COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

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

PROPOSED DECISION AND ORDER

On January 16, 2018, the complainant, Towamencin Township Police Officers (Union or Officers), filed with the Pennsylvania Labor Relations Board (Board) a charge of unfair labor practices, under the Pennsylvania Labor Relations Act (PLRA or Act), as read with Act 111, alleging that the Township violated Section 6(1)(a) and (e) of the PLRA. The Union specifically alleged that the Township violated its bargaining obligation when it changed its policy of designating the start of FMLA leave for Jamie Pierluisse's second pregnancy and childbirth from the policy it applied to her first pregnancy and childbirth.

On January 31, 2018, the Secretary of the Board issued a complaint and notice of hearing directing that a hearing be held on April 16, 2018, in Harrisburg, Pennsylvania. After many granted continuance requests, due to the medical unavailability and subsequent death of a Township witness, the hearing was rescheduled for and held on May 10, 2019. During the hearing on that date, both parties in interest were afforded a full and fair opportunity to present testimonial and documentary evidence and to cross-examine witnesses. On August 23, 2019, the Union filed its post-hearing brief. On October 17, 2019, the Township filed its post post-hearing brief.

The examiner, based upon witness testimony, admitted documents and all matters of record, makes the following:

FINDINGS OF FACT

1. The Township is a public employer and political subdivision pursuant to Act 111 and the PLRA. (N.T. 9)

2. The Union is a labor organization pursuant to Act 111 and the PLRA. (N.T. 9)

3. 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. Officer Pierluisse gave birth to her first child by C-section on October 5, 2016. She gave birth to her second child on January 10, 2018. Officer Pierluisse was a patrol officer during her first pregnancy, and she was a Detective during her second.[1] (N.T. 14-16, 31-32, 39, 184; Union Exhibit 2)

[1] I will refer to Detective Pierluisse throughout this order as "Detective" regardless of whether she was a patrol officer at the time being discussed.

4. Robert Ford has been the Township Manager since 2004. Maureen Doyle, at all times relevant to this case, was the Township Financial Director. She is now deceased. Paul T. Dickinson is the Township's Chief of Police. (N.T. 16-17, 28, 183; Union Exhibits 1 & 2; Township Exhibit 4)

5. Detective Pierluisse is the first female officer at the Township and the only female officer to become pregnant during active duty. No other officer at the Township has ever requested FMLA leave for child birth. During her first pregnancy, Detective Pierluisse had to go out on leave on March 19, or 21, 2016, approximately six months before the birth of her first child. (N.T. 16-17, 45-46, 51, 144, 159-160, 185; Union Exhibit 3)

6. At that time, Detective Pierluisse took 90 days of short-term disability, during which she received 100% of her salary from the Township as provided by the CBA. Effective on the 91st day, she received long-term disability at 80% of her salary through the Township because the long-term disability carrier, Delaware Valley Municipal Management Association (DVMMA), delayed qualifying her for disability benefits. DVMMA eventually took over the disability payments. (N.T. 20-24, 51-53; Union Exhibit 3)

7. On May 6, 2016, Ms. Doyle sent Detective Pierluisse a letter regarding "Long Term Disability/FMLA." (N.T. 17; Union Exhibit 1)

8. Ms. Doyle's May 6, 2016 letter provides, in relevant 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)(emphasis original)

9. On October 13, 2016, Mr. 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 birth of her child. (N.T. 18-20, 145-146, 159-160; Union Exhibit 2)

10. 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)

11. After approving her FMLA leave in 2016, the Township believed that Detective Pierluisse may not have met the threshold requirement of working 1250 hours in the preceding 12 months because she was out on short and long-term disability. The Township granted her the leave anyway because they already approved it. The Township did not notify Detective Pierluisse of the issue regarding its calculation of the 1250 hours. (N.T. 53-56, 146, 156, 172; Township Exhibit 2)

12. For the first eight weeks of her 12-week FMLA in 2016, Detective Pierluisse was still covered under the long-term disability insurance carrier because she underwent surgery for the birth of her child. The remaining four weeks of her 12-week FMLA, 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, 101)

13. After eight weeks of FMLA leave, Detective Pierluisse received medical clearance from her obstetrician to return to work. Also, at the direction of DVMMA, Detective Pierluisse underwent a functional capacity evaluation, at Medical Management Services, to determine whether she was capable of returning to full duty. On December 28, 2016, Medical Management Services concluded that Detective Pierluisse was capable of returning to full duty. (N.T. 23-24; Union Exhibit 3)

14. Detective Pierluisse returned to work at the expiration of her 12-week FMLA leave on January 2, 2017. (N.T. 22)

15. In 2017, Detective Pierluisse became pregnant with her second child. At some point, her physician recommended that she stop working. Based on that recommendation, Detective Pierluisse stopped working on November 27, 2017. Her projected due date for her second child was the end of January 2018. She also knew in advance that the birth of her second child would be by C-section. (N.T. 25-26)

