COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

OFFICERS OF TOWAMENCIN TOWNSHIP POLICE DEPARTMENT	:	
v.	:	Case No. PF-C-18-11-E
TOWAMENCIN TOWNSHIP	:	

FINAL ORDER

On November 13, 2019, Towamencin Township (Township) filed timely exceptions with the Pennsylvania Labor Relations Board (Board) to a Proposed Decision and Order (PDO) issued by a Board Hearing Examiner on October 24, 2019. On December 6, 2019, the Officers of Towamencin Township Police Department (Union) filed a response to the exceptions. Pursuant to extensions of time granted by the Secretary of the Board, the Township filed a brief in support of its exceptions on December 11, 2019, and the Union filed a brief in opposition to exceptions on February 28, 2020.

The Union filed a Charge of Unfair Labor Practices on January 16, 2018, alleging a violation of Section 6(1)(a) and (e) of the Pennsylvania Labor Relations Act (PLRA), as read in *pari materia* with Act 111 of 1968. The Union specifically alleged that the Township violated its bargaining obligation when it changed its policy concerning the commencement of leave under the Family and Medical Leave Act (FMLA) and use of contractual paid leave.

On January 31, 2018, the Secretary of the Board issued a Complaint and Notice of Hearing scheduling a hearing for April 16, 2018. After several continuances due to witness unavailability, a hearing was held on May 10, 2019, at which all parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. For purposes of addressing the exceptions to the PDO in this matter, the relevant facts, as found by the Hearing Examiner, may be summarized as follows.

Jamie Pierluisse has been a police officer with the Township since 2008. She is currently a Detective in the Criminal Investigations Unit, and she is the only female police officer in the Township's Police Department. Detective Pierluisse is the first and only officer to become pregnant during active duty in the Township.

During her first pregnancy, due to medical problems associated with the pregnancy, Detective Pierluisse was required to begin leave from work in March of 2016, which was approximately six months prior to her first child's birth. (N.T. 16-17, 45-46, 51, 144, 159-160, 185; Union Exhibit 3). At that time, Detective Pierluisse took ninety (90) days of short-term disability, during which she received 100% of her salary from the Township as provided by the collective bargaining agreement (CBA). Effective on the 91st day, she received long-term disability at 80% of her salary. (N.T. 20-24, 51-53; Union Exhibit 3).

On May 6, 2016, the Township Financial Director, Maureen Doyle, sent Detective Pierluisse a letter regarding "Long Term Disability/FMLA." (N.T. 17; Union Exhibit 1). This letter provides, in pertinent part, as follows:

> **Long Term Disability**
> Congratulations! I hope your pregnancy is going well. You will be eligible for Long Term Disability on **JUNE** 18, 2016. Enclosed are forms you will need to fill out and send to the Standard Benefit Administrators for the process to begin. Also enclosed, are forms which you will need to forward to your attending physician for his/her completion. All paperwork will need to be forwarded to:
>
> . . . .
>
> **Family and Medical Leave Act**
> Chief Dickinson informed me you plan to take FMLA time to care for your baby. The paperwork is enclosed. Our policy states you'll have 12 weeks available to you. You will have to use benefit time (excluding sick days) first and unpaid leave for the balance of the 12 week period. Please read the enclosed packet and policy.

(Union Exhibit 1).

Detective Pierluisse gave birth to her first child by cesarean section on October 5, 2016. Thereafter, on October 13, 2016, the Township manager, Robert Ford, sent a letter to Detective Pierluisse informing her that the Township was designating the commencement of her FMLA leave to be the date of the birth of her first child, October 5, 2016. Also, Ms. Doyle explained to Detective Pierluisse that FMLA leave would begin to run from the date of the birth of her child. (N.T. 18-20, 145-146, 159-160; Union Exhibit 2).

Mr. Ford's October 13, 2016 letter states, in relevant part, the following:

> Based on the information you provided Maureen, I understand that you delivered your baby on October 5, 2016 via caesarian section, and that you are not currently cleared to return to work, with or without accommodation.
>
> Under these circumstances, your absence due to the birth and/or care of your newborn child is FMLA qualifying. Therefore, the Township is designating your absence as FMLA leave beginning on October 5, 2016, the date of your delivery. Your FMLA leave will run concurrently with the receipt of any disability benefits, as permitted by the FMLA and in accordance with the terms of the Township's FMLA policy, a copy of which is enclosed. I have also attached a notice of designating of your leave.
>
> It is our understanding that you wish to use twelve (12) weeks of FMLA leave. Your leave of absence is therefore approved through December 28, 2016. If you do not wish to utilize twelve (12) weeks of leave or your circumstances change, please contact me or Maureen.
> . . .

