COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

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

PROPOSED DECISION AND ORDER

On August 25, 2017, the Fraternal Order of Police White Rose Lodge 15 (FOP or Union) filed a charge of unfair labor practices with the Pennsylvania Labor Relations Board (Board) against the City of York (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 changing the manner in which accrued leave is to be used under the Family and Medical Leave Act, contradicting the parties' collective bargaining agreement and past practice.

On September 11, 2017, the Secretary of the Board issued a Complaint and Notice of Hearing, assigning the charge to conciliation for the purpose of resolving the matters in dispute through mutual agreement of the parties, and designating November 6, 2017, in Harrisburg, as the time and place of hearing, if necessary. The hearing was subsequently continued, once to permit the conciliator to meet with the parties, and once at the request of the City and over the FOP's objection.

The hearing was necessary and was held before the undersigned Hearing Examiner of the Board on April 4, 2018, at which time the parties were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. The parties each filed post-hearing briefs in support of their respective positions on or about May 31, 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. 4)

2. The FOP is a labor organization under Act 111 as read *in pari materia* with the PLRA. (N.T. 4)

3. The FOP is the exclusive bargaining agent for a unit of police officers employed by the City. (Union Exhibit 1)

4. The FOP and the City are parties to a collective bargaining agreement (CBA), which is effective from January 1, 2015 through December 31, 2018. (Union Exhibit 1)

5. 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).

(Union Exhibit 1)

6. Prior to June 2017, the police officers were permitted to utilize 12 weeks of sick leave to cover Family and Medical Leave Act (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. (N.T. 8)

7. The past practice between the parties has consisted of the police officers filling out FMLA paperwork, submitting the paperwork to human resources, and notifying their supervisors, after which the City always authorized and granted the use of 12 weeks, which was deducted from the accrued sick time. (N.T. 19)

8. On June 27, 2017, FOP President Jeremy Mayer received an email from City Deputy Business Administrator Thomas Ray, attaching a draft revision of the City's FMLA Policy and asking the FOP to submit any comments or suggested revisions by 4:30 p.m. on July 11, 2017. Mayer did not respond to Ray with regard to the FMLA policy change. (N.T. 9-10, 13; Union Exhibit 2, 3)

9. By Executive Order dated July 15, 2017, Mayor C. Kim Bracey implemented the 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.

(N.T. 13-17; Union Exhibit 6)

10. The City did not bargain the change in policy with the FOP. (N.T. 13)

DISCUSSION

The FOP has charged the City with violating Section 6(1)(a) and (e) of the PLRA[1] and Act 111 by unilaterally changing the manner in which accrued leave is to be used under the Family and Medical Leave Act, contradicting the

[1] 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 employes in the exercise of the rights guaranteed in this act...(e) To refuse to bargain collectively with the representatives of his employes, subject to the provisions of section seven (a) of this act. 43 P.S. § 211.6.

parties' CBA and past practice. The City contends that the charge should be dismissed because there has been no change to the employes' 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).

As Hearing Examiner Thomas Leonard observed, the Pennsylvania Supreme Court has applied a balancing test when deciding whether a managerial decision is a mandatory subject of bargaining for municipalities in collective bargaining relationships with their police and fire employes under Act 111. Middletown Borough Police Officers Ass'n v. Middletown Borough, 46 PPER 78 (Proposed Decision and Order, 2015). Once it is determined that the decision is rationally related to the terms and conditions of employment, or germane to the work environment, the inquiry is 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. *Id.* citing Borough of Ellwood City v. PLRB, 998 A.2d 589, 600 (Pa. 2010); City of Philadelphia v. International Ass'n of Firefighters, Local 22, 999 A.2d 555, 570-571 (Pa. 2010).

In this case, the record shows that the City has unilaterally affected a change to a topic, which is rationally rated to the police officers' terms and conditions of employment and germane to their work environment. Indeed, the record shows that, prior to June 2017, the police officers were permitted to utilize 12 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. The past practice between the parties consisted of the police officers filling out FMLA paperwork, submitting the paperwork to human resources, and notifying their supervisors, after which the City always authorized and granted the use of 12 weeks, which was deducted from the accrued sick time. However, by Executive Order dated July 15, 2017, the City's Mayor implemented a new policy, which effectively capped the use of sick leave for this purpose at 120 hours or approximately three weeks, and required the use of personal time or accrued vacation leave for absences beyond 120 hours.[2] This policy reflects a change to the police officers' terms and conditions of employment, as they can no longer use sick leave to care for a family member in an FMLA qualifying event for the full 12 weeks permitted under the Federal statute, or indeed, anything beyond three weeks. Further, it cannot be seriously contested that using accrued sick

[2] The City does not contend that the policy is not applicable to the police officers.

leave to care for a family member in an FMLA qualifying event is rationally related to the employes' terms and conditions of employment and germane to their work environment. To be sure, the use of accrued leave for such purposes falls directly under the language in Act 111 requiring public employers to bargain over "working conditions" and "other benefits." As a result, the question here is whether collective bargaining over the topic would unduly infringe upon the City's essential managerial responsibilities. I find that it would not.

