COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS
BEFORE THE COMMONWEALTH EMPLOYMENT RELATIONS BOARD

In the Matter of	*	
	*	
MEDFORD SCHOOL COMMITTEE	*	
	*	Case No.: MUP-19-7746
and	*	
	*	Date Issued: August 24, 2021
MEDFORD TEACHERS ASSOCIATION	*	
	*	
	*	

CERB Members Participating:

Marjorie F. Wittner, Chair
Joan Ackerstein, CERB Member
Kelly Strong, CERB Member

Appearances:

Howard Greenspan, Esq.	-	Representing the Medford School Committee
Matthew Jones, Esq.	-	Representing the Medford Teachers Association

CERB DECISION ON APPEAL OF HEARING OFFICER'S DECISION

SUMMARY

On March 15, 2021, a Department of Labor Relations (DLR) Hearing Officer issued a decision in the above-captioned matter.[1] The Hearing Officer held that the Medford School Committee (Employer or School Committee) had committed a prohibited practice within the meaning of Section 10(a)(5) and, derivatively, Section 10(a)(1) of M.G.L. 150E (the Law) when it began designating paid sick leave that employees took due to their

[1] The Hearing Officer's decision is reported at 47 MLC 192.

own medical condition or to care for a family member, as federal Family Medical Leave Act (FMLA)[2] leave that ran concurrently, rather than consecutively, with employees' paid sick leave, without first bargaining to resolution or impasse with the Medford Teachers Association (Union) over that decision and its impacts on employees' terms and conditions of employment. We have reviewed the Hearing Officer's decision, and, finding no error in the Hearing Officer's application of the law to the facts, affirm the decision but slightly modify the Order.

Background

This matter was decided on a fully-stipulated record. Neither party challenged any of the Hearing Officer's findings and we adopt them in full.

The FMLA, the CBA, Medford's FMLA Policy and 2019 Opinion Letters

The FMLA entitles eligible employees of covered employers, including local educational agencies, to take up to twelve weeks of unpaid, job-protected leave per year for specified family and medical reasons. 29 U.S.C. §2612, et seq.; 29 U.S.C. § 2618. Articles 15-17 of the parties' collective bargaining agreement (CBA) pertain to "Sick Leave," "Temporary Leaves of Absence,"[3] and "Extended Leaves of Absence." These provisions do not reference the FMLA at all except in Article 16(l), "Adoption and Paternity

[2] 29 U.S.C. § 2601, *et seq.*

[3] Article 16, Temporary Leaves of Absence," includes Bereavement Leave, Personal Leave, School Leal Proceedings, Military Leave, and "Other Leave," which "may be granted with or without pay upon request in writing to the Superintendent of Schools and approved by the School Committee who shall be the sole judge of whether to permit said leave."

Leave," which states, "The School Committee shall comply with the [FMLA]. This leave shall be unpaid."

The School Committee maintains a separate "Family and Medical Leave Policy," (Policy), which provides that "employees may take leave without pay when they have exhausted their leave benefits and need additional leave to cover personal illness, the illness of a spouse, child or parent, or the birth or adoption of a child."[4] The Policy details the types of unpaid leave available to staff and includes definitions of terms and requirements for taking such leave. With respect to "Personal Medical Leave without Pay," the Policy states that the "employee must exhaust all available sick leave, including from the sick leave bank, before taking leave without pay."[5]

Several provisions in the FMLA statute address the interplay between the FMLA and paid sick leave benefits offered under a collective bargaining agreement or through state or local law. Specifically, in a section titled 29 U.S.C. §2612(d)(2)(B), "Substitution of Paid Leave," the FMLA states:

> (B) Serious health condition
> An eligible employee 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 leave provided under subparagraph (A), (B), (C), or (E) of subsection (a)(1) for any part of the 12-week period of such leave under such subsection.

[4] There is no evidence and no party claims that the Policy was collectively-bargained.