(Union Exhibit 2).

After approving her FMLA leave in 2016, the Township realized that Detective Pierluisse did not meet the threshold requirement of working 1250 hours in the preceding 12 months because she was out on short and long-term disability. However, the Township granted her the leave because it had already been approved. (N.T. 53-56, 146, 156, 172; Township Exhibit 2).

For the first eight weeks of her 12-week FMLA leave in 2016, Detective Pierluisse was still covered under the long-term disability insurance carrier because she gave birth via caesarean section surgery. Detective Pierluisse received medical clearance to return to work after eight weeks and underwent a functional capacity evaluation to determine whether she was capable of returning to full duty. For the remaining four weeks of her 12-week FMLA leave, Detective Pierluisse was paid by using her accrued vacation and holiday (non-sick) paid time off at a reduced rate of pay to stretch out the days. (N.T. 22-24, 101).

Detective Pierluisse returned to work at the expiration of her 12-week FMLA leave on January 2, 2017. (N.T. 22). Soon thereafter, Detective Pierluisse became pregnant with her second child. Based on the recommendation of her doctor, Detective Pierluisse stopped working on November 27, 2017. The projected due date for Detective Pierluisse's second child was the end of January 2018, and she was aware that the birth would be by caesarean section. (N.T. 25-26).

On October 31, 2017, Detective Pierluisse emailed Ms. Doyle and copied Chief Paul Dickinson stating, in pertinent part, as follows:

> I just supplied Chief with a letter from my treating physician's office showing that I will be beginning my maternity leave at 32 weeks gestation, which is November 22 2017. I still have 6.75 days of paid time off to use before the end of 2017. Since the 90 day clock will run me past December 31 2017, I was instructed to get the township stance on one of two options for that PTO: the first option would be to use that time between now and November 22 and begin my 90 day STD on November 23, the second option would be to schedule any PTO not used between now and November 22 on consecutive days starting on November 23, delaying the start of the 90 day STD until the PTO days run out. Chief requested the opportunity to use the second option so that I have time to manage my current caseload and work with my Detective Sergeant to transfer the casefiles to other detectives, but deferred the ultimate approval of that option to the township. Please advise on the use of the PTO days so that I may appropriately schedule what I need to with the PD directly and manage my caseload properly before my leave starts. Since the 90 days will take me past my expected due date of January 17 201[8], is there anything standing in the way of that 90 day clock running past my EDD, with any days not covered during my FMLA leave to be supplemented by PTO earned in 2018 if I decide to turn it in?

(Township Exhibit 4).

In response, Ms. Doyle emailed Detective Pierluisse as follows:

> Chief told me you'd be using 4 days of PTO beginning 11/22 before your STD begins. Your 90 day STD clock would start once those days are used. You don't need to take them off prior to 11/22. Once the

> 90 day clock runs out, LTD should begin. There is nothing I'm aware of that would stop the clock.

(Township Exhibit 4). In effect, Detective Pierluisse's maternity leave was supposed to start when she left work on November 22, 2017, but the Township permitted her to use her PTO before it would expire at the end of 2017, thereby pushing back commencement of her leave to November 27, 2017. Her short-term disability began November 27, 2017, for which she received 100% of her salary for 90 days. (N.T. 26-27, 107-109).

On December 5, 2017, Mr. Ford and Ms. Doyle called Detective Pierluisse at home to personally inform her that the Township was placing her on FMLA as of November 27, 2017. Detective Pierluisse responded that she expected her FMLA leave would commence on the date of the birth of her second child, just as it had with the birth of her first child the previous year. (N.T. 27-28, 35-36, 147-148, 157, 168).

Mr. Ford responded that she did not have a choice and that FMLA had to begin running on the first day that Detective Pierluisse was out of work. He further advised Detective Pierluisse that the Township was choosing to designate her FMLA to begin on the first day she was out of work due to manpower shortages in the department. Detective Pierluisse informed Mr. Ford during this telephone conversation that she needed time to care for her newborn child and additional time to physically recover from surgery. (N.T. 28-29, 169-170). Detective Pierluisse specifically expressed concerns to Mr. Ford and Ms. Doyle that she would be undergoing another cesarean section in the same incision that was made for the birth of her first child just one year before and that, without 12 weeks to recover, she was concerned about being physically able to return to police work. (N.T. 29).

