COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of	*	
	*	
MEDFORD SCHOOL COMMITTEE	*	
	*	Case No.: MUP-19-7746
and	*	
	*	Date Issued: March 15, 2021
MEDFORD TEACHERS ASSOCIATION	*	
	*	
	*	

Hearing Officer:

Kendrah Davis, Esq.

Appearances:

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

HEARING OFFICER'S DECISION

SUMMARY

The issue in this case is whether the Medford School Committee (Committee or Respondent) violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of G.L. c. 150E (the Law) by failing to bargain in good faith with the Medford Teachers Association (Union or Charging Party) when it designated employees' leaves of absence as Family Medical Leave Act (FMLA)[1] leave to run concurrently with employees' paid sick leave without bargaining to resolution or impasse with the Union over that decision and its impacts on

[1] 29 U.S.C. 2601, *et seq.*

employees' terms and conditions of employment. For the reasons explained below, I find that the Committee violated the Law when it designated employees' leaves of absence as FMLA leave to run concurrently with employees' paid sick leave without bargaining to resolution or impasse with the Union over the decision and its impacts on employees' terms and conditions of employment.

STATEMENT OF THE CASE

On December 17, 2019, the Union filed a Charge of Prohibited Practice with the Department of Labor Relations (DLR), alleging that the Committee had engaged in prohibited practices within the meaning of Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by designating employees' leaves of absences as concurrent leaves under the FMLA. On April 13, 2020, a DLR Investigator issued a Complaint of Prohibited Practice, alleging that the Committee had violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law when it failed to bargain in good faith with the Union over the decision and impacts of designating employees' leaves of absence as FMLA leave to run concurrently with employees' paid sick leave. On December 7, 2020, the parties filed a Statement of Stipulated Facts and Exhibits and Wavier of Hearing (Stipulated Record). The parties filed their post-hearing briefs on January 12, 2021.

STIPULATED RECORD

The parties stipulated to the following facts:

1. The Respondent, Medford School Committee ("School Committee"), is a public employer within the meaning of G.L. c. 150E ("the Law"), § 1.

2. The Charging Party, Medford Teachers Association ("Union"), is an employee organization within the meaning of § 1 of the Law.

3. The Union is the exclusive representative of a bargaining unit of teachers and certain other professional employees employed by the Medford School Committee. There are approximately 476 employees in the bargaining unit.

4. The Union and the School Committee are parties to a collective bargaining agreement ("CBA") effective from [September 1, 2018 through August 31, 2021].

5. Pursuant to the CBA, bargaining unit members accrue paid sick leave that can be used when an employee requests a leave of absence due to their own medical condition or to care for a family member.

6. Prior to September 2019, the School Committee allowed bargaining unit members to use paid sick time for a leave of absence due to their own medical condition or to care for a family member without designating it as leave pursuant to the Family and Medical Leave Act ("FMLA"), even if the leave was for an FMLA-qualifying event.

7. Beginning in September 2019, the School Committee designated the leaves of absence described in paragraphs 5 and 6 as FMLA leave running concurrently with employees' paid sick leave.

8. The action described in paragraph 7 applies to the entire bargaining unit described in paragraph 3.

9. The School Committee took the action described in paragraph 7 without giving the Union prior notice and an opportunity to bargain to resolution or impasse over its decision to designate employees' leaves of absence as FMLA leave running concurrently with employees' paid sick leave and the impacts of that decision on bargaining unit members' terms and conditions of employment.

The CBA

Articles 15, 16, and 17 of the CBA pertain to "Sick Leave," "Temporary Leaves of Absence," and "Extended Leaves of Absence," respectively. Article 15 is silent on the FMLA but addresses how employees may accrue, use, and/or seek reimbursement for earned sick leave. Article 16 covers Bereavement Leave, Personal Leave, School Legal Proceedings, Military Leave, Other Leave, and Adoption and Paternity Leave. Article 16's section on "Adoption and Paternity Leave" expressly references the FMLA and states in

full: "The School Committee shall comply with the revisions of the Family and Medical Leave Act of 1993. This leave shall be unpaid." Article 17 is silent on the FMLA but covers extended leaves of absence "without pay" such as "Maternity Leave (deducted from accumulated sick leave)" and "Parental Leave (deducted from accumulated sick leave)."

The Family and Medical Leave Policy

The Committee's Family and Medical Leave Policy (Policy) states, in pertinent part:

A. Leave without Pay

1. 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. Extent of leave:
    a. An eligible employee may take up to twelve weeks of leave total during a twelve[-]month period, including any paid leave used. The employee must exhaust all available paid vacation leave and personal leave before being entitled to take leave without pay.

….

B. Types of Leave without Pay

1. Personal Medical Leave without Pay: The Director may grant a medical leave of absence without pay to an employee who, because of a serious health condition is unable to perform the functions of his or her job.

    a. An employee must exhaust all available sick leave, including from the sick leave bank, before taking leave without pay.

….

2. Family Medical Leave without Pay: The Director may grant a medical leave of absence without pay to an employee who needs the time off to care for the employee's spouse, child, or parent, if the spouse, child or parent has a serious health condition.

….

