

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

IAFF LOCAL 319 :  
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 v. : Case No. PF-C-18-28-E  
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 CITY OF LANCASTER :  
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**PROPOSED DECISION AND ORDER**

On February 23, 2018, the International Association of Fire Fighters, Local Union 319 (Union or Local 319) filed a charge of unfair labor practices with the Pennsylvania Labor Relations Board (Board) against the City of Lancaster (City or Employer), alleging that the City violated Section 6(1)(a) and (e) of the Pennsylvania Labor Relations Act (PLRA), as read with Act 111, by unilaterally implementing a new Family and Medical Leave Act policy, which required employees to fill out certification forms concerning leave.

On March 6, 2018, the Secretary of the Board issued a Complaint and Notice of Hearing, assigning the charge to conciliation, and directing a hearing on May 16, 2018, in Harrisburg, if necessary. On April 13, 2018, the City filed an Answer, denying all material averments contained in the specification of charges.

The hearing was necessary and was held before the undersigned Hearing Examiner of the Board on May 16, 2018, at which time the parties were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. The City filed a post-hearing brief on July 17, 2018. The Union filed a post-hearing brief on July 18, 2018.

The Examiner, on the basis of the testimony presented at the hearing and from all other matters and documents of record, makes the following:

**FINDINGS OF FACT**

1. The City is a public employer and political subdivision under Act 111 as read *in pari materia* with the PLRA. (N.T. 3)

2. The Union is a labor organization under Act 111 as read *in pari materia* with the PLRA. (N.T. 3)

3. The Union is the exclusive bargaining representative for a unit of firefighters employed with the City. (Union Exhibit 1)

4. The Union and the City were parties to a collective bargaining agreement (CBA), which was effective through December 31, 2017. (N.T. 6-8; Union Exhibit 1)

5. Article 21 of the CBA, which is entitled "Sick Leave," provides in Section 7 as follows:

The provisions of City Policy #804 D (Family and Medical Leave Act - Fire Bureau) are incorporated herein by reference. Changes

to this policy shall be subject to bargaining between the parties.

(Union Exhibit 1)

6. The City Human Resources Policy Manual in Policy Number 804 D, entitled "Family & Medical Leave of Absence," which was effective January 1, 2015, and which applies to uniformed fire personnel, provides in relevant part, as follows:

An eligible employee may request a Leave of Absence by completing the appropriate Leave of Absence Form and submitting the form to Human Resources:

Medical Leave of Absence Form (for the employee's own medical condition)

Family Non-Military Leave of Absence Form (for the medical condition of a family member)

Service-Member Caregiver Leave of Absence Form (for the medical condition of a family member who is a service-member)

Military Exigency Leave of Absence Form (for taking care of urgent matters resulting from a family member being called to active duty), effective 10/28/09, qualifying exigency leave benefits are expanded to include family members of active duty service members...

If the employee does not submit the required forms, the Leave of Absence may be delayed or denied...

(Union Exhibit 2)

7. The City Employee Medical Leave of Absence Certification Form for sworn fire personnel contains an "Employee Information" section at the top of the form, which specifically states "to be completed by employee." Above the section for the employee's name, date, job title, and supervisor is a series of instructions, which states as follows:

Please complete this section before giving this form to your medical provider. The Family and Medical Leave Act permits an employer to require that you submit a timely, complete and sufficient medical certification to request a medical leave due to your own serious health condition. Failure to provide a complete and sufficient medical certification may result in denial of your Medical Leave. You have fifteen (15) days to return this form to Human Resources.