Also during the telephone conversation on December 5, 2017, Mr. Ford explained to Detective Pierluisse that the Township was implementing a new FMLA policy for all officers. (N.T. 30, 198). Thereafter, Mr. Ford sent a letter dated December 5, 2017, to Detective Pierluisse, which provided, in relevant part, as follows:

> As we discussed this afternoon, based on the information you have provided, in accordance with Article 11, Section XIII A of the Police Contract, you will be eligible to receive sick leave benefits at 100% of your salary for the first 90 days of your absence that started on November 27, 2017. You will then apply for Long Term Disability (LTD) benefits for any remaining period of disability. Contingent upon satisfying the terms and conditions for eligibility and approval of your disability insurance application, you will receive LTD benefits equivalent to 80% of your salary starting on or about February 26, 2018. Enclosed are forms you will need to fill out and send to the Standard Benefit Administrators for the LTD process to begin. Also enclosed are forms that you will need to forward to your attending physician for his/her completion.
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> . . .
>
> Your absence due to your pregnancy, birth and care for your newborn child is Family and Medical Leave Act ("FMLA") qualifying. Therefore, the Township is designating your absence as FMLA leave beginning on November 27, 2017, the date that you went out on leave. Your FMLA leave will run concurrently with the receipt of any

> disability benefits as permitted by the FMLA and in accordance with the terms of the Township's FMLA policy, a copy of which is enclosed. I have also attached a notice of designation of your leave.
>
> It is our understanding that you wish to use twelve (12) weeks of FMLA leave. Your leave of absence pursuant to the FMLA is approved and your period of FMLA will run through February 18, 2018. If you do not wish to utilize twelve (12) weeks of leave or your circumstances change, please contact Maureen or me . . . to let us know.

(N.T. 160; Union Exhibit 4).

Attached to the December 5, 2017 letter, was a U.S. Department of Labor Family and Medical Leave Act "Notice of Eligibility and Rights & Responsibilities" and a "Designation Notice." Mr. Ford completed the information on the Notice of Eligibility form. That form, as completed by Mr. Ford, provides as follows: "On October 31, 2017, you informed us that you needed leave beginning on November 27, 2017 for: [y]our own serious health condition." Detective Pierluisse told Mr. Ford that she did not provide or agree with that information or designation, and that she wanted her FMLA leave to begin with the January 2018 birth date of her child. (N.T. 27-28, 36-38; Union Exhibit 4).

Detective Pierluisse's second child was born on January 10, 2018. By that time, she had used over four weeks of FMLA leave such that her FMLA leave expired before she was medically cleared to return to work and before her long-term disability ended. She returned to work when she received her medical clearance on March 7, 2018. (N.T. 31-32, 72-73, 121). After returning to work on March 7, 2018, Detective Pierluisse submitted paid leave for three days per week and worked two days per week for four weeks, after which she returned to full duty. (N.T. 35, 187).

Kenneth Meyer has been a police officer with the Township since 2010. He was formerly the President, and is currently the Vice-President, of the Union. On or about January 12, 2018, Officer Meyer wrote a letter to Mr. Ford on behalf of the Union with respect to Detective Pierluisse's FMLA leave designation. (N.T. 118-119, 153; Union Exhibit 8). The letter stated, in relevant part, as follows:

> With respect the bargaining unit and Detective Pierluisse disagree with the current use of the Family and [M]edical [L]eave [A]ct, hence forth known as (FMLA). Specifically we take exception to how it was applied to Detective Pierluisse's second pregnancy and now the birth of her second daughter. As a matter of record Detective Pierluisse's second daughter was born on Wednesday January 10th 2018.
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> We have consulted with Labor Attorney Sean Welby and Attorney Blake Dunbar of FOP Lodge 14. We have also consulted with the Mid Atlantic Association of Women in Law Enforcement. After researching Federal and State case law and having multiple lengthy discussions, we have decided on the following. We believe the FMLA should be effective with a new starting date of Wednesday January 10th 2018 coinciding with the birth [of] Detective Pierluisse's second child. This would follow with doctrine of past practice established by the [T]ownship

> and how it was applied to Detective Pierluisse's first pregnancy leave.
>
> Again said [p]ast practice was established during Detective Pierluisse's first pregnancy when the FMLA leave was applied from the date of birth, of daughter Amelia, rather than the day Detective Pierluisse started sick leave. The current FMLA leave having already been started by the [T]ownship is now going against said past practice. We further believe this is actually a matter of collective bargaining. We wish to avoid litigation and the legal bill this will generate for both sides in said matter. We request the township reverse its current position.

(Union Exhibit 8).

