COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

FOP WASHINGTON LODGE 17	:	
	:	
v.	:	Case No. PF-C-22-52-E
	:	
CITY OF EASTON	:	

PROPOSED DECISION AND ORDER

On October 21, 2022, the Fraternal Order of Police, Washington Lodge 17 (FOP or Union) filed a charge of unfair labor practices with the Pennsylvania Labor Relations Board (Board) against the City of Easton (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 policy on October 3, 2022, which eliminated the past practice of bargaining unit employes being permitted to utilize sick leave while on FMLA leave for the birth of a son or daughter.

On December 6, 2022, the Secretary of the Board issued a Complaint and Notice of Hearing, directing a hearing on February 16, 2023, if necessary. The hearing ensued, as scheduled, on February 16, 2023, at which time the parties were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. The parties each filed separate post-hearing briefs in support of their respective positions on April 17, 2023.

The Hearing 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. 6)

2. The FOP is a labor organization under Act 111, as read *in pari materia* with the PLRA. (N.T. 6-7)

3. The FOP is the exclusive bargaining representative for a unit of police employes of the City. (FOP Exhibit 1)

4. The FOP and the City are parties to a collective bargaining agreement (CBA) effective January 1, 2021 through December 31, 2024. (FOP Exhibit 1)

5. Article IX of the CBA, which is entitled "Sick Leave," provides in relevant 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.
>
> Section 1: Each member of the Police Department shall be entitled to one hundred twenty (120) sick leave hours per year, except for the first partial year of employment when sick leave shall be granted on the basis of eight (8) sick leave hours per month earned. Unused sick days shall accumulate up to a set maximum of 2400 sick leave hours...
>
> Section 2(A): Employees off duty through illness shall remain at home except to visit their doctor and will call prior to going to their doctor. Employees off duty more than three (3) consecutive days shall provide a doctor's certificate pertaining to their illness upon returning to work.
>
> Section 2(B): If any employee leaves his residence for any other reason, he must report his availability for duty prior to his leaving.
>
> Section 2(C): The City recognizes that certain illnesses and/or injuries require long periods of convalescence and acknowledges that it is not their intent to restrict such employees to their residence during such illnesses or periods of convalescence...
>
> Section 3: It shall be the prerogative of the City to conduct an investigation and/or require an employee to provide medical certification from a doctor of the City's choosing in any cases where the possibility of excessive use, improper use, or abuse of sick leave is suspected.
>
> 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 shall not be in conflict with FMLA, other regulations/law regarding this matter...

(FOP Exhibit 1)

6. Justin Ligouri has been a police officer with the City since 2016. He is assigned to the patrol division and works the night shift from 6:00 p.m. to 6:00 a.m. He was on the FOP's negotiation team for the current CBA and has served as Treasurer since January 2022. (N.T. 10-12, 15-17)

7. Ligouri testified that his first son was born in July 2020, for which he took one month of sick time. At the time, he notified the Acting Lieutenant, who was Lieutenant Sal Crisafulli,[1] approximately three months prior to his son's birth that he would need to use Family Medical Leave Act (FMLA) leave. Crisafulli instructed Ligouri to notify him closer in time to

[1] The record shows that Crisafulli has since been promoted to the rank of Captain. (N.T. 18-19). The record also shows that the ranks of Chief, Captain, and Lieutenant are excluded from the bargaining unit. (N.T. 48-49, 58; FOP Exhibit 1).

the birth so he would know exactly which days Ligouri would be using. (N.T. 18-20)

8. Ligouri testified that Crisafulli approved his request, and he eventually used paid sick leave while on FMLA leave for the birth of his son. He notified Crisafulli by email from the hospital of the timing of the leave request because his wife suffered medical complications. Crisafulli did not instruct Ligouri to fill out any FMLA paperwork. (N.T. 20-22)

9. Ligouri testified that the City allowed several other police officers to use paid sick leave for the birth of a child, including Eric Siegfried, Cory Lollis, Brian Connaughton, Taylor Magditch, Dominic Price, Jonathon Vidal, and Matthew Snyder. The City's Police Chief, Carl Scalzo, acknowledged that the Lieutenant had been allowing bargaining unit police officers to use paid sick leave for the birth of a child for the past four years. (N.T. 25, 73-74, 80-82, 90-91, 106-110, 114-115)