[5] The final page of the Policy references, "P.L. 103-3, 'Family and Medical Leave Act of 1993', 29 U.S.C. §2601 et. seq." and "Department of Labor Regulations, 29 C.F.R. Part 825." In its post-hearing brief, the School Committee stated that this Policy was "intended to give effect to the FMLA…" The City further indicated in its post-hearing brief that the Policy "does not direct whether FMLA leave is counted concurrently with sick leave or other temporary leaves of absence permitted under the CBA."

The related regulation, 29 CFR §825.207, "Substitution of paid leave," states in part:

> (a) Generally, FMLA leave is unpaid leave. However, under the circumstances described in this section, FMLA permits an eligible employee to choose to substitute accrued paid leave for FMLA leave. If an employee does not choose to substitute accrued paid leave, the employer may require the employee to substitute accrued paid leave for unpaid FMLA leave. The term substitute means that the paid leave provided by the employer, and accrued pursuant to established policies of the employer, will run concurrently with the unpaid FMLA leave. . . . An employee's ability to substitute accrued paid leave is determined by the terms and conditions of the employer's normal leave policy . . .
>
> (b) If neither the employee nor the employer elects to substitute paid leave for unpaid FMLA leave under the above conditions and circumstances, the employee will remain entitled to all the paid leave which is earned or accrued under the terms of the employer's plan.

A second related regulation, 29 CFR §825.300(d), "Designation Notice," states in part:

> (1) The employer is responsible in all circumstances for designating leave as FMLA-qualifying leave, 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 a 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 . . . If the employer requires paid leave to be substituted for unpaid FMLA leave, or that paid leave taken under an existing leave plan be counted as FMLA leave, the employer must inform the employee of this designation at the time of designating the FMLA leave.

29. U.S.C. § 2651(b) pertains to the FMLA's effect on "State and Local Laws" and states in full,

> Nothing in this Act or any amendment made by this Act shall be construed to supersede any provision of any State or local law that provides greater family or medical leave rights than the rights established under this Act, or any amendment made by this Act.

29 U.S.C. § 2652 pertains to the FMLA's "Effect on existing employment benefits" including those provided pursuant to a CBA, and states in full:

(a)MORE PROTECTIVE

> Nothing in this Act or any amendment made by this Act shall be construed to diminish the obligation of an employer to comply with any collective bargaining agreement or any employment benefit program or plan that provides greater family or medical leave rights to employees than the rights established under this Act, or any amendment made by this Act.

(b)LESS PROTECTIVE

> The rights established for employees under this Act, or any amendment made by this Act shall not be diminished by any collective bargaining agreement or any employment benefit program or plan.

29 U.S.C. § 2653 encourages "more generous leave policies," and states in full: "Nothing in this Act or any amendment made by this Act shall be construed to discourage employers from adopting or retaining leave policies more generous than any policies that comply with the requirements under this Act or any amendment made by this Act."

In 2019, the Wage and Hour Division (WHD) of the federal Department of Labor issued two opinion letters (Opinion Letters) that interpreted the FMLA and several of its regulations, including, in particular, 29 CFR §825.220(d)), 29 CFR §825.300(d)(1) and 29 CFR §825.701(a),[6] to provide that, once an employer has enough information to determine that an employee's leave request qualifies as FMLA leave, the employer must designate the leave as FMLA leave, regardless of an employee's preferences or CBA

[6] 29 CFR §825.220(d), "Protection for employees who request leave or otherwise assert FMLA rights," states in part:

> (d) Employees cannot waive, nor any employer induce employees to waive their prospective rights under FMLA. For example, employees (or their collective bargaining representatives) cannot trade off the right to take FMLA leave against some other benefit offered by the employer.

provisions that would otherwise permit employees to delay taking FMLA leave until they have exhausted their contractual paid leave benefits.

The first Opinion Letter was issued on March 14, 2019 by WHD Acting Administrator Keith E. Sonderling (Sonderling). Two footnotes in in that letter reflect that the views expressed therein were inconsistent with those previously expressed by the WHD and a 2014 decision issued by the Ninth Circuit. Specially, in footnote 4, Sonderling stated that "WHD rescinds any prior statements in previous opinion letters that are inconsistent with this opinion."[7] In footnote 3, Sonderling stated that the WHD "disagrees with the Ninth Circuit's holding [in Escriba v. Foster Poultry Farms, Inc., 743 F. 3d 1236, 1244 (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." Footnote 2 of the September 10, 2019 Opinion Letter, which was issued by WHD Administrator Cheryl M. Stanton, echoed and adopted WHD's disagreement with Escriba's holding.