16. On October 31, 2017, Detective Pierluisse emailed Ms. Doyle and copied Chief Dickinson stating, in relevant 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)

17. Ms. Doyle responded that she needed time to answer her questions. On November 7, 2017, 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)

18. In effect, Detective Pierluisse's maternity leave was supposed to start on November 22, 2017, when she left work, but the Township permitted her to use her PTO before it would expire at the end of 2017, which pushed her designated maternity leave date back 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)

19. On December 5, 2017, Mr. Ford called Detective Pierluisse at home. Ms. Doyle was present in the same room with Mr. Ford on speaker phone. Although a previously drafted letter would follow, Mr. Ford wanted to personally inform Detective Pierluisse, as a courtesy clarification, that the Township was placing her on FMLA as of November 27, 2017, and not the date of the birth of her second child in January 2018. Mr. Ford was concerned that Detective Pierluisse would expect her FMLA leave to begin on the date of the birth of her second child based on her FMLA leave commencement for her first child. Detective Pierluisse told Mr. Ford at that time that she expected her FMLA to begin to run from the date of the birth of her second child as had been done with the birth of her first child in 2016. (N.T. 27-28, 35-36, 147-148, 157, 168)

20. Mr. Ford responded that he did not have a choice and that FMLA had to begin running on the first day that Detective Pierluisse was out of

work. Detective Pierluisse disagreed and informed him that the statute provides that she has a choice. Mr. Ford then acknowledged that there was a choice, but the Township was choosing to designate her FMLA to begin on the first day she was out of work due to manpower shortages and needing her back at work. Detective Pierluisse informed Mr. Ford during this telephone conversation that she needed time to care for her newborn child and she needed additional time to physically recover. (N.T. 28-29, 169-170)

21. Detective Pierluisse specifically expressed concerns to Mr. Ford and Ms. Doyle that she would be undergoing another C-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)

22. Also during the December 5, 2017 telephone conversation, Mr. Ford explained that the Township was implementing a new FMLA policy. Mr. Ford mentioned the name of another officer who was injured on duty at about the same time that Detective Pierluisse took leave in November 2017 and explained that he was being placed on FMLA leave from the date he took leave also. (N.T. 30, 198)

23. Also on December 5, 2017, Mr. Ford sent a letter to Detective Pierluisse. He wrote the letter because he was changing the FMLA leave designation of the birth of her second child from the FMLA leave designation of her first child. (N.T. 160; Union Exhibit 4)

24. The letter provides, 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. . . .
>
> . . . .
>
> 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.

(Union Exhibit 4)

25. 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. She told him that she wanted leave as of the January 2018 birth date of her child. (N.T. 27-28, 36-38; Union Exhibit 4)

26. Detective Pierluisse's second child was born on January 10, 2018. By that time, she was required to use over four weeks of FMLA leave. Her FMLA leave expired before she was medically cleared to return to work and before her long-term disability ended. She was out longer than 12 weeks utilizing disability, because she was not yet cleared to return to work, she used some paid time off, and she returned to work when she received her medical clearance on March 7, 2018. (N.T. 31-32, 72-73, 121)

27. 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 Towamencin Police Benevolent Association. On or about January 12, 2018, Officer Meyer wrote a letter to Mr. Ford on behalf of the Association with respect to Detective Pierluisse's FMLA leave designation. (N.T. 118-119, 153; Union Exhibit 8)

28. Officer Meyer's January 12, 2018 letter provides, 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.
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> 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)

29. The DVMMA did not require Detective Pierluisse to obtain a functional capacity evaluation before returning to work after her second C-section. Mary Hicks from the DVMMA told Detective Pierluisse that they would accept her obstetrician's medical clearance instead. Detective Pierluisse believes that a functional capacity evaluation would have revealed that she was not capable of returning to police work. (N.T. 32, 70-71)

30. Detective Pierluisse did not feel physically capable to return to police work on March 7, 2018. Her incision was not healed; she experienced numbness in her abdominal area; and she suffered radiating pain and sensitivity through her abdomen and down into her legs. She was not confident that she could perform her duties as a police officer. (N.T. 33-34, 61)

31. On March 1, 2018, as a result of her condition, Detective Pierluisse contacted Mary Hicks regarding an appointment for a functional capacity exam before returning to work. Detective Pierluisse did not hear back from Ms. Hicks as of March 6, 2018, the day before she was ordered to report for duty on March 7, 2018. On March 6, 2018, Detective Pierluisse emailed Ms. Doyle as follows:

> I wanted to make sure I'm still on the schedule to return to work tomorrow, 3/17/18. Before I commute in the impending snow storm.
>
> After my conversation with Mary Hicks on March 1, she advised she would be in contact regarding my return. I have yet to be contacted regarding an appointment with a DVHIT physician, functional capacity exam, or any evaluation regarding my return to work. I have been cleared by my personal physician, and [t]hat information was relayed to Mary on March 1.
>
> If there is an issue with my return without having been seen by a DVHIT physician or completing a functional capacity exam, I would appreciate knowing that before commuting in the blizzard conditions tomorrow.