10. The parties executed the current CBA on November 23, 2021, which was retroactive to January 1, 2021. (N.T. 17; FOP Exhibit 1)

11. In March 2022, the parties had a labor-management meeting, during which they discussed the use of paid sick leave for FMLA-qualifying childbirth. Present for the FOP were President Tim Wagner, Vice President Dave Costa, Secretary Eric Campbell, and Ligouri, while Chief Scalzo and now-Captain Crisafulli were present on behalf of the City. (N.T. 25-26)

12. Ligouri testified that the City acknowledged during the March 2022 labor-management meeting that the FOP was correctly using paid sick leave for FMLA-qualifying childbirth. Ligouri explained that Chief Scalzo indicated that he would not intervene unless it got out of hand. At the hearing, Scalzo denied saying that the FOP was doing things correctly during this meeting. (N.T. 26-27, 70-71)

13. In September 2022, Chief Scalzo advised FOP President Wagner that the bargaining unit police officers would only be able to use up to two weeks of paid sick leave in conjunction with FMLA leave for the birth of a child and that the remaining leave would have to be vacation time. The Chief further warned Wagner that if there was any pushback, then officers would no longer be able to use any paid sick leave at all. (N.T. 28-30)[2]

14. In September or October 2022, Ligouri met with Chief Scalzo and advised him that the FOP was not in agreement with the Chief's new rule. Ligouri informed Scalzo that the FOP would agree to limit the use of paid sick leave for FMLA-qualifying paternity leave to one calendar month. Scalzo indicated that he would speak to the City administration to see if one month was acceptable. (N.T. 31-33)

15. Ligouri testified that Chief Scalzo called him back several days later on October 3, 2022 and explained that the City would not allow bargaining unit employes to use paid sick leave with FMLA paternity leave. (N.T. 34, 38-39)

16. Ligouri testified that after his phone call with Chief Scalzo, he went to human resources to fill out FMLA paperwork and talk to Luis Campos,

[2] The FOP has neither alleged, nor argued that this statement constitutes an independent violation of Section 6(1)(a) of PLRA.

the City Administrator. Ligouri discussed the issue with human resources representatives, Shelly Wagner and Shakira Griffin, who provided him with a form, which is located on the City's website. Ligouri filled out the FMLA request form, indicating a potential date of November 9, 2022 for the birth of his second child and requesting off for the period of November 9, 2022 to December 9, 2022. He signed the form on October 3, 2022. (N.T. 35-39; FOP Exhibit 2)

17. The City's FMLA Request Form includes an "Employee Statement of Understanding," which provides in relevant part as follows:

> I must return a medical certification form to the Human Resources Department as soon as practicable. Failure to do so may result in my leave being delayed until I provide this documentation;
>
> Before I return to work following a leave for my own serious illness, I may be required to present a fitness for duty certification to the Human Resources Department;
>
> My health benefits will continue during my leave and I am expected to pay my co-share of health benefits;
>
> I must report on a periodic basis the status, and intention of returning to work.
>
> The City will permit you to use part or all of accrued vacation, sick or personal days...

(N.T. 37-38; FOP Exhibit 2)

18. By email dated October 3, 2022, Chief Scalzo circulated a Memo to the bargaining unit employes, which indicated in relevant part, as follows:

> All,
>
> It has recently been brought to my attention that officers have been utilizing their sick leave benefits for extended periods of leave for the birth of their children. Upon questioning this practice, it was explained to me by a union board member that there was a belief that this practice was a protected right under the Federal Government's Family Medical Leave Act (FMLA). Upon further review of this practice and legal advice based on law and precedent, the following has been determined:
>
> First and foremost, FMLA and sick leave are two different benefits.
>
> FMLA allows you to take 12 weeks off work to be with your new child without jeopardizing your job. Employees taking advantage of FMLA leave are entitled to return to their same or equivalent job at the end of their FMLA leave. Employees will also continue to maintain medical benefits during FMLA leave as provided by the employer, the same as if the employee had not taken leave.
>
> FMLA **does not require** the employer to pay you for this time off. However, you are only entitled to paid time off to the extent

> that the employer has a paid leave program. In this instance, all paid time off must follow contractual agreements, rules, and regulations on paid leave benefits.
>
> **Utilization of sick leave** – If the employer requires you to prove that you are actually "sick" to utilize "sick leave," you **cannot use** paid sick leave during your FMLA leave.
>
> **Utilization of paid time off** – Employees may use paid time off, such as personal days, vacation days, etc., to replace the unpaid days afforded them during FMLA leave. This paid time off, however, must be utilized following all normal paid leave rules and regulations...
>
> 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 utilization of supplanting paid time off for unpaid FMLA in violation of the contractual rules governing these days...