Importantly, the CBA between the Township and the Union provides in Article XIII for sick leave that "[e]very Officer hereunder shall be entitled to unlimited Sick Leave … subject only to the requirements of application for long term disability insurance payments as set forth hereinafter."[1] The Township has never bargained with the Union about applying FMLA leave for the birth of a child nor the application of FMLA leave in general, and the CBA does not contain any provisions relating to an FMLA leave policy. Further, the Township does not have a written FMLA policy for uniformed employes. (N.T. 144-145, 154, 169).

In the PDO, the Hearing Examiner determined that the Township acted unlawfully by commencing 12 weeks of FMLA-designated leave for Detective Pierluisse when she first went out on leave approximately six weeks prior to the birth of her second child. The Hearing Examiner found that the Township previously had permitted employes to utilize other negotiated paid leave benefits first and reserve the FMLA-designated leave.[2] The Hearing Examiner reasoned that the FMLA and implementing regulations do not require that an employer designate when FMLA-designated leave must commence. Therefore, the Township's policy regarding when FMLA must be taken is a subject over which bargaining was required. Because the Township failed to bargain its change in FMLA and leave policy, the Hearing Examiner concluded that the Township committed an unfair labor practice in violation of Section 6(1)(a) and (e) of the PLRA.

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[1] Section XIII E of the CBA provides, in relevant part, as follows:

> Any officer, who is unable to perform the essential duties of his/her position as a police officer … as a result of a non-work related injury or accident, for a continuous period of more than 90 days, shall be required to apply for disability insurance…. [B]eginning on the 91st day, the Township shall continue to pay said officer at 80% of his/her salary prior to the onset of accident or illness for five (5) years or until the date of retirement…."

[2] Officer Meyer was out of work for six months for a non-work-related knee surgery in 2014, and for three months in 2016 to undergo hip surgery, but the Township did not designate any of that time as FMLA-related.

Initially, in its exceptions, the Township alleges that the Hearing Examiner erred in making numerous findings of fact.[3] The Hearing Examiner's findings of fact will be sustained by the Board where there is substantial evidence in the record to support the finding. Pennsylvania State Rangers Association v. Commonwealth of Pennsylvania, Department of Conservation and Natural Resources, 45 PPER 1 (Final Order, 2013). Substantial evidence is such "relevant evidence as a reasonable mind might accept as adequate to support a conclusion." PLRB v. Kaufman Department Stores, 29 A.2d 90 (Pa. 1942). Further, the Hearing Examiner must set forth those findings that are relevant and necessary to support the conclusion reached but need not make findings summarizing all the evidence presented. Page's Department Store v. Velardi, 346 A.2d 556 (Pa. 1975).

Moreover, it is well-settled that the Board defers to the hearing examiner's decision to credit some, all, or none of a witness' testimony because he is best able to observe the manner and demeanor of the witnesses at the hearing. Pennsylvania State Troopers Association v. Commonwealth of Pennsylvania, Pennsylvania State Police, 33 PPER ¶33011 (Final Order, 2001); Crestwood School District v. Crestwood Education Association, 32 PPER ¶32050 (Final Order, 2001). The Board will not disturb a hearing examiner's credibility determinations absent compelling circumstances. Id. Here, the Hearing Examiner credited the testimony of the Union's witnesses and the Township did not allege any compelling circumstances to warrant overturning those credibility determinations.

Upon review of the Township's exceptions to the challenged findings, in light of the entire record, the Hearing Examiner cited accurately the testimony and evidence to establish each of the disputed points of fact. As such, the Hearing Examiner's relevant findings are supported by the record, and the Township's exception thereto is dismissed.

Further, the Township contends that the Hearing Examiner misconstrued the fundamental principles underlying the FMLA, as well as interpretive legal authorities. Specifically, the Township excepts to the Hearing Examiner's conclusion that it violated its bargaining obligation pursuant to Section 6(1)(a) and (e) of the PLRA by unilaterally changing its FMLA policy without negotiating with the Union. In making this argument, the Township insists that the FMLA provides for only twelve weeks of protected leave in any twelve month period and that it is the employer who determines when the FMLA leave will commence. Thus, the Township contends that it is privileged to require Detective Pierluisse, and other officers, to use 12 weeks of FMLA leave immediately upon an FMLA-qualifying event despite the fact that in the past, employes had consistently been permitted to use negotiated contractual sick leave benefits before utilizing FMLA-designated leave.

The Township relies upon the notice provisions of the FMLA to support this assertion, and points to the United States Supreme Court case of Ragsdale v. Wolverine World Wide, Inc., 535 U.S. 81 (2002) for the proposition that the FMLA was intended only as a guarantee of job protection for twelve weeks. The Township contends that it is impermissible in any scenario to "stack" leave so that an employe can use other negotiated paid leave before invoking the unpaid leave guaranteed by the FMLA.