(Union Exhibit 5)

32. At 12:52 a.m. on March 7, 2018, Ms. Doyle responded as follows: "Yes, your doctor confirmed your return to work and Mary was notified." (Union Exhibit 5)

33. On her first day back to work, Detective Pierluisse was dispatched to the scene of a deceased person where she was asked to assist the coroner's personnel in transporting the body down a set of stairs of the home where the body was located. Her sergeant ordered her not to assist due to her physical condition and limitations on her first day back at work. (N.T. 34-35)

34. 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)

35. The Township has never bargained with the Union about applying FMLA leave for the birth of a child or FMLA leave in general, and the CBA does not contain any provisions relating to FMLA leave policy. Also, the Township does not have a written FMLA policy for uniformed employes. (N.T. 144-145, 154, 169)

36. Officer Meyer was out of work for six months for a non-work-related knee surgery in 2014. He was out of work for hip surgery in 2016 for three months. The Township did not designate any of that time as FMLA related, and it did not force the commencement of FMLA leave. Officer Meyer sustained a work-related hand injury on April 22, 2019. On May 3, 2019, the Township provided notice that Officer Meyer was being involuntarily placed on FMLA leave.

DISCUSSION

As an initial matter, during the hearing, the Township moved to dismiss the complainant's case after the Complainant rested. (N.T. 134-142). The Township's motion is denied. The issue under consideration in this case is whether the Township violated Section 6(1)(a) and (e) of the PLRA as read with Act 111 when it designated the commencement of FMLA leave for Detective Pierluisse when she left work for an FMLA qualifying event resulting from her incapacity to perform police officer duties due to her second pregnancy and when she desired to use negotiated paid leave benefits instead of FMLA designated leave, as the Township permitted during her first pregnancy. The Township argues that an employer has an obligation and responsibility, under the Department of Labor Regulations, to designate qualifying leave as FMLA leave within five business days and that a failure to do so could subject an employer to liability. (Township Brief at 9). The case law in this area from multiple jurisdictions holds contrary to the Township's position and draws a distinction between designating leave as FMLA qualifying and mandating that employes take leave under the FMLA instead of using other leave benefits.

In International Association of Firefighters, Local 1803 v. City of Reading, 31 PPER 31057 (Final Order, 2000), the Board adopted a hearing examiner's determination that discretionary aspects of the Family and Medical Leave Act are mandatorily bargainable, citing AFSCME Local 1971 v. Philadelphia Office of Housing and Community Development, 27 PPER 27214 (Proposed Decision and Order, 1996). In Housing and Community Development, the examiner reasoned: "Since the FMLA does not specifically prohibit the employer from bargaining over the discretionary leave matters . . . and since leave issues are matters subject to mandatory bargaining, it follows that [the Office of Housing and Community Development] was required to bargain over its decision to apply its previously agreed to leave policies to the newly created FMLA leave." Housing and Community Development, 27 PPER at 489.

Subsequently, in International Association of Firefighters Local 1749 v. City of Butler, 32 PPER 32066 (Proposed Decision and Order, 2001), the examiner relied upon the Board's decision in City of Reading adopting Housing and Community Development. In City of Butler, the employer unilaterally designated the commencement of an employe's leave as FMLA while concurrently deducting accrued leave benefits. In rejecting the employer's argument that

the FMLA and the Department of Labor regulations authorize an employer to designate FMLA leave commencement while the employe has chosen to take paid leave benefits, the examiner emphasized that the Board has distinguished between mandatory and discretionary language in a statute. The examiner further noted that there is no mandate in the federal regulations that an employer designate leave commencement under the FMLA. The examiner opined as follows:

> Furthermore, although the regulations cited by the [employer] indicate that it is the employer's responsibility to designate employe leave as FMLA leave, they do not mandate that the type of leave at issue be treated as leave under the FMLA. Rather, such action is discretionary. Therefore, the regulations upon which the City relied do not remove the particular issue of employe leave which is in dispute here from mandatory negotiation under Act 111.

City of Butler, 32 PPER at 178.