(N.T. 39-40; FOP Exhibit 3)(Emphasis in original)

19. Ligouri testified that the FOP did not agree to the terms and conditions contained in the Chief's October 3, 2022 policy. (N.T. 40)

20. On October 22, 2022, Ligouri filed a grievance, alleging that the Chief's October 3, 2022 policy violated Article IX of the CBA, as well as the parties' past practice of allowing officers to use sick leave for FMLA paternity leave. (N.T. 44-46; FOP Exhibit 4)

21. Ligouri testified that the City ultimately agreed during the grievance process to permit him to use sick leave for the birth of his second child in October 2022. He explained that the City has not rescinded the October 3, 2022 policy though. (N.T. 46-47, 55)

22. On December 6, 2022, City Administrator Luis Campos circulated a Memorandum to FOP President Tim Wagner, which provided in relevant part as follows:

> On November 10, 2022, members of [the FOP], including grievant Justin Ligouri met with the City of Easton Administration to resolve a dispute regarding utilizing "Sick Time" for offering care to a spouse as a result of the birth of a child (Baby Bonding).

As a result of this meeting, the Administration has agreed to offer the ability to use "Sick Time" for "Baby Bonding" in conjunction with coverage under the Family Medical Leave Act (FMLA). Both parties acknowledge that the current Collective Bargaining Agreement is explicit on the means and methods members can utilize paid sick time and that "Baby Bonding" is not a contractual permitted use. Any utilization of sick time in this manner shall be a mutually **agreed-upon** contradiction to the current contract and the acceptable utilization of sick time. This offer will be limited in scope as outlined below.

The Administration and the Union agree to the following:

Officers can request and utilize **unpaid** FMLA time off for any legally permitted reason and the legally permitted period as protected by Federal Law.

Any request to utilize **unpaid** FMLA time off shall be made in adherence to all rules and procedures established by the City of Easton.

At the time of the FMLA request, officers may request to utilize their accrued **paid** sick days in place of **unpaid** FMLA days off with the following stipulations:

The utilization of Sick Time to supplant unpaid FMLA days is only for "Baby Bonding." All other utilizations of sick time must adhere to the mutually agreed upon [CBA].

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

Officers can utilize no more than fifteen (15) sick days for officers working a twelve (12) hour shift or twenty (20) sick days for officers working an 8-hour shift to supplant unpaid FMLA "Baby Bonding" time off. The maximum amount of a "Sick Time" benefit that can be used would be no greater than four weeks of **consecutive** days beginning on the officer's child's birth date.

Paid sick time utilized to supplant unpaid FMLA "Baby Bonding" time shall be utilized concurrently with unpaid FMLA and not consecutively for additional time off.

When sick time is utilized to supplant unpaid FMLA time off for "Baby Bonding," it shall begin on the date of birth of the officer's child, and the days shall run consecutively from that date forward. The sick days must be supplanted immediately during the FMLA period and can not [sic] be used intermittently or following any unpaid FMLA "Baby Bonding" time off.

Sick time utilization concurrently with FMLA will forfeit any "Sick Time" bonus.

Officers utilizing sick time for FMLA "Baby Bonding" supplementation shall not be required to adhere to the stipulations pertaining to 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 FMLA/Sick usage period ends. This includes, but is not limited to, training, special assignments, call-ins for specialty units, and court.
>
> When officers intend to utilize paid sick leave to supplant unpaid FMLA time off for "Baby Bonding," they shall do so as soon as the expected due date of their child is known. This date can fluctuate based on the actual date of birth but will afford the department time to plan for the utilization of extended sick usage by officers in this manner. The actual date of birth shall be the first day of the FMLA/Sick leave for "Baby Bonding" purposes.
>
> This agreement shall be retroactive from the Grievance date, October 3, 2022. This language shall be adopted as the mutually agreed upon departmental procedure during the next contract negation [sic] period for inclusion in the [CBA]. Any changes to the agreed-upon language herein, before adoption in the contract, will be a matter of negotiation.
>
> Both parties acknowledge that this agreement/settlement satisfies any grievance or unfair labor practice filed referencing this matter. As such, any filing shall be withdrawn upon its signing...