[3] Specifically, the Township challenges Findings of Fact 11, 12, 13, 14, 20, 29, 30, 31, 33, and 36.

In Ragsdale, the employe asked her employer, Wolverine World Wide, Inc., for a leave of absence to seek treatment for her own serious medical condition, Hodgkin's disease. Wolverine granted her initial request, and then granted several extension requests, for a total of thirty (30) weeks of leave during which Wolverine held Ragsdale's job open. During all that time, Wolverine did not designate Ragsdale's time off from work as "FMLA leave." When Ragsdale asked for a seventh extension of time off work, Wolverine terminated her and she filed suit alleging violations of the FMLA.

Importantly, in Ragsdale, unlike the instant matter, the employe had sued her employer for damages related to violating the FMLA. Here, however, the controversy surrounds an employer's failure to bargain with a union regarding an employe's use of negotiated leave and contractual rights, and how those relate to the use of FMLA leave. Indeed, in Ragsdale, the United States Supreme Court repeatedly cited to 29 C.F.R. §825.700(a), and how Congress intended employers to agree to more generous benefits than those required by the FMLA.[4] The question here is the Township's obligation to adhere to those more generous sick leave benefits established in the CBA and by past practice.[5] As such, Ragsdale is inapposite to resolution of the exceptions filed in this case.

Rather, as noted by the Union, the decision in International Association of Firefighters Local #1749 v. City of Butler, 32 PPER ¶32066 (Proposed Decision and Order, 2001) is persuasive. In that case, George Leitsch, a City of Butler firefighter, suffered a work-related injury on March 29, 2000, and began receiving benefits under the Pennsylvania Heart and Lung Act (HLA) while he was off work. On April 14, 2000, the City sent Leitsch a letter advising him that his injury was a serious medical condition qualifying him for benefits under the FMLA. The City then began deducting time that Leitsch was off work from his leave entitlement pursuant to the FMLA as of March 29, 2000, thereby running his FMLA benefits concurrently with his HLA benefits based on its view that this was a managerial prerogative over which it did not need to bargain.

As in the instant case, the Union filed a charge of unfair labor practices against the City, asserting that the implementation of an FMLA policy concerning use of contractual leave is mandatorily negotiable under Act 111 as read in *pari materia* with the PLRA. The City in Butler violated its bargaining obligation by mandating that Leitsch's FMLA-designated leave begin when he first was out of work due to his work-related injury, despite the fact that he was entitled to, and was receiving, time off from work with pay pursuant to the HLA.

Rejecting the City's argument in City of Butler, the hearing examiner relied upon the crucial distinction between mandatory and discretionary

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[4] "An employer must observe any employment benefit program or plan that provides greater family or medical leave rights to employees than the rights established by the FMLA." 29 C.F.R. §825.700(a).

[5] Notably, the express contract provisions in this case provide for unlimited sick leave with disability pay up to five years. *See* Wilkes-Barre Township. v. PLRB, 878 A.2d 977 (Pa. Cmwlth. 2005) (an employer policy which unilaterally alters the terms in a contract is an unfair labor practice).

language in a statute or regulation as it impacts the scope of bargaining under Act 111. In defending the charge, as in the instant case, the City relied upon 29 C.F.R. §825.208(a) and §825.507(d)(2), respectively, arguing that the federal regulations **require** an employer to give notice of an employe's entitlement to FMLA if it meets the requirements of a "serious medical condition," and **permit** an employer to run the FMLA leave concurrently with any other type of leave to which an employe may be entitled. Noting that leave policies and implementation of discretionary provisions of the FMLA are mandatorily negotiable under Act 111,[6] the hearing examiner held that because the language in 29 CFR §825.207(d)(2) (*i.e.* to "permit") is discretionary, the City was required to bargain with the Union prior to implementing a policy which would require FMLA leave to run concurrently with other types of contractual leave.[7]

The Township's mandate in 2017 that Detective Pierluisse take her FMLA leave for her own serious medical condition during pregnancy when she had other contractual paid leave available, had the effect of reducing her entitlement to family medical leave following the birth of her second child.[8] Whereas, previously, with the birth of her first child, Detective Pierluisse had been permitted to use her contractual unlimited sick leave for her illness during pregnancy, and use the birth of her child as the FMLA-qualifying event for unpaid family medical leave. Thus, here, as in Butler, the Township was not at liberty to unilaterally implement a change in its policy to now mandate that Detective Pierluisse take her FMLA leave for her own serious medical condition.