The examiner in City of Butler rejected the same argument made by the Township here, which is that the FMLA and Department of Labor regulations require the forced commencement of FMLA leave to begin as soon as the employe is off work due to a qualifying event and can make an employe use paid leave benefits concurrently with FMLA leave. As emphasized in City of Butler, there is no mandate in the federal regulations that requires an employer to designate that FMLA leave actually commence, nor do they mandate that absence from work necessarily be treated as leave under the FMLA when other leave is available. In this regard, the regulations upon which the Township relies, as relied upon by the employer in City of Butler, do not remove the issue of leave commencements or concurrent leave use under the FMLA from being a mandatory subject of bargaining. Similarly, in Fraternal Order of Police Queen City Lodge No. 10 v. City of Allentown, 32 PPER 32110 (Proposed Decision and Order, 2000), a different examiner concluded that "[t]he requirement that police officers substitute paid leave for FMLA leave entitlement directly affects their wages, hours, and other terms and conditions of employment." Id. at 287.

The decisions of this Board and its examiners (that an employer may not unilaterally designate FMLA leave commencement to run concurrently with paid leave benefits without bargaining) are consistent with the position of the National Board. In Verizon North Inc. and International Brotherhood of Electrical Workers, Local 1637, 352 NLRB 1022 (2008), the employer's former policy was to permit an employe to use paid leave benefits instead of being charged for FMLA time for FMLA qualifying leave. The employer then changed its FMLA policy from permitting the stacking of paid leave benefits with unpaid FMLA leave to requiring the concurrent use of both types of leave so that the employe was simultaneously double charged FMLA leave and paid leave, thereby diminishing the employe's job protection. The employer in Verizon North argued to the National Board, as employers have attempted to argue before this Board, that the FMLA permits employers to designate FMLA leave concurrently with paid leave benefits. The National Board, as has this Board, rejected the position that the permissive language in federal regulations overrides an employer's collective bargaining obligation with respect to leave use. Moreover, the language at 29 U.S.C §2612(d)(2)(A) that "an eligible employe may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal leave, or family leave of the employee for FMLA leave" addresses the substitution of paid leave for FMLA leave as one type of leave or the other. The permissive

language does not preempt the employer's collective bargaining obligations, nor does it require double charging an employe for both FMLA leave and paid leave benefits. Id.

In Salem Community College and Salem Community College Faculty Association, 38 NJPER 42 (NJPERC, 2011) (2011 WL 4520703), the New Jersey Public Employment Relations Commission (PERC) also addressed the issue presented in this case (i.e., scope of bargaining where the employer forced the commencement of FMLA leave to begin running while an employe is choosing to take earned paid leave) where the double-charging of time reduces the amount of time the employe has job protection. In Salem, the New Jersey PERC opined, consistent with this Board and the National Board, as follows;

> The FMLA entitles eligible employees to a total of 12 workweeks of unpaid leave during any 12-month period for the birth and care of a son or daughter or for a "serious health condition that makes the employee unable to perform the functions of the position of such employee." The College argues that the FMLA mandates that it designate the illness as a serious health condition and that it require use of unpaid FMLA benefits at the outset of any leave of absence. . . .
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> The College's argument rests on the federal regulations implementing the FMLA and requiring it to provide certain notices to employees. In particular, 29 CFR 800.325(b) requires an employer to notify an employee of his or her eligibility to take FMLA leave "when an employee requests FMLA leave, or when the employer acquires knowledge that an employee's leave may be for an FMLA qualifying reason." 29 CFR 800.325(d) further directs an employer to issue a "designation notice" to the employee.
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> This regulation provides, in part:
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> > The employer is responsible in all circumstances for designating leave as FMLA qualifying, and for giving notice of the designation to the employee as provided in this section. When the employer has enough information to determine whether the leave is being taken for an FMLA qualifying reason (e.g. after receiving a certification), the employer must notify the employee whether the leave will be designated and will be counted as FMLA leave within five business days absent extenuating circumstances.
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> We agree with the College 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 College 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 that 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) (emphasis added).

In distinguishing an opinion letter issued by the Deputy Assistant Administrator of the Wage and Hour Division of the United States Department of Labor, the New Jersey PERC further stated: "The FMLA regulations, 29 CFR Part 825, provide that 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 FMLA." Id. However, the New Jersey PERC also stated that "[t]he letter recognizes that employees may consider other forms of leave preferable to FMLA leave and concludes that if the negotiated leave of absence provides greater benefit than the FMLA, 'the employer may not cite FMLA as a reason not to adhere to the employer's established policy.'" Id. (emphasis added)(citations omitted). Consequently, the PERC held that an employer with collective bargaining obligations does not have the preemptive right to force an employe to take FMLA leave instead of other negotiated benefits. In Salem Community College, the New Jersey PERC rejected the employer's position that an employer can force the commencement of FMLA leave where double charging the employe for both FMLA leave and paid leave benefits results in the reduction of job protection without bargaining. Id.

In Township of Parsippany—Troy Hills and Parsipanny Public Employees, Local 1, 36 NJPER 127 (NJPERC, 2010), aff'd, 419 N.J. Super. 512 (App. Div. 2011) the New Jersey PERC opined that, although an employer has an obligation to notify qualifying employees of their FMLA eligibility, "[T]he FMLA regulations do not address an employer's duty to designate leave as FMLA qualifying when, as in this case, the employee declines FMLA leave and wishes to use paid leave." Id. at 327 (emphasis added). The New Jersey PERC held that an employer may not solicit the completion of medical verification forms and designate the commencement of FMLA leave where an employe chooses not to take FMLA leave in favor other negotiated leave benefits.