(N.T. 142-143; City Exhibit 2)(Emphasis in original)

23. Campos testified that the parties did not sign his December 6, 2022 proposed agreement. He described how the FOP made proposed changes regarding more flexibility and expanding the potential use of sick leave beyond four weeks, which the City rejected. (N.T. 143-144)

24. On January 5, 2023, Campos circulated another Memorandum to Wagner, which indicated, in relevant part, the following:

> On November 10, 2022, members of [the FOP], including grievant Justin Ligouri met with the City of Easton Administration to resolve a dispute regarding FMLA "Sick Time" supplementation for "Baby Bonding."
>
> As a result of this meeting, the City of Easton Administration will agree to the following.
>
> The City maintains that FMLA time off has been designed as an unpaid benefit to allow employees to maintain their property rights to employment in instances where officers require extended time off for FMLA-approved purposes. The City of Easton administration maintains that Chief Scalzo's October 3rd, 2022, memo thoroughly details this position.
>
> The [C]ity maintains that the City of Easton police department has contractual and policy stipulations that preclude officers from using their paid time off to supplant unpaid time off for approved FMLA reasons and, as such, cannot agree that paid time off can be or has been used in this manner.

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 [four] 4 officers, six [6] 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. (i.e., March 3rd, 2023, to April 3rd, 2023, etc.)

When paid time off is utilized for "Baby Bonding," it shall begin on the date of birth of the officer's child, the day of the child's adoption, or the placement of a foster child. The days shall run consecutively from that date forward. If the day the Officer's child is born, adopted, or fostered is not on a scheduled workday, the baby bonding time begins on the next assigned workday.

If officers elect to utilize paid sick time for "baby bonding," the officer's "sick time bonus" shall be forfeited as prescribed in the collective bargaining agreement at the time of the sick usage.

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 includes, but is not limited to, training, special assignments, call-ins for specialty units, and court. Officers must notify specialty unit supervisors, the courts, etc., advising of this prolonged absence.

When officers intend to utilize paid leave for "Baby Bonding," they shall do so as soon as the expected due date of their child is known. This date can fluctuate based on the actual date of birth but will afford the department time to plan for the officer's extended time off usage in this manner.

> This memo shall be retroactive from the Chief's FMLA memo dated October 3rd, 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].
>
> **At this point Officer Ligouri will receive the remedy sought in his grievance on 10/22/22. This matter is now considered closed.**

(N.T. 145-146; City Exhibit 3)(Emphasis in original)

25. Campos testified that he considered the grievance resolved at that point because the City had given Ligouri the exact remedy he requested. He also claimed that the City will honor the January 5, 2023 memo until the parties bargain a successor agreement. He further stated that the January 5, 2023 memo would be applicable to anyone in the bargaining unit and provide them with the ability to use sick leave for "baby bonding" purposes. (N.T. 145-146)

DISCUSSION

The FOP contends that the City violated Section 6(1)(a) and (e) of the PLRA[3] and Act 111 by unilaterally implementing a new policy on October 3, 2022, which precluded officers from using paid sick leave while on FMLA leave for the birth of a child in violation of a binding past practice. The City counters that the charge should be dismissed because the October 3, 2022 policy did not involve a mandatory subject of bargaining. Likewise, the City argues that there was no binding past practice of allowing sick leave in these circumstances because no bargaining unit employes ever formally applied for FMLA until October 2022. According to the City, the mere fact that managerial police employes permitted the use of paid sick leave for the birth of a child is not sufficient to establish a binding past practice on the City's Administration because the police employes are also members of the FOP, and therefore, "brothers" of the bargaining unit officers under their charge. The City also claims that the charge fails because the CBA prohibits the use of paid sick leave for paternity leave in connection with the birth of a child. The City further maintains that the charge should be dismissed because the City Administrator ultimately agreed to provide Officer Ligouri with the relief requested in his grievance, which would also apply to the rest of the officers in the bargaining unit.