(Union Exhibit 9)

8. The City Employee Medical Leave of Absence Certification Form then contains a box containing a bold line at the top stating "I am requesting to invoke my FMLA rights," which is followed by a section where the employee must check yes or no. The instructions further state "If **Yes**, the information on this front page and back page must be completed," and "If **No**, the Provider Information below and Sections 2 through 6 must be completed by the provider." (Union Exhibit 9)

9. The City uses a nearly identical form for its sworn police personnel, the only difference being the absence of the box described directly above. Instead, the police form simply contains a line stating "I am requesting to invoke my FMLA rights," which is followed by a section where the employee must check yes or no. (Union Exhibit 11)

10. Each of the fire and police certification forms then goes on to include the same sections numbered 1 through 6, addressing health condition information; diagnosis, length of condition, symptoms, and treatment regimen; job functions the employee is not able to perform; whether continuous medical leave is required; whether intermittent medical leave is required; and whether the employee may be able to work during the period of treatment and recovery. (Union Exhibit 9, 11)

11. Prior to January 22, 2018, the City did not require the fire employees to complete the entire Employee Medical Leave of Absence Certification Form when the employee indicated that he or she was not invoking FMLA rights. In such circumstances, the employee simply checked the box indicating no FMLA and was not required to submit any additional documentation. If the employee was requesting FMLA leave, then he or she had to fill out the form and provide additional medical documentation. (N.T. 6-8, 18)

12. The parties began negotiating for a successor agreement in June 2017. (N.T. 8)

13. By email dated July 11, 2017, the City's Human Resources Generalist Sharon Allen-Spann distributed updated FMLA forms to the Union. (Union Exhibit 10)

14. By emailed dated July 12, 2017, Union President Kevin Ressler replied stating, in relevant part, as follows:

I noticed on our form that the section requiring you to have a doctor fill out paperwork even if you are not requesting FMLA is still there. I know Ryan and Angie just settled this again the other week...and agreed that you don't have to have that part filled out so I was hoping we could remove it from the form so that there is no confusion in the future.

(Union Exhibit 10)

15. By emailed dated July 12, 2017, Allen-Span responded, in relevant part, as follows:

I understand that Angie and Ryan spoke about the FMLA process briefly. We will continue to use the current form available on the intranet and follow the process that Angie and Ryan discussed on 6/27/17.

Please disregard the document I sent to you.

(Union Exhibit 10)

16. On July 25, 2017, the City provided the Union with a proposal that included the following changes to Article 21, Section 7 of the CBA:

All firefighters shall complete the appropriate *Leave of Absence Form* when they have received FMLA documents from Human Resources in accordance with HR Policy #804-D. Completion of the appropriate form shall be consistent with the firefighter's choice of whether or not to invoke their FMLA rights for the leave.

(N.T. 8-10; Union Exhibit 4) (Emphasis in original)

17. Union President Kevin Ressler testified that the proposed language sought to change the practice such that employees will be required to fill out all information, including the additional medical documentation, even if FMLA was not requested. The Union did not agree to the change. (N.T. 10)

18. The City sought the same change during bargaining sessions on September 21, 2017, December 6, 2017, March 8, 2018, and April 19, 2018. The Union did not agree to the change. (N.T. 10-15; Union Exhibit 4, 5, 6, 7)

19. The Union eventually declared impasse for purposes of Act 111, after which the City submitted a specification of issues in September 2017, which included the same proposed language. (N.T. 15-16; Union Exhibit 8)

20. On December 27, 2017, Chief Timothy Gregg issued a Memo to all uniformed fire personnel with a subject of "FMLA Policy," which stated in relevant part as follows:

To ensure consistent administration of City Human Resources Policy #804-D, members of the Fire Bureau are receiving a copy of Policy #804-D and the Employees Medical Leave of Absence Certification Form.

Beginning today, shift commanders will distribute the FMLA policy packets to members. Members shall sign off to acknowledge receipt of the policy. Members who are currently on long-term leave will receive the policy via certified mail and a signature will be required.

Effective January 15, 2018, the Fire Administration will fully implement and monitor adherence of (sic) the policy. All members who meet the requirements of policy #804-D will be required to follow the policy. The Employee Medical Leave of Absence Certification Form shall be completed in its entirety and submitted to the Bureau of Human Resources within the appropriate timeframe indicated. Failure to follow the policy will result in a denial of the leave of absence.

Questions about the content of this memo and the implementation of the policy should be directed to the Fire Bureau, through the chain of command.