The Unilateral Change

As set forth in the stipulations, before September 2019, the School Committee permitted bargaining unit members to use their contractual paid sick leave for FMLA-

[7] The footnote cited WHD Opinion Letter FMLA-67, 1995 WL 1036738 at *3 (July 21, 1995) and WHD Opinion Letter FMLA-49, 1994 WL 1016757, at *2 (October 27, 1994). As noted in a decision issued by a Pennsylvania Labor Relations Board (PLRB) described *infra*, in the 1994 letter, the WHD administrator took a very different view of the FMLA and its regulations, stating in pertinent part 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." Officers of Towamencin Township Police Department v. Towamencin Township, 52 PPER 75, n. 10 (July 24, 2020) (citing 1994 WL 1016757).

qualifying reasons, without designating that leave as FMLA leave. Beginning in September 2019, the School Committee designated the leaves of absence in which employees used paid sick time due to their own medical condition or to care for a family member as FMLA leave that ran concurrently with employees' paid sick leave. There is no dispute that the School Committee took this action without first giving the Union prior notice and an opportunity to bargain over this change or the impacts of this change on bargaining unit members' terms and conditions of employment.

Opinion[8]

A public employer violates Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law when it unilaterally changes wages, hours, and other terms and conditions of employment affecting mandatory subjects of bargaining without first giving its employees' exclusive collective bargaining representative notice and an opportunity to bargain over the change to resolution or impasse. Commonwealth of Massachusetts v. Labor Relations Commission, 404 Mass. 124 (1989); School Committee of Newton v. Labor Relations Commission, 388 Mass. 557 (1983).

To establish a unilateral change violation, a union must establish that: 1) the employer altered an existing practice or instituted a new one; 2) the change affected a mandatory subject of bargaining; and 3) the employer established the change without prior notice or an opportunity to bargain. Here, the parties' stipulations regarding the changes establish the first and third criteria, and there is no dispute that generally, sick leave and the criteria for granting such leave, are mandatory subjects of bargaining under

[8] The CERB's jurisdiction is not contested.

Chapter 150E. Town of Hull, 19 MLC 1780, 1784, MUP-7771 (April 20, 1993) (citing City of Boston, 3 MLC 1450, MUP-2646, MUP-2647 (1977)); Commonwealth of Massachusetts, 21 MLC 1637, 1641, SUP-3587 (May 20, 1995). Therefore, unless the School Committee raises and proves a valid affirmative defense, its unilateral change affecting a mandatory subject of bargaining violates the Law. See generally, Board of Trustees of the University of Massachusetts, 21 MLC 1795, 1802, SUP-3375 (May 12, 1995) (employer bears burden of proving affirmative defenses).

Before the Hearing Officer, the School Committee defended its conduct on two grounds: 1) that "non-discretionary federal law," i.e., FMLA statutory and regulatory provisions, as interpreted in the Opinion Letters, mandated that any FMLA-qualifying leave taken run concurrently with employees' paid sick leave; and 2) that the change was mandated by Article 16 of the CBA.

The Hearing Officer first considered the Opinion Letters' effect on the School Committee's administration of its FMLA policies. Relying on a number of federal and state decisions, she concluded that although the Opinion Letters were entitled to respect under certain circumstances, they do not have the force of law and were therefore not binding on the School Committee. See, e.g., Skidmore v Swift & Co., 323 US. 134, 140 (1944); Niles v. Huntington Controls, Inc., 92 Mass. App. Ct. 15, 21 (2017).