In determining whether an employer has committed a bargaining violation by contravening an established past practice, the Board must initially decide whether the change involves a mandatory subject of bargaining. South Park Township Police Ass'n v. PLRB, 789 A.2d 874 (Pa. Cmwlth. 2002); City of Wilkes-Barre Police Benevolent Ass'n v. City of Wilkes-Barre, 33 PPER ¶ 33087 (Final Order, 2002). An employer may not act unilaterally regarding a

[3] 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.

mandatory subject of bargaining without satisfying its statutory bargaining obligations with its employes' union representative. Teamsters Local Union 764 v. Lycoming County, 41 PPER 8 (Proposed Decision and Order, 2010). In FOP White Rose Lodge 15 v. City of York, 50 PPER 17 (Proposed Decision and Order, 2018), 50 PPER 18 (Final Order, 2018), the Board found that employe use of sick leave during FMLA absences is a mandatory subject of bargaining.[4]

In City of Wilkes-Barre, supra, the Board noted that it has consistently applied the definition of past practice adopted by the Pennsylvania Supreme Court in County of Allegheny v. Allegheny County Prison Employees Independent Union, 381 A.2d 849 (Pa. 1978) and stated 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 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. *Id.* quoting County of Allegheny, at 852, n. 12. 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. In Pennsylvania Liquor Control Board Officers III v. Pennsylvania State Police, Bureau of Liquor Control Enforcement, 24 PPER ¶ 24171 (Final Order, 1993), the Board held that, where evidence of past practice revealed a divergent application of a seniority system in selecting vacation periods, there was no past practice.

In this case, the FOP 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

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[4] 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).

employes being permitted to utilize paid sick leave for FMLA-qualifying events such as the birth of a son or daughter. The record unequivocally shows that the parties had an established practice of permitting bargaining unit police officers to use sick leave for the FMLA-qualifying birth of a child for the past four years. The City's Police Chief, Carl Scalzo, readily conceded this fact. 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. To that end, Scalzo testified that the practice began in 2019 and continued through September and October 2022. (N.T. 90, 114-115). In fact, Scalzo admitted that Officer Magditch was utilizing paid sick leave for the birth of a child at the time of Scalzo's October 3, 2022 memo, forbidding the practice. (N.T. 115). Thus, the record clearly shows that the practice continued unabated even beyond the execution date of the current CBA, which was on November 23, 2021. The Board has long held that a practice which continues unabated into the term of a new contract continues to remain binding, regardless of the presence of an integration or waiver clause in the contract.[5] Teamsters Local 764 v. Berwick Area Joint Sewer Authority, 39 PPER 22 (Final Order, 2008). In Allegheny County Prison Employees v. Allegheny County, 52 PPER 18 (Proposed Decision and Order, 2020), Hearing Examiner Marino noted that there is a long history of consistent Board precedent that a past practice, which continues beyond a new collective bargaining agreement and involves a mandatory subject of bargaining, is a binding term of employment that must be bargained before changed. As a result, the City here committed an unfair labor practice by unilaterally implementing a new policy on October 3, 2022, which eliminated the practice of allowing officers to use paid sick leave for the birth of a child.

The City defends the charge on the grounds that the use of sick leave here is not a mandatory subject of bargaining, not based on any alleged new or different facts, which alter the weight the matter at issue bears on the interests of the parties, but rather based on the Commonwealth Court's recent decision in Towamencin Township v. PLRB, 54 PPER 25 (Pa. Cmwlth. 2022). Although Chief Scalzo offered general testimony at the hearing about potential manpower shortages, which could cause safety issues for the police officers working those shifts, (N.T. 82-83), he conceded on cross-examination that he could not identify any problems from 2019 to the present with manning during any of the sick leave absences the officers took for the birth of a child. (N.T. 91-92). Moreover, the City did not argue at the hearing or in its post-hearing brief that these alleged manning issues altered the Act 111 balancing test for determining whether sick leave for the FMLA-qualifying birth of a child is a mandatory subject of bargaining. Instead, the City has advanced the argument that the Towamencin Court categorically held that the use of sick leave while on FMLA is not a mandatory subject of bargaining, such that the FOP could not possibly meet its burden of proof. (*See* City brief at 11). However, the City's reliance on Towamencin is misplaced, as that case is wholly inapplicable to this matter and therefore not controlling.

