

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

FRATERNAL ORDER OF POLICE, :  
WASHINGTON LODGE 17 :  
 :  
 v. : Case No. PF-C-22-52-E  
 :  
 CITY OF EASTON :

**FINAL ORDER**

The City of Easton (City) filed timely exceptions and a supporting brief with the Pennsylvania Labor Relations Board (Board) on July 17, 2023, challenging a Proposed Decision and Order (PDO) issued on June 26, 2023.<sup>1</sup> In the PDO, the Board's Hearing Examiner concluded 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, when it unilaterally implemented a policy forbidding bargaining unit police officers from using paid sick leave for paternity leave in conjunction with the birth of their child. The Fraternal Order of Police, Washington Lodge 17 (Union) filed a response and brief in opposition to the exceptions on August 7, 2023.

The relevant facts of this case are summarized as follows. The City and the Union are parties to a collective bargaining agreement (CBA), effective January 1, 2021, through December 31, 2024. (FF 4). Article IX of the CBA, entitled "Sick Leave," provides in pertinent part, as follows:

Purpose: The City provides paid sick leave to its employees for the purpose of protecting them from financial loss resulting from lost wages due to incapacitation from illness or injury or to incapacitation due to pregnancy and confinement. In order to ensure a mutual beneficial working relationship between all parties concerned the City retains the right to enforce the sick leave policy and to control through proper procedures set forth in any personnel policy, the continuation of providing sick leave as a privilege for its employees.

\* \* \* \*

An employee who utilizes sick days in excess of entitlement shall have excess usage charged against other accumulated time off. An employee who uses unexcused time off in excess of all accumulations shall be considered to have abandoned his/her position and be subject to termination. This section

---

<sup>1</sup> The City's exceptions are timely because Sunday, July 16, 2023, the twentieth day following issuance of the Hearing Examiner's proposed decision, is excluded from computation of the twenty-day period for filing exceptions. 34 Pa. Code § 95.100(b).

shall not be in conflict with FMLA, other regulations/law regarding this matter ...

(FF 5).

Police Officer Justin Ligouri testified that his first son was born in July 2020, and that he took one month of sick leave after the birth of his son. Lieutenant Crisafulli approved the request and instructed Officer Ligouri to notify him closer to the birth so that he would know exactly which days Officer Ligouri would be using. (FF 7, 8). Officer Ligouri further testified that the City permitted several other police officers to use paid sick leave for the birth of a child. Police Chief Carl Scalzo acknowledged that Lieutenant Crisafulli had been allowing the officers to use paid sick leave for the birth of a child for the past four (4) years. (FF 9).

In September of 2022, Chief Scalzo advised Union President Tim Wagner that, going forward, bargaining unit police officers would only be permitted to use up to two (2) weeks of paid sick leave in conjunction with the birth of a child, with any remaining time off to be taken as vacation leave. (FF 13). Thereafter, Officer Ligouri, as part of the Union's negotiation team, met with Chief Scalzo to advise him that the Union was not in agreement with the new policy, but would agree to limit the use of paid sick leave for paternity leave to one month. Chief Scalzo stated that he would speak to the City's administration to see if one month was acceptable. (FF 14).

However, several days later, on October 3, 2022, Chief Scalzo called Officer Liguori to advise him that the City would not allow bargaining unit officers to use any of their paid sick leave for paternity leave. (FF 15).<sup>2</sup> Shortly thereafter, Chief Scalzo sent out a Memo dated October 3, 2022, to all bargaining unit police officers, stating in pertinent part, as follows:

The Easton Police Department's sick leave usage policy does not allow for the utilization of sick leave for paternity leave. Officers must be incapacitated from injury or illness, or confinement due to pregnancy to utilize accrued sick leave.

All employees are entitled to utilize 12 weeks of unpaid FMLA leave for paternity leave. If an employee chooses to substitute paid leave to replace unpaid FMLA time off, all paid leave rules must be followed to include adherence to minimum manning requirements.

Based on the above, officers are not permitted to utilize sick leave for unpaid FMLA paternity or any other FMLA unpaid leave. They can only utilize their accrued sick leave as permitted by the contract. To that end, officers are to cease immediately the

---

<sup>2</sup> Immediately after this call, Officer Liguori filled out paperwork under the Family Medical Leave Act (FMLA) requesting one month of paternity leave for the birth of his second child. (FF 16). This was the first time Officer Liguori had filled out FMLA paperwork, although he had previously taken one month of sick leave for the birth of his first child.

utilization of supplanting paid time off for unpaid FMLA in violation of the contractual rules governing these days...

(FF 18). The Union did not agree to the terms of the policy announced in this Memo. (FF 19).