The School Committee does not challenge this conclusion. It argues, however, that the Hearing Officer erred as a matter of law when she stated that the School Committee "implemented the disputed change pursuant to . . . administrative opinions that interpreted the FMLA in March and September of 2019, but not pursuant to direct

statutory mandates related to the FMLA." The School Committee contends that direct FMLA mandates did, in fact, compel its conduct. However, the Hearing Officer considered and rejected the statutory arguments in the final section of her opinion. Thus, to the extent that the School Committee argues that the Hearing Officer disregarded its statutory arguments, this argument lacks merit.

In any event, although the School Committee points to the various FMLA provisions and regulations set out above to argue that its conduct was compelled by law, it repeatedly points to the Opinion Letters' **interpretatio**n of those provisions in making its arguments. Further, in its post-hearing brief, the School Committee acknowledged that it did not begin requiring paid leave to run concurrently with FMLA leave until the WHD issued the second Opinion Letter in September 2019. As the Hearing Officer points out in her opinion, however, the School Committee has not argued, and there is no basis for us to conclude, that either the FMLA statute or its regulations have changed. Thus, it was hardly error, much less reversible error, for the Hearing Officer to conclude that the School Committee made these changes pursuant to the Opinion Letters, as opposed to a direct statutory mandate.

We turn therefore to the School Committee's main argument on appeal, that the FMLA statute and regulations justified its unilateral action. There is no question that an employer is excused from its bargaining obligation where a third party over which the employer has no control exercises its authority to change employees' terms and conditions of employment. Higher Education Coordinating Council, 22 MLC 1662, 1668, SUP-4078 (April 11, 1996) (additional citations omitted), or when acting pursuant to a

specific, narrow statutory mandate that exempts matters within its scope from the collective bargaining process." City of Lynn v. Labor Relations Commission, 43 Mass. App. Ct. 172 (1983).[9]

The Hearing Officer considered whether Section 2612 of the FMLA mandated the School Committee's unilateral action. Based on the repeated use of the word "may" with respect to an employee's ability to elect, or an employer's ability to require, substitution of accrued paid leave for unpaid FMLA leave, she concluded that this provision was permissive, not mandatory, i.e., that it did not "expressly prohibit employers or employees from choosing [not] to make that substitution."[10]

The School Committee argues that this was an erroneous interpretation that ignored that, as defined in 29 CFR §825.207(a), the word "substitute" means that the paid leave will run concurrently with the unpaid FMLA leave. The School Committee contends that this means that once an employer learns that an employee wants to use paid sick leave for FMLA-qualifying reasons, the employer must designate that leave as FMLA

[9] The School Committee does not argue that the FMLA preempts state law such that the CERB is without jurisdiction to even consider this claim. See, e.g., City of Boston, 33 MLC 1, MUP-02-3491 (June 22, 2006) *aff'd* City of Boston v. CERB, 453 Mass. 389 (2009) (rejecting employer's argument that the Fair Labor Standards Act (FLSA) preempted Chapter 150E's bargaining obligation for the purpose of computing future overtime compensation owed to officers, where the Court found no explicit or implicit Congressional intent to preempt the state law obligation and the obligation did not conflict with the FLSA or stand as an obstacle to the accomplishment of federal objectives). Even if the City had raised this argument, we would reject it based on Section 29 USC §2652, which plainly contemplates collective bargaining over family and medical leave benefits.

[10] We agree with the School Committee's contention in footnote 4 of its supplementary statement that the Hearing Officer appears to have inadvertently omitted the word "not" from this sentence.

leave pursuant to 29 CFR §925.300(b). Based on its further contention than an employee cannot waive FMLA rights pursuant to 29 CFR §825.220, the School Committee thus reasons that designated FMLA leave must run concurrently with elective sick leave.

The difficulty with this interpretation is that it is not derived from a direct specific and narrow statutory mandate such as that found in Higher Education Coordinating Council, where the CERB concluded that Legislature had expressly directed employer to establish optional retirement program, thereby excusing the employer from any duty to bargain over its decision to establish the program. 22 MLC at 1678, or in City of Lynn, supra, where the Appeals Court held that the City had no duty to bargain over its authority under M.G.L. c. 32, §16(1)(a) to initiate a superannuation retirement process for a disabled firefighter. 43 Mass. App. Ct. at 182-183.