As noted by the Hearing Examiner, the National Labor Relations Board (NLRB) has also considered the very issue before us, and likewise determined that an employer may not unilaterally designate FMLA commencement to run concurrently with other available paid leave benefits without bargaining. In Verizon North Inc. and International Brotherhood of Electrical Workers, Local 1637, 352 NLRB 1022 (2008), an employer changed its policy from one that prevented its employes from taking paid leave benefits before invoking unpaid FMLA, to requiring the concurrent use of both contractual paid leave and unpaid FMLA leave. Before the NLRB, Verizon argued, as does the Township here, that the permissive language in the federal regulations allows it to preclude employes from "stacking" their FMLA unpaid leave benefits on top of other paid leave entitlements. However, the NLRB disagreed, holding that the permissive language of the regulation does not override an employer's collective bargaining obligations.

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[6] *See* International Association of Firefighters, Local 1803 v. City of Reading, 31 PPER ¶31057 (Final Order, 2000).

[7] Additionally, 20 C.F.R. §825.301(d) provides that FMLA leave may be retroactively designated, so long as it does not cause harm or injury to the employe.

[8] Indeed, here there is no contractual provision covering care for family members with serious health conditions or for the care of a new-born child. By requiring Detective Pierluisse to use FMLA leave during her own illness related to the pregnancy (for which she was contractually entitled to unlimited leave), the Township reduced, or could have eliminated entirely, her ability to take needed FMLA leave to care for family or her new-born child.

Other tribunals have considered the scenario where an employer forces the commencement of FMLA leave to run concurrently with other paid leave to which an employe is entitled. For example, in Salem Community College and Salem Community College Faculty Association, 38 NJPER 42 (NJPERC 2011), a grievance was filed against the College because it required its employe to take FMLA leave at the beginning of the employe's time off work even though other leave was available. In deciding to deny the College's request to restrain binding arbitration, the New Jersey Public Employment Relations Commission stated emphatically:

> We agree with the [employer] that 29 CFR 800.325(b) mandates that it notify an employee with a serious health condition of his or her eligibility to take an FMLA leave. On that question, the regulation speaks in the imperative and coincides with the regulation's evident objective of ensuring that employees know what their rights are and can invoke them if they see fit. But we do not agree with the [employer] that an employee with a serious health condition is required to take FMLA leave when that employee may have recourse to other negotiated benefits. On that question, the regulation does not speak in the imperative or indicate any intent to diminish employee benefits. . . . This case does not mandate than an employee be forced to take an FMLA leave when other forms of leave may be available nor does it preclude a majority representative from negotiating other forms of leave that may be invoked before an FMLA leave is taken.

(Salem Community College, 2011 WL 4520703 at 3-4).[9]

Furthermore, in the case of Gravel v. Costco Wholesale Group, 230 F. Supp. 3d 430 (E.D. Pa. 2017), the federal District Court for the Eastern District of Pennsylvania discussed the FMLA at length, and noted that not only can "an employee … affirmatively decline to use FMLA leave even if the underlying reason for seeking the leave would have invoked FMLA protection," Id. at 436, citing Ridings v. Riverside Medical Center, 537 F.3d 755, 769 n.3 (7th Cir. 2008), and Escriba v. Foster Poultry Farms, Inc., 743 F.3d 1236, 1244 (9th Cir. 2014), but an "employer could find itself open to liability for forcing FMLA leave on the unwilling employee." Id., citing Wysong v. Dow Chemical Company, 503 F.3d 441, 449 (6th Cir. 2007).

Nevertheless, here, in reliance upon two recent Opinion letters issued by the federal Department of Labor (DOL), the Township insists that the Hearing Examiner misunderstood and misapplied the FMLA and its regulations. The first such letter, Opinion Letter FMLA2019-1-A, states that employers may not delay the designation of FMLA-qualifying leave, and must provide the notice within five business days. The second such letter, Opinion Letter FMLA2019-3-A, states, in pertinent part, that "once an eligible employee communicates a need to take leave for an FMLA-qualifying reason, an employer may not delay designating such leave as FMLA leave, and neither the employee nor the employer may decline FMLA protection for that leave." Opinion Letter FMLA2019-3-A at 3.

[9] Additionally, the New Jersey Superior Court considered whether an employer could require an employe to complete an FMLA medical certification in a circumstance where the employe clearly waived his or her rights to unpaid FMLA leave in favor of using paid sick leave, and concluded that it could not. In re Township of Parsippany-Troy Hills, 17 A.3d 834 (N.J. Super, 2011).