Thereafter, on October 22, 2022, Officer Liguori filed a grievance, alleging that the policy announced by Chief Scalzo's Memo on October 3, 2022, violated Article IX of the CBA and the past practice that had been in place for several years of allowing male police officers to use sick leave for paternity leave. (FF 20). After some back and forth between the parties to resolve the grievance, City Administrator Luis Campos issued a Memo on January 5, 2023, which stated, in pertinent part, as follows:

The City of Easton administration agrees that the police administration, in error, has allowed officers to take sick time in violation of the contract to "baby bond" following the birth of their child. To that end, the department has allowed a total of 4 officers, six individual occurrences, to utilize sick time to "baby bond" for an average of 14.3 days off per occurrence over the past four years.

The City of Easton administration agrees that to resolve this issue of past practice, and without admission of any wrongdoing, will allow officers to utilize paid time off for "baby bonding" as outlined in this agreement reflective of the past four years' practice. This agreement reflects a resolution of sick time usage only in purpose and practice and remains silent on any issue of FMLA rights.

At the time of the "baby bonding" request, officers may request to utilize their accrued paid time off with the following stipulations:

Officers must have accrued and banked the requested paid time off before utilizing any paid leave in this manner.

Officers can use paid time off for "baby bonding" up to the number of working days required to be off from work, including scheduled days off, for a period not to exceed one calendar month.

\* \* \* \*

Officers utilizing sick time for "Baby Bonding" shall not be required to adhere to the stipulations regarding contractual sick time usage, i.e., sick occurrences, leaving the house, doctors' notes, etc.; however, they will not be able to return to work for any reason until their "baby bonding" period ends.

\* \* \* \*

This memo shall be retroactive from the Chief's FMLA memo dated October 3<sup>rd</sup>, 2022. Any officer affected by the FMLA memo shall be eligible for the benefits outlined herein.

A copy of this memo shall be provided to the union for circulation amongst its members. This language shall be valid until the next contract negotiation period, when this past practice issue will become a negotiation item for potential inclusion in the [CBA].

(FF 24) (emphasis in original). Ultimately, the grievance was settled with the City permitting Officer Liguori to use sick leave for the time he took off in October 2022 for the birth of his second child.

The Union filed a Charge of Unfair Labor Practices with the Board on October 21, 2022, alleging that the City violated Section 6(1)(a) and (e) of the PLRA, and Act 111, by unilaterally implementing a new policy on October 3, 2022, which prohibited officers from using paid sick leave while off work on paternity leave in violation of a binding past practice. On December 6, 2022, the Secretary issued a Complaint and Notice of Hearing, assigning this matter to a Hearing Examiner. A hearing was held before the Hearing Examiner on February 16, 2023, at which time all parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. Both parties filed post-hearing briefs.

In the PDO, the Hearing Examiner concluded that the City's new policy, issued on October 3, 2022, violated Section 6(1)(a) and (e) of the PLRA, and stated, in relevant part, as follows:

In this case, the [Union] has sustained its burden of proving that the City violated the PLRA and Act 111 by unilaterally implementing a new policy on October 3, 2022 which eliminated the past practice of bargaining unit employees being permitted to utilize paid sick leave for ... the birth of a son or daughter. The record unequivocally shows that the parties had established [a] practice of permitting bargaining unit police officers to use sick leave for the ... birth of a child for the past four years.

\* \* \* \*

What is more, the record also shows that the practice continued unabated into the term of the parties' current CBA, which is effective January 1, 2021, through December 31, 2024.

(PDO at 10-11). Further, the Hearing Examiner dismissed the City's argument that the sick leave provisions in the parties' CBA precluded utilizing sick leave for paternity leave as the terms in the CBA were, at best, ambiguous and, in any event, the City's past practice of permitting the use of sick leave for the birth of a child was a waiver of any prohibition in the CBA. Finally, the Hearing Examiner concluded that the underlying issue did not become moot through the issuance of City Administrator Campos' January 5, 2023, Memo because: (1) there was nothing in the record establishing that the

Union agreed to the terms in the Memo; and (2) the bargaining unit officers continue to suffer residual effects from the October 3, 2022, policy change. Accordingly, the Hearing Examiner sustained the Union's Charge and directed that the City rescind the October 3, 2022, policy.

An employer commits an unfair labor practice when it makes a unilateral change in a mandatory subject of bargaining that has been established through a binding past practice. Pennsylvania State Troopers Association v. Commonwealth of Pennsylvania, Pennsylvania State Police, 43 PPER 53 (Final Order, 2011); Wilkes-Barre Police Benevolent Association v. City of Wilkes-Barre, 29 PPER ¶ 29041 (Proposed Decision and Order, 1998). The Board has consistently held that paid days off, such as sick leave, are mandatory subjects of bargaining. Chester Upland Education Association, PSEA/NEA v. Chester Upland School District, 47 PPER 50 (Final Order, 2015), aff'd sub nom., Chester Upland School District v. PLRB, 150 A.3d 143 (Pa. Cmwlth. 2016). Where the charge alleges an established past practice concerning a mandatory subject of bargaining, the complainant has the burden of proving by substantial, credible evidence that the employer has unilaterally changed the practice. South Park Township Police Association v. PLRB, 789 A.2d 874 (Pa. Cmwlth. 2002), appeal denied, 806 A.2d 864 (Pa. 2002); Delaware County Lodge No. 27, Fraternal Order of Police v. PLRB, 694 A.2d 1142 (Pa. Cmwlth. 1997); Fraternal Order of Police Fort Pitt Lodge 1 v. City of Pittsburgh, 37 PPER 84 (Proposed Decision and Order, 2006). In County of Allegheny v. Allegheny County Prison Employees Independent Union, 381 A.2d 849 (Pa. 1978) the Pennsylvania Supreme Court defined a past practice as follows:

A custom or practice is not something which arises simply because a given course of conduct has been pursued by Management 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 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 the underlying circumstances presented.

381 A.2d at 852 n.12 (emphasis in original).

Initially, the City concedes in its exceptions that "[t]he record established that a practice existed in the City's Police Department that allowed officers to use their contractual paid sick leave to cover a time off request related to the birth of their child." (City's Brief at 3). Indeed, the evidence presented established that, at least for the past four (4) years prior to the Charge being filed, there had been six (6) individual instances (between four officers) where the City had permitted a bargaining unit member to use his sick leave time for paternity leave for the birth of a child, which was supported by the City's own witness, Chief Scalzo, who testified that "four officers six times was enough in my mind to solidify the past practice." (N.T. 90). Given this evidence of a recurring set of circumstances with the same response by the City, the Hearing Examiner properly concluded that a past practice existed within the City's police

department which permitted bargaining unit officers to utilize their paid sick leave while off work due to the birth of a child.<sup>3</sup>

On exceptions, the City argues that the Commonwealth Court's unreported plurality decision in Towamencin Township v. PLRB, 288 A.3d 136 (Pa. Cmwlth. 2022) controls in this matter. In this regard, the Hearing Examiner stated that "it is of no moment whether the bargaining unit employes ever formally submitted forms for FMLA leave, as the parties clearly had an established practice of permitting the police employes to use paid sick leave in connection with the FMLA-qualifying event of childbirth." (PDO at 13). Contrary to the City's reliance on Towamencin, the Hearing Examiner held in this case that there was a binding past practice and policy of the City to allow officers to use sick leave for paternity leave regardless of the FMLA.<sup>4</sup>

The City also argues that the unfair labor practice charge is moot because Officer Liguori was ultimately permitted to use one month of sick leave when his second child was born, and the City issued a memo on January 5, 2023, which permitted bargaining unit officers to use up to one month of sick leave for paternity leave. However, while the January 5, 2023, memo recognized the established past practice, and stated that the practice would remain effective to the expiration of the CBA, there is nothing in the record establishing that the Union agreed to the terms and limitations on the practice as set forth in either the October 3, 2022, or January 5, 2023, memos. Therefore, the Hearing Examiner did not err by concluding that the instant unfair labor practice charge was not moot.

After a thorough review of the exceptions, the briefs of the parties, and all matters of record, the Hearing Examiner properly concluded that the City violated its duty to bargain under Section 6(1)(a) and (e) of the PLRA when it unilaterally altered the past practice of the employes' use of sick leave for the birth of a child. Accordingly, the Board shall dismiss the City's exceptions and make the Proposed Decision and Order 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

---

<sup>3</sup> The City alleges that the Hearing Examiner erred in concluding that the sick leave provisions in the CBA were ambiguous and did not preclude its use for paternity leave for the birth of a child. However, the sick leave provisions in the parties' CBA do not specifically prohibit or permit the use of sick leave for paternity leave. Further, the City concedes that it had been allowing bargaining unit officers to use sick leave for paternity leave for four years. Therefore, the City's exception is dismissed.

<sup>4</sup> As astutely recognized by the Hearing Examiner, Towamencin was limited to the narrow issue of whether a public employer could prohibit its employe from "stacking" contractual leave and FMLA leave to lengthen time off from work for the birth of her child. That is not the case here where the facts concern an employer's past practice and policy of permitting the use of sick leave for paternity leave regardless of the FMLA. See 29 U.S.C.A. §2652(a). Therefore, the Hearing Examiner properly found that the Commonwealth Court's unreported plurality decision in Towamencin is inapplicable.

HEREBY ORDERS AND DIRECTS

that the exceptions filed by the City of Easton are dismissed, and the June 26, 2023, Proposed Decision and Order be and the same is hereby 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, Albert Mezzaroba, Member, and Gary Masino, Member, this sixteenth day of April, 2024. 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.

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

FRATERNAL ORDER OF POLICE,  
WASHINGTON LODGE 17

v.

CITY OF EASTON

:  
:  
:  
:  
:  
:

Case No. PF-C-22-52-E

**AFFIDAVIT OF COMPLIANCE**

The City of Easton 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 herein by immediately rescinding the October 3, 2022 policy, 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 and Final Order; 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