Although not as persuasive, in terms of authority, as the New Jersey PERC and the Federal Courts, and certainly not binding as the precedent from this Board, the Assistant Director of Public Employment Practices and Representation for the New York Public Employment Relations Board (PERB) concluded, consistent with that authority, that "the FMLA does not remove the issue of unpaid leaves of absence from negotiations." In the Matter of Rome Healthcare Association, 27 PERB 4575 (NYPERB Director's Decision, 1994). *See also*, Academic Professionals of California v. Trustees of the California State University, 29 PERC 161 (Recommended Determination, 2005)(concluding that changes to leave of absence policy pursuant to the FMLA must be bargained before implementation).

The authority from this Board and the persuasive authority from the National Board and the labor boards and commissions from other jurisdictions collectively agree and consistently conclude that the Township's implementation of an FMLA policy, without bargaining with the Union, which forces employes to commence FMLA leave when the employe chooses to use other

paid leave benefits and not invoke his/her rights under the FMLA, constitutes an unfair labor practice.

Against the authority to the contrary, the Township maintains that the FMLA requires it to designate qualifying leave as FMLA leave and that the designation of Detective Pierluisse's qualifying leave as FMLA leave was not discretionary and, therefore, not bargainable. (Township Brief at 13-14). The Township further contends that City of Butler, City of Reading and City of Allentown are inapposite because the United States Department of Labor, Wage and Hour Division has, since those decisions, recently issued two opinion letters concluding that: an employer has a mandatory obligation to designate FMLA qualifying leave as FMLA leave even where there are collective bargaining agreements in place providing additional leave benefits; and concluding that an employer's decision to mandate the immediate taking of FMLA leave upon notice of qualifying leave is no longer optional. (Township's Brief at 9-12, 13-14).

The Township also emphasizes the September 10, 2019 United States Department of Labor letter from Wage and Hour Division Administrator Cheryl M. Stanton stating in footnote 2 that the Wage and Hour Division "disagrees with the Ninth Circuit's holding [in Escriba v. Foster Poultry, 743 F.3d 1236 (9th Cir. 2014)] that an employee may decline to use FMLA leave for an FMLA-qualifying reason in order to preserve FMLA leave for future use." (2019 WL 4324268 (FMLA2019-3-A) (Township's Brief at 11-12). The Township additionally argues that designating FMLA qualifying leave as FMLA leave is a managerial prerogative under this examiner's prior decision in New Cumberland Police Employes v. New Cumberland Borough, 43 PPER 28 (Proposed Decision and Order, 2011).

In Escriba, the Ninth Circuit Court of Appeals held as follows: "We thus conclude that an employee can affirmatively decline to use FMLA leave, even if the underlying reason for seeking the leave would have invoked FMLA protection. *See, e.g.*, Ridings v. Riverside Med. Ctr., 537 F3d 755, 769 n. 3 (7th Cir. 2008)"(parenthetical omitted). Escriba, 743 F.3d at 1244. Indeed, in Gravel v. Costco Wholesale Group, 230 F. Supp. 3d 430 (E.D. Pa 2017), the Federal District Court for the Eastern District of Pennsylvania quoted Escriba and adopted the conclusion of the 9th, 6th and 7th circuits that an employe may, under Federal law, decline to use FMLA leave before using or exhausting other leave benefits.

In Dougherty v. Cable News Network, 2019 WL 4142066 (District Court for the District of Columbia 2019), a Memorandum Opinion, the United States District Court for the District of Columbia noted the Federal Circuit Court opinions holding that an employe has the right to decline to take FMLA leave in favor of paid leave benefits. The Dougherty Court also recognized the Department of Labor Opinion letters reaching a contrary conclusion, cited by the Township. In this regard, the District Court stated as follows:

> A number of courts have found that employees are allowed to explicitly refuse to take leave they would otherwise be entitled to under the FMLA. *See, e.g.*, Escriba, 743 F.3d at 1244 (noting that "there are circumstances in which an employee might seek time off but not intend to exercise his or her rights under the FMLA"); Gravel v. Costco Wholesale Corp., 230 F. Supp. 3d 430, 437 (E.D. Pa. 2017) (finding no FMLA violation when the plaintiff specifically elected not to take FMLA leave, and thus was not protected under the act while on leave); Skrynnikov v. FNMA, 226 F. Supp. 3d 26, 38

> (D.D.C. 2017) (noting that plaintiff had properly indicated to employer that he was not electing to take DC FMLA leave for rib injury and instead would use vacation time). On the other hand, the Department of Labor indicated in a recent opinion letter that it disagrees with Escriba and regards the FMLA as requiring employees to take FMLA-qualifying leave, with no option to "use non-FMLA leave for an FMLA-qualifying reason."