(City Exhibit 2)

21. The City actually implemented the policy on January 22, 2018. (N.T. 22)

## DISCUSSION

The Union has charged the City with violating Section 6(1)(a) and (e) of the PLRA<sup>1</sup> and Act 111 by unilaterally implementing a new FMLA policy, which required employees to fill out certification forms concerning leave. The City contends that the charge should be dismissed because there has been no change to the employees' terms and conditions of employment, and the City had a contractual privilege to implement the policy.

Section 1 of Act 111 provides, in pertinent part, as follows:

Policemen or fireman employed by a political subdivision of the Commonwealth or by the Commonwealth shall, through labor organizations or other representatives designated by fifty percent or more of such policemen or firemen, have the right to bargain collectively with their public employers concerning the terms and conditions of their employment, including compensation, hours, **working conditions**, retirement, pensions, and **other benefits**, and shall have the right to an adjustment or settlement of their grievances or disputes in accordance with the terms of this act.

43 P.S. § 217.1 (emphasis added).

The Board has previously held that changing the discretionary aspects of an existing FMLA policy is a mandatory subject of bargaining. City of Reading, 31 PPER ¶ 31057 (Final Order, 2000). Likewise, the Board has held that the use of sick leave benefits is a mandatory subject of bargaining. West Norriton Township, 28 PPER ¶ 28163 (Final Order, 1997).

There is no dispute in this matter that the policy allegedly requiring employees to fill out certification forms in their entirety even when not invoking FMLA rights concerns a mandatory subject of bargaining. Instead, as previously set forth above, the City initially defends the charge on the grounds that there has been no change to the employees' terms and conditions of employment. The City's argument in this regard, however, is unavailing.

The record shows that prior to January 2018, the City did not require the fire employees to complete the entire Employee Medical Leave of Absence Certification Form when the employee indicated that he or she was not invoking FMLA rights. In such circumstances, the employee simply checked the box indicating no FMLA and was not required to submit any additional documentation. If the employee was requesting FMLA leave, then he or she had to fill out the form and provide additional medical documentation. In essence, the employees simply filled out the preliminary identifying information on the top of the form, checked the no FMLA box, and turned the form back in to human resources when they used a regular sick leave day. However, on January 22, 2018, the City implemented the policy set forth by Gregg in his memo from December 27, 2017, indicating that employees had to fill out the entire form, including the medical documentation from a treatment provider, even when they were just using regular sick leave and not

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<sup>1</sup> Section 6(1) of the PLRA provides that "[i]t shall be an unfair labor practice for an employer: (a) To interfere with, restrain or coerce employees in the exercise of the rights guaranteed in this act...(e) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of section seven (a) of this act. 43 P.S. § 211.6.

invoking FMLA rights. In effect, the City began requiring employees to get a doctor's note for a regular sick leave day. The City cannot reasonably dispute that this new requirement constitutes a very clear change to the employees' terms and conditions of employment.

In addition, the City also defends the charge on the grounds of contractual privilege. In FOP White Rose Lodge 15 v. City of York, 50 PPER 18 (Final Order, 2018), the Board opined as follows:

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.*

In this case, the City relies on Article 21 of the CBA, which is entitled "Sick Leave," and which provides in Section 7 that:

The provisions of City Policy #804 D (Family and Medical Leave Act - Fire Bureau) are incorporated herein by reference. Changes to this policy shall be subject to bargaining between the parties.

The City Human Resources Policy Manual in Policy Number 804 D, entitled "Family & Medical Leave of Absence," which applies to uniformed fire personnel, provides in relevant part, as follows:

An eligible employee may request a Leave of Absence by completing the appropriate Leave of Absence Form and submitting the form to Human Resources:

Medical Leave of Absence Form (for the employee's own medical condition)

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Military Exigency Leave of Absence Form (for taking care of urgent matters resulting from a family member being called to active duty), effective 10/28/09, qualifying exigency leave benefits are expanded to include family members of active duty service members...

If the employee does not submit the required forms, the Leave of Absence may be delayed or denied...