3. Parental Leave without Pay: An employee may take parental leave without pay within one year of the birth of the child in order to care for that child. An employee may take parental leave without pay within one year of the placement of a child with the employee for adoption or foster care.

….

C. Special Rules

1. …The following rules apply to any employee who takes leave without pay under this policy and who is employed principally in an instructional capacity.

….

d. the extended leave is counted against the teacher's FMLA allotment. If the teacher's FMLA allotment expires during the extension[,] the additional time is nevertheless deemed FMLA leave.

2. Intermittent Leave and Reduced Leave Schedules:

….

b. If a teacher takes intermittent leave or a reduced leave schedule which is for more than 20% of the normal working days over the period of the leave, that teacher must instead take the entire period as FMLA leave.

….

The FMLA and the Opinion Letters

The parties agreed to permit the Hearing Officer to take administrative notice of the FMLA, 29 U.S.C. § 2601, *et seq.* The parties also agreed to permit me to take administrative notice of two opinion letters from the United States Department of Labor (DOL), Wage and Hour Division (WHD) that issued on March 14, 2019 and September 10, 2019.

1. The FMLA

29 U.S.C. § 2611(5) of the FMLA defines "Employee Benefits" as:

> [A]ll benefits provided or made available to employees by an employer, including group life insurance, health insurance, disability insurance, sick leave, annual leave, educational benefits, and pensions,

> regardless of whether such benefits are provided by a practice or written policy of an employer or through an "employee benefit plan", as defined in section 1002(3) of this title.

29 U.S.C. 2612 pertains to "Leave Requirement" and states, in pertinent part:

> (a) IN GENERAL
> (1) ENTITLEMENT TO LEAVE
> Subject to section 2613 of this title and subsection (d)(3), an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period for one or more of the following:
>
> (A) Because of the birth of a son or daughter of the employee and in order to care for such son or daughter.
>
> (B) Because of the placement of a son or daughter with the employee for adoption or foster care.
>
> (C) In order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition.
>
> (D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.
>
> (E) Because of any qualifying exigency (as the Secretary shall, by regulation, determine) arising out of the fact that the spouse, or a son, daughter, or parent of the employee is on covered active duty (or has been notified of an impending call or order to covered active duty) in the Armed Forces.
> ….
>
> (d)RELATIONSHIP TO PAID LEAVE
> ….
>
> (2) SUBSTITUTION OF PAID LEAVE
>
> (A)In general
> 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.

> (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 medical or sick leave of the employee for leave provided under subparagraph (C) or (D) of subsection (a)(1) for any part of the 12-week period of such leave under such subsection, except that nothing in this subchapter shall require an employer to provide paid sick leave or paid medical leave in any situation in which such employer would not normally provide any such paid leave. An eligible employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal leave, family leave, or medical or sick leave of the employee for leave provided under subsection (a)(3)[2] for any part of the 26-week period of such leave under such subsection, except that nothing in this subchapter requires an employer to provide paid sick leave or paid medical leave in any situation in which the employer would not normally provide any such paid leave.
>
> ….

29 U.S.C. § 2618 covers "Special rules concerning employees of local educational agencies" and states in pertinent part:

> (a)APPLICATION
> (1) IN GENERAL
> Except as otherwise provided in this section, the rights…remedies, and procedures under this subchapter shall apply to—
>
> (A) any "local educational agency" (as defined in section 7801 of title 20)[3] and an eligible employee of the agency;
> ….

[2] 29 U.S.C. 2612 (a)(3) pertains to "Special rule for GAO employees."

[3] 20 U.S.C. § 7801 (30)(A) defines "local educational agency" as:

> …a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary schools or secondary schools in a city, county, township, school district, or other political subdivision of a State, or of or for a combination of school districts or counties that is recognized in a State as an administrative agency for its public elementary schools or secondary schools.

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" 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."

2. The Opinion Letters

On March 14, 2019, WHD Acting Administrator Keith E. Sonderling (Sonderling) issued opinion letter WHD FMLA2019-1-A, which stated in pertinent part:

Dear Name*:[4]

This letter responds to your request for an opinion on whether an employer may delay designating paid leave as Family and Medical Leave Act (FMLA) leave or permit employees to expand their FMLA leave beyond the statutory 12-week entitlement. This opinion is based exclusively on the facts you have presented. You represent that you do not seek this opinion for any party that the Wage and Hour Division (WHD) is currently investigating or for use in any litigation that commenced prior to your request.

BACKGROUND

You represent that some employers "voluntarily permit[ ][5] employees to exhaust some or all available paid sick (or other) leave prior to designating leave as FMLA-qualifying, even when the leave is clearly FMLA-qualifying" You state that employers justify this practice by relying on 29 C.F.R. § 825.700,[6] which provides in relevant part that "[a]n employer must observe any employment benefit or program that provides greater family and medical leave rights to employees than the rights provided by the FMLA." You ask whether it is indeed permissible under this provision for an employer to delay the designation of FMLA-qualifying paid leave as FMLA

[4] In an unnumbered footnote, Sonderling stated that he removed the actual name of the addressee "to protect privacy in accordance with 5 U.S.C. § 552(b)(7)."