Dougherty, 2019 WL 4142066 (citing U.S. Dep't of Labor Wage and Hour Division, Opinion Letter FMLA2019-1-A 2 n.3 (Mar. 14, 2019). The District Court, however, explained that the facts in the Dougherty case did not require the Court to resolve the conflict because the record showed that Dougherty, the Plaintiff, did not decline FMLA leave. Id.

The Township argues that controlling weight should be given to the opinions of the Department of Labor Wage and Hour Division, as the Federal Agency responsible for the interpretation of the FMLA, and the agency's conclusion that an employer must mandate that an employe take FMLA leave upon leaving for a qualifying event without discretion. (Township Brief at 9-10).

However, I am unable to give controlling weight to an opinion by one administrator that contradicts the overwhelming weight of federal and state authority (as well as prior DOL-WHD opinion letters) holding that mandating the use of FMLA when an employe wishes to use other leave benefits instead is within the scope of bargaining, where a collective bargaining relationship exists and is not mandatory for employers. A single administrator of the Wage and Hour Division does not have more authority than multiple Circuit Courts of Appeals, Federal District Courts, including Pennsylvania, the National Labor Relations Board, which has expertise in determining the scope of bargaining in the private sector, all of which have concluded that choosing not to take FMLA leave in favor of paid leave benefits is permissive, optional for the employe and within the scope of bargaining. Verizon, supra. Moreover, 29 CFR 825.701(a) provides that the FMLA shall not supersede any provision of any state or local law that provides greater family or medical leave rights. Therefore, Pennsylvania law that provides the protection of bargaining over medical leave, where a collective bargaining relationship exists, supersedes a more restrictive interpretation of the FMLA regulations.

The March 14, 2019 opinion letter cited by the Township was written by an Acting Administrator of the Wage and Hour Division named Keith E. Sonderling. This letter does not address the issue of employe postponement of FMLA leave for a qualifying event in favor of paid leave benefits in the collective bargaining context. Neither does the letter address whether the matter is bargainable. It does categorically conclude that the employer must designate the leave as FMLA qualifying, that an employe may not postpone the FMLA leave and that the employe must utilize other paid leave benefits concurrently. However, Mr. Sonderling, in his letter, also exposes the fleeting nature of such opinions, which change course with the federal government administrations. In Footnote 4 of his letter, he disagrees with two prior contrary opinion letters from a different administration.

In an October 27, 1994 opinion letter from Deputy Assistant Administrator, Daniel F. Sweeney, which Mr. Sonderling rejected, Mr. Sweeney opined as follows:

> Employees cannot waive their rights under the FMLA by accepting, for example, a trade-off of another benefit offered by the employer

> for FMLA leave. Likewise, the employer is prohibited from inducing an employee to waive his or her rights under the FMLA. While the employer must grant FMLA leave to an eligible employee who needs a leave of absence for a qualifying reason, the employer may, but is not required to, count the leave used against the 12-week FMLA leave entitlement. Under such circumstances, the employer would be required to provide FMLA's benefits and protection during the leave of absence.
>
> Given the circumstances in your letter, the employer's initial response to allow an employee who wished not to take FMLA leave for a qualifying event to sign a form waiving rights to FMLA leave would be irrelevant. Employees may not waive their FMLA rights. The employer's subsequent response to make FMLA leave mandatory for eligible employees who are taking leave for qualifying events is permissible under the law, but is not required. As previously mentioned, an employer is not precluded under the FMLA from extending greater coverage, e.g., grant the FMLA leave with full protection and benefits without actually counting the leave used against the 12-week entitlement. This response would allow for greater protection and benefits because it would extend the 12-week leave entitlement in the 12-months designated period provided under the FMLA. For example, 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)(emphasis added)

In Mr. Sweeney's opinion, employes may elect whether to use other paid leave benefits instead of FMLA leave and "an employer is not precluded under the FMLA from extending greater covering, e.g., grant the FMLA leave with full protection and benefits without actually counting the leave used against the 12-week entitlement." Id. It is therefore plain to see that different opinion letters from different administrations render different conclusions about the permissive election to use FMLA protected leave and are therefore unreliable in the face of consistent collective bargaining laws from more persuasive, binding and consistent authorities who have ruled that forcing employes to take FMLA before or concurrently with other paid leave benefits constitutes a mandatory subject of bargaining and remains discretionary under the regulations and not mandatory in a way that preempts or precludes bargaining.