However, the City's reliance on Article 21, Section 7 of the CBA and Policy 804-D is misplaced. The contractual language at issue cannot be read as giving management the authority to issue a bargaining unit wide policy requiring medical certification from a provider for the simple use of regular sick leave. To the contrary, Policy 804-D specifically governs the use of FMLA leave and is devoid of any language whatsoever relating to the use of regular sick leave. Nor does the language of the forms insulate the City from liability here, as the record shows that the Union never actually agreed to use the forms implemented by the City for the fire personnel. (N.T. 25, 43-44; Union Exhibit 11).<sup>2</sup> In any event, as the Union notes, the CBA expressly states that changes to the policy shall be subject to bargaining. (Union Exhibit 1). By issuing the memo in January 2018, the City was not merely applying contractual language to require a bargaining unit member to fill out certification forms for an FMLA leave of absence. 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. See Wilkes-Barre Twp., supra, at 983 (the distinction between an employer's application of the terms in a collective

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<sup>2</sup> Instead, the record shows that the City showed the Union the police form at the bargaining table, which differs from the current fire form insofar as it does not include the box under the invocation of FMLA rights, allegedly requiring the entire form to be completed. (N.T. 25, 43-44; Union Exhibit 11). The police form contains the question regarding the invocation of FMLA rights, which is then followed by a signature line for the employee and then the provider information, as well as the health condition information sections, both of which expressly state "to be completed by physician or provider." (Union Exhibit 11). How the employees should know to have a provider fill out the entire form when they are using regular sick leave, not invoking their FMLA rights, and have not even necessarily seen a provider, is unclear. Although generally credible, the testimony of the City Business Administrator Patrick Hopkins that the police employees do so without question has been accorded little weight. (N.T. 37, 48). In any case, there is no evidence whatsoever that the Union had any knowledge of such a practice by the police unit.

bargaining agreement, which must have a sound basis in the contract, and 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). Indeed, the City has implemented a policy, which effectively eliminates the employees' ability to use regular sick leave without seeing a treatment provider and completing medical documentation. 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.

### **CONCLUSIONS**

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

1. The City is a public employer and political subdivision under Act 111 as read *in pari materia* with the PLRA.
2. The Union is a labor organization under Act 111 as read *in pari materia* with the PLRA.
3. The Board has jurisdiction over the parties hereto.
4. The City has committed unfair labor practices in violation of Section 6(1)(a) and (e) of the PLRA.

### **ORDER**

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

### **HEREBY ORDERS AND DIRECTS**

that the City shall

1. Cease and desist from interfering with, restraining or coercing employees in the exercise of the rights guaranteed in the PLRA and Act 111;
2. Cease and desist from refusing to bargain with the representatives of its employees;
3. Take the following affirmative action which the examiner finds necessary to effectuate the policies of the PLRA and Act 111:
  - (a) Immediately rescind the January 2018 FMLA policy as it relates to the bargaining unit of firefighters, restore the status quo ante, and make whole any bargaining unit employees who have been adversely affected due to the City's unfair labor practices;
  - (b) Post a copy of this Decision and Order within five (5) days from the effective date hereof in a conspicuous place readily accessible to the bargaining unit employees and have the same remain so posted for a period of ten (10) consecutive days;



(c) Furnish to the Board within twenty (20) days of the date hereof satisfactory evidence of compliance with this Decision and Order by completion and filing of the attached Affidavit of Compliance; and

(d) Serve a copy of the attached Affidavit of Compliance upon the Union.

**IT IS HEREBY FURTHER ORDERED AND DIRECTED**

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

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this 26th day of October, 2018.

PENNSYLVANIA LABOR RELATIONS BOARD

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John Pozniak, Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA  
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IAFF LOCAL 319

v.

CITY OF LANCASTER

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AFFIDAVIT OF COMPLIANCE

The City of Lancaster 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 as directed therein by immediately rescinding the January 2018 FMLA policy as it relates to the bargaining unit of firefighters, restoring the status quo ante, and making whole any bargaining unit employees 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 as directed therein; and that it has served an executed copy of this affidavit on the Union at its principal place of business.

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Signature/Date

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Title

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

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Signature of Notary Public