In response, the Union asserts that these DOL Opinion Letters are not entitled to controlling weight. The Union asserts in this matter that the DOL's Opinion letters do not take into account the impact of Pennsylvania jurisprudence, including this Board's decisions which provide protection of bargaining rights for employes who are entitled to various types of negotiated paid leave. We agree. Notably, DOL Opinion Letters are subject to change thereby reducing the weight to be assigned to them.[10] In addition, the DOL Opinion Letters do not squarely address the issue presently before us, namely, whether an employer is required to collectively bargain over the discretionary aspects of the FMLA before implementing a leave policy prohibiting the "stacking" of leave benefits where two FMLA-qualifying absences occur back-to-back, such as here, where the employe suffered her own serious health condition which was then followed by the necessity to care for a newborn child.

Next, the Township argues that the Hearing Examiner erred by finding that the Township established a binding past practice when it permitted Detective Pierluisse to take paid leave for her own serious medical condition in 2016, and reserve her unpaid FMLA leave benefits for the subsequent care of her newborn child. "The definition of past practice requires that the parties must develop a history of similar responses or reactions to a recurring set of circumstances." Ellwood City Police Wage and Policy Unit v. Ellwood City Borough, 29 PPER ¶29214 (Final Order, 1998), *aff'd sub nom.*, Ellwood City Police Wage and Policy Unit v. PLRB, 731 A.2d 670 (Pa. Cmwlth. 1999). A past practice must be "accepted in the sense of being regarded by the [parties] involved as the normal and proper response to the underlying circumstances presented." County of Allegheny v. Allegheny County Prison Employees Independent Union, 381 A.2d 849, 852 n. 12 (Pa. 1977). Binding past practices between the employer and union may be used to define ambiguous words in the contract, or may create separate terms and conditions of employment not covered by the collective bargaining agreement. Id.

Here, the Township contends that because Detective Pierluisse did not actually qualify for FMLA leave in 2016 (in that she had not worked 1,250 hours in the previous 12 months), there can be no past practice concerning the delegation of her FMLA leave.[11] This argument is without merit. The record clearly establishes that regardless of whether Detective Pierluisse was actually entitled to unpaid FMLA leave in 2016, or whether she knew that

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[10] For example, in an October 27, 1994 opinion letter from Deputy Assistant Administrator Daniel F. Sweeney, the DOL took the exact opposite position to that later announced by the March 14, 2019 opinion letter upon which the Township now relies. In particular, the 1994 letter stated that "…an employer may permit an employee to use accrued paid sick leave for FMLA qualifying events and, as long as FMLA's job protection and benefits are extended, to bank the 12-week FMLA entitlement leave for later use such as after the employee's sick leave has been exhausted." (1994 WL 1016757).

[11] The Township erroneously makes much of the fact that Detective Pierluisse knew that she did not actually qualify for FMLA in 2016, and challenges the Hearing Examiner's ruling regarding documentation submitted by the Township on this point. However, Detective Pierluisse's knowledge, or lack thereof, regarding her 2016 FMLA eligibility is irrelevant to the undisputed fact that the Township had previously permitted Detective Pierluisse to utilize her paid leave before utilizing FMLA leave for her pregnancy and child birth. As noted above, Detective Pierluisse was the only woman, and only instance of pregnancy in the Township's police bargaining unit.

she was not so entitled, the Township communicated to her by letter dated May 6, 2016 that she could commence taking unpaid FMLA-designated leave to care for her first newborn child after having used paid disability leave for her own serious health condition arising from medical problems with her pregnancy.

Similarly, there is substantial corroborating evidence of a binding past practice established by the Township's treatment of its officers with various medical conditions other than pregnancy. In this regard, Officer Meyer credibly testified that in 2014, he was out of work for six months for knee surgery, and in 2016, for three months to have hip surgery, and that neither time did the Township require him to take unpaid FMLA-designated leave concurrently with his paid leave benefits despite the fact that both of those absences were for FMLA-qualifying events. (N.T. 121-125). Clearly, this substantial evidence establishes that the Union and the Township have an accepted practice with regard to the use of contractual leave for an officer's own serious medical condition and the use of FMLA leave for the care of a family member, new-born child, or later qualifying FMLA event.

The Township mandating the commencement of FMLA leave commensurate with an officer's own serious illness, directly impacts the employes' contractual sick leave, and is a change from the Township's accepted past practices regarding use of contractual sick leave and unpaid FMLA leave. Because the Township failed to bargain when it unilaterally instituted a change to the leave policy without bargaining, the Township violated Section 6(1)(a) and (e) of the PLRA.