In Towamencin, the Commonwealth Court, in an evenly split plurality, held that any leave beyond the 12-week maximum allowable under the FMLA was a managerial prerogative. In that case, the township employer had allowed a police detective, who became pregnant in 2016, to use contractual sick leave and disability leave for six months for medical issues arising from her

[5] The CBA here does not contain an integration or waiver clause. (FOP Exhibit 1).

pregnancy, and then to use 12 weeks of FMLA leave after she gave birth to the child. However, in 2017, when the detective became pregnant again, and her doctor took her off work for approximately 60 days prior to her due date, as a result of her prior complications, the township employer did not allow her to begin using FMLA leave following the birth of the child and instead unilaterally designated her contractual sick leave prior to the due date as FMLA leave counting towards the 12-week maximum. The Board found that the township employer had committed unfair labor practices in violation of Section 6(1)(a) and (e) of the PLRA and Act 111 because the parties had a past practice of permitting employes to use their unlimited sick leave pursuant to the collective bargaining agreement, along with disability leave, for medical complications due to pregnancy, and then permitting the employes to use their statutory 12 weeks of unpaid leave under the FMLA following the birth of the child. Officers of Towamencin Twp. Police Dept. v. Towamencin Twp., 51 PPER 29 (Proposed Decision and Order, 2019), 52 PPER 75 (Final Order, 2020). The Commonwealth Court reversed the Board's Final Order and found that the township employer did not violate the PLRA because the township employer had a managerial prerogative to require the detective to use contractual leave concurrently with unpaid FMLA leave in 2017 prior to the birth of her second child. Towamencin Township v. PLRB, 54 PPER 25 (Pa. Cmwlth. 2022). The Commonwealth Court also concluded that the birth of the detective's first child did not create a past practice that bound the parties relative to the birth of the second child, as it represented just one occurrence. *Id.* at 52 PPER fn 65. The Towamencin decision is readily distinguishable from the instant matter.

Here, the FOP is actually arguing for the concurrent use of paid sick leave under the CBA with unpaid FMLA leave. As such, the potential issue of stacking leave, which the Commonwealth Court disapproved of in Towamencin, a practice whereby officers use extended contractual paid sick leave prior to going off work for the birth of a child and then subsequently use 12 weeks of unpaid FMLA leave following the birth of the child, is simply not present. In fact, the parties have an established practice of allowing paid sick leave for the birth of a child in conjunction with paternity leave under the FMLA. As a result, there is no possibility that the bargaining unit officers will have to go off work and use paid sick leave prior to the birth of the child at all. Unless, of course, that is pursuant to the FMLA-qualifying leave to care for a spouse who has serious medical complications. But in that event, such a leave request would still be designated as FMLA-qualifying, meaning the 12-week clock would begin to run as soon as the officer begins using sick leave for that purpose. This case simply does not implicate leave beyond the 12-week maximum, which the Towamencin Court held to be a managerial prerogative.[6]

What is more, the record here clearly shows a consistent binding practice for the past four years, which further distinguishes this case from Towamencin. Even the City's Chief of Police conceded that the past practice has existed for the past four years and continued unabated into the new contract term. Nevertheless, the City insists that there was no past practice because no bargaining unit employes formally applied for FMLA leave

[6] Notably, the authority of Towamencin is uncertain at best, in any event. The decision was an unreported memorandum opinion and based on an evenly divided plurality of the commissioned judges, instead of a majority. And, the Board has since filed a Petition for Allowance of Appeal therefrom with the Pennsylvania Supreme Court on December 28, 2022. Towamencin Twp. v. PLRB, 621 MAL 2022 (Pa. 2022).

until October 2022. However, this contention is belied by the credible testimony of Officer Ligouri, who indicated that he notified then-Lieutenant Crisafulli approximately three months prior to his first son's birth in July 2020 that he would need to use FMLA leave. Ligouri also testified convincingly that Crisafulli then subsequently approved his leave request, after which he used paid sick leave on FMLA leave for the birth of his first son. Crisafulli did not instruct Ligouri to fill out any FMLA paperwork. (N.T. 18-22). If the City has a policy of requiring the police employes to fill out FMLA paperwork through its human resources department, then it was incumbent upon the City's non-bargaining unit managerial personnel to advise the bargaining unit employes of that fact. The City does not dispute the fact that the bargaining unit employes were requesting and being granted paid sick leave in connection with the birth of their children, which is clearly an FMLA-qualifying event. Thus, 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. That fact, standing alone is sufficient to establish a binding term and condition of employment, which the City unilaterally changed in October 2022 without bargaining with the FOP. In any case, even the City's own FMLA form, which was posted on its website and provided to Ligouri by the City's human resources employes on October 3, 2022, states that "[t]he City will permit you to use part or all of accrued vacation, sick or personal days..." (FOP Exhibit 2). As such, the City's policy was to allow paid sick leave for the birth of a child whether in conjunction with formal FMLA paperwork or not.