Moreover, the Department of Labor, Wage and Hour Division opinion letters from March and September 2019 do not address, or undermine, the analyses of the federal and state cases cited above in which the key factor is that, although the Department of Labor regulations mandate an employer's notification of eligibility for FMLA leave, those regulations are permissive, not mandatory, with respect to an employer's mandating FMLA leave upon the qualifying event. The regulations on this point have not changed and therefore the scope of bargaining analysis of this Board, other state labor boards and commissions, the national board and federal courts need not be revisited and remain viable. The fact that different administrators at the Wage and Hour Division would revisit the same issue and reach different conclusions under the same regulations undermines reliance on those opinions, when the only thing that has changed is the administration. The regulations

themselves carry more authority than the opinion letters, and they have not changed.

With respect to this examiner's prior decision in New Cumberland, supra, that decision was wrongly decided and contradicts the overwhelming weight of authority which consistently requires that mandating concurrent use of FMLA leave with other leave benefits is a mandatory subject of bargaining. In this regard, I reject that decision, and I refuse to follow it. New Cumberland Borough is not binding authority here.

The essential facts in this case are not in dispute. There is no doubt that the Township implemented an FMLA policy of mandating the involuntary commencement of FMLA leave against the desires of Detective Pierluisse, who had not wanted to invoke her FMLA protections until a later time, without bargaining with the Union. The Township argues that the one-time it designated Detective Pierluisse's leave to commence on the date of birth of her first child did not establish a past practice. (Township Brief at 15-16).

However, it is of no moment whether the Township's FMLA leave policy or designation for Detective Pierluisse's first pregnancy constituted a past practice. The Township's mandate, that Detective Pierluisse commence involuntary FMLA leave the moment she left work for her pregnancy, was not the practice or the policy at the Township for represented uniformed officers, and the implementation of such a policy constituted a change in a mandatory subject of bargaining. City of Erie v. PLRB, 612 Pa. 661, 32 A.3d 625 (2011)(stating that: bargaining benefits is mandatory "regardless of whether the collective bargaining agreement expressly mentions such benefits; whether they have been incorporated into the agreement by reference; or whether the agreement is silent on that mandatory subject of bargaining."); City of Reading, supra; West Norriton Township Police Dep't v. West Norriton Township, 28 PPER 28163 (Final Order, 1997)(holding that matters affecting the use and disposition of sick leave constitute a mandatory subject of bargaining).

Moreover, the Board stated, in Wilkes-Barre Police Benevolent Association v. City of Wilkes-Barre, 33 PPER 33087 (Final Order, 2002), which addressed the change in a sick-leave donation policy, that a "policy that increases the amount of paid time off for an officer suffering from an extended illness or injury, as compensation for time off, certainly constitutes a benefit and directly affects wages and hours within the meaning of Section 1 of Act 111." Wilkes-Barre, 33 PPER at 193. Accordingly, regardless of past practice, the Township implemented a policy that affected terms and conditions of employment constituting a mandatory subject of bargaining.

Although the averments in the specification of charges are limited to the Township's FMLA policy change with respect to Detective Pierluisse's leaving work for childbirth, she was just the first officer to be forced to take FMLA leave under the Township's policy change, and the record shows that the Township is forcing the designation and commencement of FMLA leave upon other officers for leaving work for an FMLA qualifying event. Accordingly, the examination of the issue is not limited to the Township's change in policy pertaining only to Detective Pierluisse. The specification of charges placed the Township on notice that the complainant was challenging the unilateral change in FMLA policy that forced uniformed employes to involuntarily commence FMLA leave when they instead wanted to use negotiated paid leave and benefits. Moreover, both parties argued the broader issue of

the Township's designating and forcibly mandating the taking of FMLA leave immediately upon the FMLA qualifying leave event, which affects all the officers.

Alternatively, the Township's policy change was indeed a change in a past practice affecting a mandatory subject of bargaining and the bargaining unit. The Board has held that, depending on the nature of the employer's response to a unique circumstance that cannot, by its very nature, occur frequently, the employer's previous response to that circumstance raises the expectation of employes should that circumstance arise again and thereby constitutes a past practice. Wilkes-Barre, supra, (opining that the "nature of the underlying circumstances . . . governs the frequency and character of an employer's response to those circumstances"). The Township has never had a female officer take leave for the pregnancy with or birth of a child before Detective Pierluisse's first child. When the Township permitted her to take FMLA designated leave commencing on the date of birth of her first child, it set the standard for how it was to designate FMLA leave for childbirth.

Also, Officer Meyer credibly testified that he was out of work for six months in 2014 for knee surgery and for three months in 2016 for hip surgery. The Township at no time designated the commencement of FMLA leave when the officer was out of work allowing Officer Meyer to choose not to take FMLA leave and instead choose to use paid leave benefits. On this record, the Township has, over a period of years and on multiple occasions, permitted officers not to take FMLA as soon as they are out of work and instead use paid leave benefits, and the Township certainly did not forcibly designate the commencement of FMLA as soon as the officer was out of work for a qualifying event. Additionally, Mr. Ford admitted that he changed the Township's FMLA policy with respect to designating the commencement of leave as soon as an officer is out of work instead of permitting the officer to defer FMLA and utilize short term disability at full pay under the CBA.

