

3. The Board has jurisdiction over the parties hereto.

4. The Borough has not committed unfair labor practices within the meaning of Section 6(1) (a) and (e) of the PLRA as read in pari materia with Act 111.

ORDER

In view of the foregoing and in order to effectuate the policies of the PLRA and Act 111, the hearing examiner

HEREBY ORDERS AND DIRECTS

That the charge is dismissed and the complaint is rescinded and that in the absence of any exceptions filed with the Board pursuant to 34 Pa. Code § 95.98(a) within twenty (20) days of the date hereof, this order shall be final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this second day of August, 2011.

PENNSYLVANIA LABOR RELATIONS BOARD

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JACK E. MARINO
Hearing Examiner