Here, while Section 2612 of the FMLA addresses whether an employer may require an employee to use paid accrued leave while on FMLA leave, it does not squarely address the converse situation, whether an employer can require an employee who has already elected to take paid sick leave for an FMLA-qualifying reason can be required to take unpaid FMLA leave at the same time. However, 29 CFR §825.300(d)(1) does address this situation and it does not support the School Committee's view. [11] While, as

[11] An agency regulation has the force and effect of law if 1)the power to legislate on the subject and to promulgate the rule in question has been granted the agency by Congress in conformity with the congressionally mandated limitations; and 2) the regulation is a substantive rather than an interpretative rule. Chrysler Corp. v. Brown, 441 U.S. 281 (1979). In this case, neither party challenged the regulations themselves as beyond the scope of the statute, and pursuant to 29 U.S.C. §2654, Congress specifically instructed the DOL to "prescribe such regulations as are necessary to carry out [the FMLA]." We therefore treat them as having the force and effect of statute.

the School Committee argues, this regulation may require employers to "designate" FMLA leave as FMLA-qualifying and to notify the employee whether the leave will be so designated, the final sentence of this provision includes a limitation, stating only: "*If* the employer requires . . .that paid leave taken under an existing leave plan be counted as FMLA leave, the employer must inform the employee of this designation at the time of designating the FMLA leave." (Emphasis added.)

This sentence is important for two reasons. First, the word "if" at the beginning of the sentence implies that the employer is permitted, but not required, to have paid leave counted as FMLA leave. Second, the final clause of the sentence establishes that an employer's initial designation of leave as "FMLA-qualifying leave" is distinct from an employer's designation that "paid leave taken under an existing leave plan be counted as FMLA leave." When read as a whole, therefore, this regulation does not confirm the School Committee's contention that the FMLA requires that if an employee chooses to take paid leave for an FMLA-qualifying reason, that paid leave will run concurrently with the FMLA leave.

Further, the School Committee's interpretation of 29 CFR §825.220(d) is contrary to that expressed in Escriba, supra, where the Ninth Circuit opined that the prohibition against waiving or "permanently relinquishing" FMLA rights is "fundamentally different from affirmatively declining the present exercise of a right to preserve it for future use." Escriba, 743 F. 3d at 1244-1245 (citing Hauk v. J.P. Morgan Chase Bank USA, 552 F. 3d 1114, 1119 (9th Cir. 2009); Black's Law Dictionary 1574 (7th ed. 1999) (defining waiver as "[t]he voluntary relinquishment or abandonment . . .of a legal right or advantage")). Based

on this view of the regulation and the statute as a whole, the Court concluded that "nothing in the FMLA precludes an employee from deferring the exercise of his or her FMLA rights and. . .the preservation of future FMLA leave is a compelling practical reason why an employee might wish to do so." Id. at 1247.

The School Committee's view that the FMLA excuses its bargaining obligation is also at odds with decisions issued by other labor relations agencies, including the National Labor Relations Board and the Pennsylvania Public Employment Relations Board. See Verizon North, Inc., 352 NLRB 1022 (2008) (affirming ALJ that nothing on the face of Section 2612(d)(2)(a) "specifically goes to the issue of double-charging employees for paid leave and for FML[A] time" and thus leave was a mandatory subject of bargaining); Officers of Towamencin Township Police Department v. Towamencin Township, 52 PPER 75 (July 24, 2020) (affirming hearing examiner's conclusion that Township's unilateral implementation of an FMLA policy that forces employees to commence FMLA leave when the employee chooses to use other paid leave benefits and not to invoke his/her rights under the FMLA, constitutes an unfair labor practice).[12]