Finally, the Township contends that the Hearing Examiner erred by fashioning a remedy directing the Township to "immediately make whole Detective Pierluisse for any out-of-pocket expenses including but not limited to day care expenditures and other related costs . . . and any leave use affected by the expiration of her FMLA designated leave before 12 weeks following the birth of her second child." (Final Order, p. 18). Section 8(a) of the PLRA empowers the Board to "order any person engaging in any unfair labor practice to cease and desist from such unfair labor practice, and to take such reasonable affirmative action . . . as will effectuate the policies of th[e] Act." 43 P.S. § 211.8(c). This power is remedial, rather than punitive. Plumstead Township v. PLRB, 713 A.2d 730 (Pa. Cmwlth. 1998). Generally, whether to grant remedial make whole relief for the commission of an unfair labor practice is a matter of Board discretion. PLRB v. Martha Company, 359 Pa. 347, 59 A.2d 166 (1948).

Make whole relief directed by the Board is designed to restore the *status quo ante*, and reimburse employes who have incurred out-of-pocket expenses necessary to replace benefits lost due to the unfair labor practice. The Board finds that the Hearing Examiner's order to make Detective Pierluisse whole for any leave affected by the Township's unlawful change to its FMLA policy, is remedial and in furtherance of the purposes and policies of the PLRA and Act 111. *See* Middletown Borough Police Officers Association v. Middletown Borough, 47 PPER 30 (Final Order, 2015). However, the reimbursement of day care expenses is not a benefit provided for in the parties' CBA and, therefore, Detective Pierluisse is not entitled to reimbursement for those personal expenses. *See* Wyoming Borough Police Department v. Wyoming Borough, 43 PPER 22 n.3 (Final Order, 2011). Accordingly, the Township's exception is sustained in part, dismissed in part, and that portion of the remedy regarding the reimbursement of day care expenses is vacated.

After a thorough review of the exceptions and all matters of record, the Hearing Examiner properly concluded that the Township violated its statutory duty to bargain under Section 6(1)(a) and (e) of the PLRA by unilaterally requiring Detective Pierluisse to use contractual leave concurrently with unpaid FMLA leave benefits contrary to its past practice of permitting employes to use contractual leave prior to unpaid FMLA benefits. Accordingly, the exceptions filed by the Township are sustained in part, and dismissed in part, and the PDO made absolute and final as modified herein.

ORDER

In view of the foregoing, and in order to effectuate the policies of the Pennsylvania Labor Relations Act, as read in *pari materia* with Act 111, the Board

HEREBY ORDERS AND DIRECTS

that the exceptions filed by Towamencin Township are hereby sustained in part, dismissed in part, and the Proposed Decision and Order dated October 24, 2019, shall be, and hereby is, made absolute and final as modified herein.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

that the Township shall:

1. Cease and desist from interfering, 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 collectively in good faith with an employe representative which is the exclusive representative of employes in an appropriate unit, including but not limited to the discussing of grievances with the exclusive representative;

3. Take the following affirmative action:

(a) Immediately restore the *status quo ante* and restore the FMLA policy that was in place prior to December 5, 2017. Immediately permit officers to choose when they would take FMLA leave, and immediately cease requiring officers to commence FMLA leave concurrently with paid leave benefits;

(b) Immediately make whole Detective Pierluisse for any leave affected, if any, by the Township's unilateral change to its FMLA leave policy;

(c) Post a copy of the Proposed Decision and Order and Final Order within five (5) days from the effective date hereof in a conspicuous place readily accessible to its employes and have the same remain so posted for a period of ten (10) consecutive days; and

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

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

Pursuant to conference call meeting of the Pennsylvania Labor Relations Board, James M. Darby, Chairman, Robert H. Shoop, Jr., Member, and Albert Mezzaroba, Member, this twenty-first day of July, 2020, 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 on July 24, 2020.

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

OFFICERS OF TOWAMENCIN TOWNSHIP POLICE DEPARTMENT	:	
v.	:	Case No. PF-C-18-11-E
TOWAMENCIN TOWNSHIP	:	

AFFIDAVIT OF COMPLIANCE

The Township hereby certifies that it has ceased and desisted from its violations of Section 6(1)(a) and (e) of the Pennsylvania Labor Relations Act as read in *pari materia* with Act 111; that it has restored the FMLA policy that was in place prior to December 5, 2017; that it is permitting officers to choose when they invoke FMLA leave consistent with the *status quo ante*; that it has made Detective Pierluisse whole for any leave affected, if any, by the Township's unilateral change to its FMLA leave policy; that it has posted a copy of the Proposed Decision and Order and Final Order as directed; and that it has served a 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