The City's argument that there was no past practice because the non-bargaining unit managerial police personnel, who permitted the use of paid sick leave in this fashion, are also members of the FOP, and therefore "brothers" of the bargaining unit officers, is equally untenable. The record shows that the Captains and Lieutenants are excluded from the bargaining unit as managerial employes. As a result, those officers are also agents of the City, who knew and approved of the practice that spanned a number of years and multiple contracts. The Board has held that a public employer commits an unfair practice by unilaterally changing a past practice, of which its agents are aware. Aliquippa Education Ass'n v. Aliquippa School District, 32 PPER ¶ 32034 (Proposed Decision and Order, 2001) *citing* PSSU Local 668, SEIU v. Lancaster County, 24 PPER ¶24027 (Final Order, 1993). Therefore, the City's argument in this regard must also be rejected.

The City also maintains that the charge should be dismissed because the CBA precludes the use of paid sick leave for paternity leave in connection with the birth of a child. The City relies on Article IX of the CBA for this proposition. However, the CBA is silent on the issue of paid sick leave in connection with paternity leave for the birth of a child. The CBA does not specifically authorize such leave or preclude it. Article IX provides that the City offers "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." (FOP Exhibit 1). It cannot be seriously contended that this provision expressly forbids the use of paid sick leave for FMLA-qualifying events, such as illness, injury, or pregnancy to care for a family member. Indeed, there is no requirement whatsoever that such illness, injury, or pregnancy must be for the employes themselves. Certainly, the employes can suffer financial loss resulting from lost wages due to a need to care for a sick, injured, or pregnant family member. Furthermore, the remaining provisions in Article IX, upon which the City relies, are equally

opaque on this point. While these provisions set forth rules regarding how leave is accrued or accumulated, along with requirements for employes who are off duty through illness, the language is devoid of any mention of paid sick leave in connection with paternity leave for the birth of a child. At best then, the CBA is ambiguous.

The Pennsylvania Supreme Court has held that 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. County of Allegheny v. Allegheny County Prison Employees Independent Union, 381 A.2d 849 (Pa. 1978). Because the CBA here is silent and therefore ambiguous regarding the use of paid sick leave for the birth of a child, then the parties' past practice of allowing the use of such leave for several years is appropriate to determine the existing terms and conditions of employment. What is more, even if the CBA could somehow be read as prohibiting the use of paid sick leave under these circumstances, as alleged by the City, the parties' established practice of permitting the use of such leave for several years unabated into the term of the new CBA demonstrates that such an alleged provision has been waived by the parties. *Id.* at 855. Accordingly, the City's defense on these grounds must also fail.

Finally, the City submits that the charge should be dismissed because the City Administrator, Luis Campos, eventually agreed to provide Officer Ligouri with the relief requested in his grievance, which would also apply to the rest of the officers in the bargaining unit. This is essentially an argument that the charge has now become moot.

The Board has long held that a unilateral implementation charge of unfair labor practices is rendered moot by resolution of the bargaining impasse through execution of a successor agreement. Temple University, 25 PPER ¶ 25121 (Final Order, 1994). In determining whether alleged past violations of bargaining obligations occurring during negotiations should be heard, the Board considers as paramount whether its involvement after a successor agreement has been reached, is appropriate under the facts of any particular case. AFSCME District Council 33 and Local 159 v. City of Philadelphia, 36 PPER 158 (Final Order, 2005). In this regard, the Board distinguishes between those charges where the employes continue to suffer the residual effects of an unlawful, unilateral change to wages, hours and working conditions, which are typically not moot, as opposed to those involving bargaining tactics which do not result in affirmative relief to the employes, but rather cease and desist orders, which are generally mooted by the parties' entry into a collective bargaining agreement. *Id.* (citing Hazleton Area Education Support Personnel Ass'n v. Hazleton Area School District, 29 PPER ¶ 29180 (Final Order, 1998)(holding that the charge was not moot because the employer failed to present evidence that the new agreement addressed the matters involved in the unfair practices charge). Of course, even if a charge is technically moot, it may be decided when the issue presented is one of great public importance or is one that is capable of repetition yet evading review. Association of Pennsylvania State College and University Faculties v. PLRB, 8 A.3d 300, 305 (Pa. 2010).