[12] The Pennsylvania Board cited a number of decisions from other tribunals in support of its ruling, including the New Jersey Public Employee Relations Commission, which rejected an employer's contention that FMLA regulations require an employee with a serious health condition to take FMLA leave when that employee may have recourse to other negotiated benefits. Officers of Towamencin Township Police Department, 52 PPER 75, slip. op. at 7 (citing Salem Community College, 38 NJPER 42 (September 22, 2011)). The Pennsylvania Board was also guided by a decision issued by federal District Court for the Eastern District of Pennsylvania, which held 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," but an "employer could find itself open to liability for forcing FMLA leave on the unwilling employee." Officers of Towamencin Township, slip op. at 8 (quoting Gravel v. Costco, 230 F. Supp. 3d 430, 436 (E.D. Pa

Finally, as the Hearing Officer indicated, the School Committee's interpretation ignores the express statutory policy articulated in Sections 2612(b) and 2653(b) of allowing for "greater" and "more generous" benefits to bargaining unit members. As stated above, the City's former practice of allowing bargaining unit members to use their paid leave benefits for FMLA-qualifying reasons without requiring the paid leave to run concurrently with FMLA leave increased the total amount of job-protected leave available to employees for their own medical condition or to care for a family member. Given the absence of a clear statutory mandate and the conflicting opinions construing the same, we decline to construe the FMLA as a third-party authority or a narrow statutory mandate that authorizes the School Committee to make a change that *diminishes* the amount of job-protected leave available to employees who need to take leave for an FMLA-qualifying reason without first giving the Union notice and an opportunity to bargain over this decision and the impacts of this decision.[13]

2017)(further quoting Wysong v. Dow Chemical Company, 503 F.3d 449 (6th Cir. 2007))(additional citations omitted).

[13] Even if we had concluded that the Employer's statutory arguments had merit, because the School Committee's conduct impacted the total amount of job-protected leave available to employees, the School Committee still would have been required to give the Union notice and an opportunity to bargain over the *impacts* of its decision before implementing the change. Its failure to do so also violates Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law. Such impact bargaining may have included bargaining over ways in which to ameliorate the effects of the loss of an additional twelve weeks of job protected leave under the FMLA by, for example, increasing the number of weeks of unpaid but job protected leave that is available to employees. See Higher Education Coordinating Council, 22 MLC at 1670-1671 (where impacts were not *de minimis*, employer violated the law by failing to give union prior notice and an opportunity to bargain over the impacts of legislation directing the employer to establish an optional retirement plan).

CBA

In its post-hearing brief, the School Committee reiterates its arguments concerning Article 16(I) of the CBA, which, under the heading "Adoption and Paternity Leave," directs it to "comply with the revisions of the Family and Medical Leave Act of 1993." Even assuming that this provision applies to FMLA-qualifying leave for an employee own serious medical condition or to care for a family member with a serious medical condition,, and not just to "Adoption and Paternity Leave," as the heading suggests, we agree with the Hearing Officer that because there have been no "revisions to the FMLA" that justified its unilateral action, the School Committee's contractual defense fails. We summarily affirm this aspect of the Hearing Officer's decision.

Conclusion

For these reasons, and those stated in the Hearing Officer's decision, we conclude that the School Committee violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law when it began designating paid sick leave that employees used for FMLA-qualifying reasons as FMLA leave that ran concurrently with the paid sick leave, without providing the Union with prior notice and the opportunity to bargain to resolution or impasse over the decision and its impacts on employees' terms and conditions of employment.

Remedy

In fashioning appropriate remedies, the CERB attempts to restore the status quo as nearly as possible to that which would have existed but for the unfair labor practice. Newton School Committee v. Labor Relations Commission, 388 Mass. 557, 576 (1983).

As previously discussed, the main effect of the School Committee's decision was to reduce the total amount of job-protected leave available to employees who needed to take leave for an FMLA-qualifying reason. Because leave is a mandatory subject of bargaining, the Hearing Officer appropriately ordered the School Committee to cease and desist from unilaterally designating FMLA-qualifying paid sick leave as FMLA leave that ran concurrently with FMLA unpaid leave and to rescind the new policy until the parties bargained to resolution or impasse over this issue. The Hearing Officer also ordered the School Committee to "restore to all affected employees any unpaid leave designated to run concurrently with FMLA-qualifying paid sick leave beginning in September 2019" until the School Committee bargained to resolution or impasse over the criteria for graining paid and unpaid leave."