Mr. Ford informed Detective Pierluisse that the Township was designating the commencement of FMLA for another officer (who was injured on duty at about the same time as Detective Pierluisse left work for her second pregnancy) to begin as soon as the other officer left work. The Township has repeatedly over the years left FMLA leave commencement up to the officers. Consistent with that policy, the Township permitted Detective Pierluisse to commence FMLA on the date of birth of her first child and raised her expectations that the same practice would continue for her second child, as well as the expectations of other officers, who choose to use paid leave benefits before commencing FMLA leave. Mr. Ford admittedly changed that policy with respect to Detective Pierluisse and another officer in November 2017. The Township again applied that policy change in May 2019, when it designated the commencement of FMLA leave for Officer Meyer, who was out for a hand injury. This admitted change in FMLA policy constituted a change in a past practice regarding a mandatory subject of bargaining.[2]

[2]The Township's forced designation of FMLA leave commencement for Officer Meyer is post charge and not discretely remediable. Also, the complainant is not seeking a remedy for the other officer placed on FMLA leave in November 2017. However, the Township's FMLA policy change affected multiple officers in the bargaining unit even though the remedy is limited to the effect of the policy change on Detective Pierluisse, which first placed the complainant on notice of the change.

The FMLA was passed as a protection for employes; it was never intended to be a sword for employers to reduce the length of leave for employes who are temporarily unable to perform the functions of their jobs.[3] An employer with collective bargaining obligations does not have a preemptive right to force an employe to take FMLA leave instead of or contemporaneously with other paid leave benefits in an effort to reduce the leave or job protection of the employe. Detective Pierluisse was correct, i.e., that the choice to invoke the protections of FMLA is the employe's and not the employer's. (F.F. # 20). Indeed, Mr. Ford recognized that there was supposed to be such a choice, which he unilaterally eliminated without bargaining. When an employe chooses to use paid leave benefits instead of FMLA leave, an employer may not force that employe to take FMLA leave before he/she wants to take it, when there are other job protections in the form of leave benefits in place, unless that right was bargained away. Otherwise the FMLA would not provide any more protection than an employe's existing leave benefits and would only protect or benefit those employes with little or no negotiated or employer-provided leave.

Accordingly, the Township violated its bargaining obligation to the Union by unilaterally changing its FMLA policy without negotiating with the Union over forcing Detective Pierluisse and other officers to commence FMLA leave as soon as they left work for an FMLA qualifying event when those employes in the past had the option of using paid leave instead of and before invoking the protections of the FMLA, as Detective Pierluisse did with her first pregnancy, and as other officers had done with other medical conditions requiring leave. The Township implemented an FMLA leave commencement policy that affected terms and conditions of employment, and it changed a practice that formerly permitted the stacking of paid leave benefits with unpaid FMLA leave in violation of the Act.

CONCLUSIONS

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

1. The Township is a public employer and a political subdivision within the meaning of the PLRA as read in pari materia with Act 111.

2. The Union is a labor organization within the meaning of the PLRA as read in pari materia with Act 111.

3. The Board has jurisdiction over the parties hereto.

4. The Township has committed unfair labor practices within the meaning of Section 6(1)(a) and (e) of the PLRA as read in pari materia with Act 111.

[3] Despite these conclusions about the EFFECT of the Township's unilateral change, it is important to note that the Township did not act out of malice and worked with Detective Pierluisse to accommodate her medical condition.

ORDER

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

HEREBY ORDERS AND DIRECTS

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, which the hearing examiner finds necessary to effectuate the policies of Act 111 as read in pari materia with the PLRA:

(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 against their will.

(b) Immediately make whole Detective Pierluisse for any out-of-pocket expenses including but not limited to day care expenditures and other related costs; and immediately make whole Detective Pierluisse for any leave use affected by the expiration of her FMLA designated leave before 12 weeks following the birth of her second child;

(c) Post a copy of this decision and 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 this decision and order by completion and filing of the attached affidavit of compliance.

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 order shall be and become final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this twenty-fourth day of October, 2019.

PENNSYLVANIA LABOR RELATIONS BOARD

_____

JACK E. MARINO
Hearing Examiner

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 immediately 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, and that it is not requiring officers to commence FMLA leave concurrently with paid leave benefits; that it has made whole Detective Pierluisse for any out-of-pocket expenses including but not limited to day-care expenditures and other related costs; that it has made whole Detective Pierluisse for any leave use affected by the expiration of her FMLA designated leave before 12 weeks following the birth of her second child; that it has posted a copy of this decision and order within five (5) days from the effective date hereof in a conspicuous place readily accessible to its employes and had the same remain so posted for a period of ten (10) consecutive days; 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