Here, the record does not support a determination that the charge has become moot. First of all, while Campos may have agreed to provide Ligouri with the relief requested in his grievance and to apply those terms to the rest of the unit, there is no evidence that the FOP entered into any agreement with the City. In fact, Campos acknowledged that the FOP refused

to enter his December 6, 2022 proposed agreement and that the FOP made its own proposed changes, which the City rejected. After that, Campos issued his January 5, 2023 proposed agreement, which caused him to deem the matter resolved. However, there is no evidence the FOP entered into the January 2023 agreement either. To the contrary, the record shows that such a proposal was unacceptable to the FOP. In fact, the FOP demonstrated that, despite the City's January 5, 2023 proposal, the bargaining unit employes continue to suffer residual effects from the City's October 3, 2022 unlawful and unilateral implementation of the new policy. On this point, the January 5, 2023 memo is clearly limited in scope and duration. Indeed, Campos indicated that the City will permit the bargaining unit officers to use paid sick leave for the birth of a child for a period not to exceed one calendar month. (City Exhibit 3). However, the record does not show that the parties' current practice is limited in any respect. Rather, Ligouri credibly testified that some officers had taken more than one month of paid sick leave in these circumstances. (N.T. 18). Further, Campos indicated in the January 5, 2023 memo that although the City would permit the officers to use paid sick leave for the birth of a child, the City would not allow them to return to work for any reason until their "baby bonding" period ends. (City Exhibit 3). Once again, this contradicts the established practice, as Ligouri credibly testified that he returned to work several times following the birth of his son in July 2020 to file charges and arrest jackets, attend a court hearing, and answer an emergency call. (N.T. 23-24). He even was allowed to put in for overtime in connection with the charges he filed. (N.T. 24). In addition, Campos indicated in his January 5, 2023 memo that officers must have accrued and banked the requested paid time off before utilizing any paid leave in this manner. (City Exhibit 3). Unfortunately for the City, this requirement expressly contradicts the parties' current CBA, which provides in Article IX, Section 3 that an employe who utilizes sick leave in excess of entitlement shall have the excess usage charged against other accumulated time off. (FOP Exhibit 1).

Furthermore, Campos stated in his January 5, 2023 memo that the City would only allow the officers to use paid sick leave for the birth of a child until the next contract negotiation period. (City Exhibit 3). But as previously set forth above, the parties' clearly have a binding past practice of permitting the officers to use their paid sick leave in this fashion. Thus, while the City is certainly free to bring such an issue to the table, the City must nevertheless bargain out from the status quo, as the use of paid sick leave is an established term and condition of employment. On top of that, the record shows that Officer Magditch, who was out on approved sick leave at the time the Chief issued the October 3, 2022 policy, had his sick time changed to vacation leave without even being told. (N.T. 33-34). Similarly, the record shows that the City has not rescinded the October 3, 2022 policy. (N.T. 46-47). On these facts, I am unable to conclude that the charge has been rendered moot following the issuance of the City Administrator's January 2023 memo, as the bargaining unit employes continue to suffer residual effects due to the City's unlawful and unilateral implementation of the October 3, 2022 policy.[7] Therefore, it must be concluded that the City has committed unfair labor practices in violation of Section 6(1)(a) and (e) of the PLRA.

[7] The City does not argue that the charge should be deferred to the grievance arbitration process.

CONCLUSIONS

The hearing 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 October 3, 2022 policy, 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;

(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 26th day of June, 2023.

PENNSYLVANIA LABOR RELATIONS BOARD

/s/ John Pozniak
John Pozniak, Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

FOP WASHINGTON LODGE 17	:	
	:	
v.	:	Case No. PF-C-22-52-E
	:	
CITY OF EASTON	:	

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 as directed therein by immediately rescinding the October 3, 2022 policy, 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.

_____
Signature of Notary Public