The Union argued both to the Hearing Officer and to the CERB on appeal that a return to the status quo ante in this case would also include the restoration of paid leave balances to any employees who were required to use such leave under the new policy, or cash equivalent payments to former employees affected by the policy. However, as explained above, and as the stipulations reflect, the change at issue is that the School Committee designated FMLA leave to run concurrently with the paid sick leave that employees had already decided to use for FMLA-qualifying reasons. Thus, the employees did not lose any paid sick leave as a result of the unilateral change - they lost additional unpaid FMLA leave. Accordingly, restoring the status quo ante here would not include restoring any paid sick leave that employees voluntarily chose to take and for which they were paid. Nor would it include restoring any other type of paid leave available

to employees because there is no evidence that employees were required to take such paid leave as a result of the School Committee's change. We therefore decline to modify the remedy as the Union suggests.

We do, however, modify that aspect of the Hearing Officer's order requiring the School Committee to restore any unpaid FMLA leave designated to run concurrently with FMLA-qualifying sick leave. To fully restore the status quo ante, this remedy should only restore any unpaid FMLA leave that the School Committee designated in the *current* twelve-month FMLA period, however the School Committee calculates that period.[14] For example, if, when this Order issues, an employee has already used two weeks of paid sick leave for FMLA-qualifying reasons in the current twelve-month period and the School Committee designated those two weeks as FMLA leave that ran concurrently with the sick leave, restoring the two weeks of FMLA leave would restore the status quo ante by giving the employee a full twelve weeks of FMLA leave to use in the current period instead of ten (assuming the employee has used not used any other FMLA leave).

As presently written, however, the Order requires the School Committee to restore all FMLA leave that the School Committee has designated *since September 2019* to run concurrently with FMLA-qualifying sick leave. Under this remedy, if an employee used a

[14] Pursuant to 29 CFR §825.200 (b), an employer is permitted to choose one of four methods for determining the 12-month period in which the 12 weeks of FMLA leave entitled described in §825.200(a) occur:

1) the calendar year;
2), any fixed 12-month leave year, such as a fiscal year, a year required by State law or a year starting on an employee's anniversary date;
3) the 12-month period measured forward;
4) a "rolling" 12-month period measured backward from the date an employee used FMLA leave.

total of five weeks of FMLA-designated leave in previous twelve-month FMLA periods, e.g., in 2019 and 2020, but none in the current period, that employee would have a total of seventeen weeks of unpaid FMLA leave (five weeks from prior FMLA periods and twelve weeks in the current period) available to use in the current twelve-month period. Because this would have the effect of granting employees *more* unpaid FMLA leave in the current period than they would have had if the School Committee had not made the change, this does not restore the status quo ante but rather makes employees more than whole. We therefore modify this aspect of the Order to order the School Committee to restore unpaid FMLA leave that was designated to run concurrently with paid sick leave only for the unpaid FMLA leave that was so designated in the current twelve-month FMLA period.[15].

Order

WHEREFORE, based on the foregoing, IT IS HEREBY ORDERED that the School Committee shall:

1. Cease and desist from:

   a. Refusing to bargain collectively with the Union by failing to negotiate over the criteria for granting paid and unpaid leave, including designating paid sick leave taken for FMLA-qualifying reasons as FMLA leave that runs concurrently with the paid sick leave;

   b. Designating paid sick leave taken for FMLA-qualifying reasons as FMLA leave that runs concurrently with the paid sick leave without giving the Union prior notice and an opportunity to bargain to

[15] We note that the Union has not argued and there is no evidence in the record demonstrating that employees lost any pay (as opposed to benefits) as a direct result of the unlawful change. We therefore do not order any back pay. See City of Boston, MUP-04-4077 (May 20, 2009) (declining make-whole remedy as too speculative).

resolution or impasse over the decision and the impacts of the decision;

c. In any like or related manner interfering with, restraining or coercing employees in the exercise of their rights guaranteed under the law.