As the FOP points out, the record is silent on how requiring bargaining over which leave is being used to cover FMLA absences would unduly burden the City. Although Ray testified generally to some "discussions with the police department about the use of sick leave for family members and how that was negatively impacting their operations," (N.T. 23), the City offered no specific justifications or compelling reasons why bargaining over the same would be unduly burdensome. In fact, the City does not appear to contend that the use of sick leave for FMLA purposes is not a mandatory subject of bargaining and primarily relies on its contractual privilege defense instead. Indeed, the City concedes in its post-hearing brief that "the use of paid sick leave is a discretionary element of the FMLA." *See* City Brief at 6. As the FOP notes, 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).

It is well settled that the Board properly relies on precedent to determine whether a matter constitutes a mandatory subject of bargaining rather than reinventing the wheel by applying the Act 111 balancing test to arrive at the same result as the established precedent. Pennsylvania State Corrections Officers Ass'n v. Commonwealth of Pennsylvania, Dept. of Corrections, Fayette SCI, 35 PPER 58 (Proposed Decision and Order, 2004) citing Teamsters Local 77 & 250 v. PLRB, 786 A.2d 299 (Pa. Cmwlth. 2001). Although the decision regarding the negotiability of a particular subject is in part fact driven (i.e. balancing the relationship of the issue to Section 1 matters on one hand and core managerial interests on the other), once the Board has conducted this analysis the result is precedential for future cases on the same or similar facts. Fayette SCI, *supra.* Of course, where a party introduces new or different facts that may alter the weight the matter at issue bears on the interests of the parties, additional analysis may be warranted. The burden is on the party requesting departure from established precedent to demonstrate on the record facts warranting such a departure. *Id.* citing Wilkes-Barre Police Benevolent Ass'n v. City of Wilkes-Barre, 33 PPER ¶ 33087 (Final Order, 2002).

In the instant matter, the record does not show that collective bargaining over the use of sick leave for FMLA absences would unduly infringe upon the City's essential managerial responsibilities. Nor has the City introduced any new or different facts to justify a departure from the Board's established precedent.[3] As such, it must be concluded that the use of sick leave for FMLA purposes is a mandatory subject of bargaining.

[3] In New Cumberland Borough, 43 PPER 28 (Proposed Decision and Order, 2011), Hearing Examiner Jack Marino ruled that an employer's involuntary designation of FMLA leave without the option of switching it out for accrued paid leave where there is no existing practice, policy, or bargained-for agreement does not violate the Act. However, that case addressed a specific scenario where

As previously set forth above, the City has raised a contractual privilege defense. The Board has adopted the sound arguable basis or contractual privilege defense to a claimed refusal to bargain, which calls for the dismissal of a charge when the employer establishes a sound arguable basis in the language of the parties' collective bargaining agreement, or other bargained-for agreement, for the claim that the employer's action was permissible, i.e. contractually privileged under the terms of that agreement. Temple University Hospital Nurses Ass'n et. al. v. Temple University Health System, 41 PPER ¶ 3 (Final Order, 2010). Where the employer asserts a contractual right to change a mandatory subject of bargaining, it must point to specific, agreed-upon contract language which arguably indicates the union expressly and intentionally authorized the employer to take the precise unilateral action at issue. *Id.* citing Port Authority Transit Police Ass'n v. Port Authority of Allegheny County, 39 PPER 147 (Final Order, 2008). However, a repudiation or alteration of the terms of the collective bargaining agreement is an unfair labor practice. Wilkes-Barre Twp. Police Benevolent Ass'n v. Wilkes-Barre Twp., 35 PPER 137 (Final Order, 2004) *aff'd sub. nom.* Wilkes-Barre Twp. v. PLRB, 878 A.2d 977 (Pa. Cmwlth. 2005).

The City relies on Article XV of the CBA, which 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).

(Emphasis added).

However, the City's reliance on this provision is misplaced. 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. *See* County of Allegheny v. Allegheny County Prison Employees Independent Union, 381 A.2d 849, 855 (Pa. 1978)(reliance on past practice is permissible to clarify ambiguous language in the collective bargaining agreement, to implement general contract language, or to show that a specific provision in the contract has been waived by the parties). 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. *See* Wilkes-Barre Twp., *supra,* at 983 (the Board astutely observed a distinction between an employer's application of the terms in a collective 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 discretion for sick

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an officer could tack FMLA leave on the end of his or her sick leave, which would require the employer to maintain the officer's position and benefits for 12 weeks beyond any accumulated sick leave, a concern not at issue here, as the employes have long been using sick leave to cover FMLA absences.

leave to cover FMLA absences to care for a family member. As such, the City's contractual privilege defense is rejected,[4] 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 FOP 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 employes 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 employes;

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 July 15, 2017 FMLA policy as it relates to the bargaining unit of police officers, restore the status quo ante, and make whole any bargaining unit employes who have been adversely affected due to the City's unfair labor practices;

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[4] The City also points to language in the broad management rights provision found in Article IV of the CBA for the claim that it acted in accordance with the CBA here. However, this language simply requires the City 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 representatives." (Union Exhibit 1). This language does not give the City the authority to unilaterally alter an otherwise mandatory subject of bargaining like the use of sick leave to care for a family member under the FMLA.

(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 employes 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 2nd day of July, 2018.

PENNSYLVANIA LABOR RELATIONS BOARD

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John Pozniak, Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

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	:	
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v.	:	Case No. PF-C-17-63-E
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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 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 as directed therein; 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.

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Signature of Notary Public