2. Take the following affirmative action:

a. Rescind those portions of the policy that designates paid sick leave taken for FMLA-qualifying reasons as FMLA leave that runs concurrently with the paid sick leave and restore the FMLA policy that was in place prior to September 2019;

b. Restore to employees any FMLA leave designated to run concurrently with FMLA-qualifying paid sick leave in the current twelve month-period in the manner set forth in the Remedy section of this decision;

c. Upon request, bargain collectively with the Union over the criteria for granting paid and unpaid leave, including designating paid sick leave taken for FMLA-qualifying reasons as FMLA leave that runs concurrently with the paid sick leave;

d. Post immediately signed copies of the attached Notice to Employees in all conspicuous places where members of the Union's bargaining unit usually congregate or notices are usually posted, including electronically if the School Committee customarily communicates with these unit members via intranet or email, and display for a period of thirty (30) days thereafter; and

e. Notify the CERB in writing of the steps taken to comply with this order within ten (10) days of its receipt.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
COMMONWEALTH EMPLOYMENT RELATIONS BOARD

Marjorie F Wittner

_____
MARJORIE F. WITTNER, CHAIR

_____

JOAN ACKERSTEIN, CERB MEMBER

_____

KELLY STRONG, CERB MEMBER

APPEAL RIGHTS

Pursuant to M.G.L. c. 150E, Section 11, decisions of the Commonwealth Employment Relations Board are appealable to the Appeals Court of the Commonwealth of Massachusetts. To obtain such an appeal, the appealing party must file a notice of appeal with the Commonwealth Employment Relations Board within thirty (30) days of receipt of this decision. No Notice of Appeal need be filed with the Appeals Court.

THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS
COMMONWEALTH EMPLOYMENT RELATIONS BOARD

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE COMMONWEALTH EMPLOYMENT RELATIONS BOARD
AN AGENCY OF THE COMMONWEALTH OF MASSACHUSETTS

The Commonwealth Employment Relations Board (CERB) has affirmed a Department of Labor Relations Hearing Officer decision holding that the Medford School Committee (School Committee) violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E (the Law) by unilaterally designating employees' contractual paid sick leave that employees took due to their own medical condition or to care for a family member as Family Medical Leave Act (FMLA) leave that ran concurrently with this sick leave without providing the Medford Teachers Association (Union) with prior notice and an opportunity to bargain to resolution or impasse over the decision and its impacts on employees' terms and conditions of employment.

The Law gives public employees the right to form, join or assist a union; to participate in proceedings at the DLR; to act together with other employees for the purpose of collective bargaining or other mutual aid or protection; and, to choose not to engage in any of these protected activities. Based on these rights, the School Committee assures its employees that:

WE WILL NOT refuse to bargain collectively with the Union by failing to negotiate over the criteria for granting paid and unpaid leave, including designating paid sick leave taken for FMLA-qualifying reasons as FMLA leave that runs concurrently with the paid sick leave.

WE WILL NOT designate paid sick leave taken for FMLA-qualifying reasons as FMLA leave that runs concurrently with the paid sick leave, without giving the Union prior notice and an opportunity to bargain to resolution or impasse over the decision and the impacts of the decision;

WE WILL NOT in any like or related manner interfere with, restrain or coerce employees in the exercise of their rights guaranteed under the Law.

WE WILL rescind those portions of the policy that designate paid sick leave taken for FMLA-qualifying reasons as FMLA leave that runs concurrently with the paid sick leave and restore the FMLA policy that was in place prior to September 2019;

WE WILL restore to all affected employees any unpaid FMLA leave that was designated in the current twelve-month FMLA period to run concurrently with FMLA-qualifying paid sick leave.

WE WILL, upon request, bargain collectively with the Union over the criteria for granting paid and unpaid leave, including designating paid sick leave taken for FMLA-qualifying reasons as FMLA leave that runs concurrently with the paid sick leave

_____ _____

Medford School Committee Date

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED OR REMOVED

This notice must remain posted for 30 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Department Labor Relations, Lafayette City Center, 2 Avenue de Lafayette, Boston, MA 02111, (617)626-7132.