[5] Brackets appear in original Opinion Letter.

[6] 29 C.F.R. § 825.700 covers to "Interaction with employer's policies" and states in pertinent part:

> (a) An employer must observe any employment benefit program or plan that provides greater family or medical leave rights to employees than the rights established by the FMLA. Conversely, the rights established by the Act may not be diminished by any employment benefit program or plan….If an employer provides greater unpaid family leave rights than are afforded by FMLA, the employer is not required to extend additional rights afforded by FMLA, such as maintenance of health benefits (other than through COBRA), to the additional leave period not covered by FMLA.
>
> (b) Nothing in this Act prevents an employer from amending existing leave and employee benefit programs, provided they comply with FMLA. However, nothing in the Act is intended to discourage employers from adopting or retaining more generous leave policies.

leave or to provide additional FMLA leave beyond the 12-week FMLA entitlement.

GENERAL LEGAL PRINCIPLES

The FMLA entitles eligible employees of covered employers to take up to 12 weeks of unpaid, job-protected leave per year for specified family and medical reasons. 29 U.S.C. § 2612(a) [footnote 1 omitted]…. The employer may require, or the employee may elect, to "substitute" accrued paid leave (e.g., paid vacation, paid sick leave, etc.) to cover any part of the unpaid FMLA entitlement period. *Id.*[7] at § 2612(d)(2) [footnote 2].[8]

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[7] All italics appear in original Opinion Letter.

[8] In footnote 2 of his letter, Sonderling stated in full, "Under the FMLA, '[t]he term substitute means that paid leave provided by the employer…will run *concurrently* with the unpaid FMLA leave.' 29 C.F.R. § 825.207(a) (emphasis added)."

29 C.F.R. § 825.207(a) pertains to "Substitution of paid leave" and states, in full:

> 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. Accordingly, the employee receives pay pursuant to the employer's applicable paid leave policy during the period of otherwise 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. When an employee chooses, or an employer requires, substitution of accrued paid leave, the employer must inform the employee that the employee must satisfy any procedural requirements of the paid leave policy only in connection with the receipt of such payment. *See* § 825.300(c). If an employee does not comply with the additional requirements in an employer's paid leave policy, the employee is not entitled to substitute accrued paid leave, but the employee remains entitled to take unpaid FMLA leave. Employers may not discriminate against employees on FMLA leave in the administration of their paid leave policies.

The employer is responsible in all circumstances for designating leave as FMLA-qualifying and giving notice of the designation to the employee. 29 C.F.R. § 825.300(d)(1).[9] WHD's regulations require employers to provide a written "designation notice" to an employee within five business days—absent extenuating circumstances—after the employer "has enough information to determine whether the leave is being taken for a FMLA-qualifying reason." *Id*. Failure to follow this notice requirement may constitute an interference with, restraint on, or denial of the exercise of an employee's FMLA rights. 29 C.F.R. §§ 825.300 (e), 825.301(e).

Nothing in the FMLA prevents employers from adopting leave policies more generous than those required by the FMLA. 29 U.S.C. § 2653; *see* 29 C.F.R. § 825.700. However, an employer may not designate more than 12 weeks of leave—or more than 26 weeks of military caregiver leave—as FMLA-protected. *See*, *e.g.*, *Weidner v. Unity Health Plans Ins. Corp.*, 606 F. Supp. 2d 949, 956 (W.D. Wis. 2009) (citing cases for the principle that "a plaintiff cannot maintain a cause of action under the FMLA for an employer's violation of its more-generous leave policy"); *cf. Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 93-94 (2002) ("[T]he 12-week figure was the

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[9] 29 U.S.C. §825.300(d)(1) states in full:

(d) Designation notice.

(1) 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 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 absent extenuating circumstances. Only one notice of designation is required for each FMLA-qualifying reason per applicable 12-month period, regardless of whether the leave taken due to the qualifying reason will be a continuous block of leave or intermittent or reduced schedule leave. If the employer determines that the leave will not be designated as FMLA-qualifying (e.g., if the leave is not for a reason covered by FMLA or the FMLA leave entitlement has been exhausted), the employer must notify the employee of that determination. 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.

result of compromise between groups with marked but divergent interests in the contested provision…. Courts and agencies must respect and give effect to these sorts of compromises."); *Strickland v. Water Works & Sewer Bd. of City of Birmingham*, 239 F.3d 1199, 1204-06 (11th Cir. 2001) ("Congress intended that the FMLA provide employees with a minimum entitlement of 12 weeks of leave, while protecting employers against employees tacking their FMLA entitlement on to any paid leave benefit offered by the employer.").

OPINION

An employer may not delay the designation of FMLA-qualifying leave or designate more than 12 weeks of leave (or 26 weeks of military caregiver leave) as FMLA leave.

First, an employer is prohibited from delaying the designation of FMLA-qualifying leave as FMLA. Once an eligible employee communicates a need to take leave for an FMLA-qualifying reason, neither the employee nor the employer may decline FMLA protection for that leave. *See* 29 C.F.R. § 825.220(d)[10] ("Employer cannot waive, nor may employers induce employees to waive, their prospective rights under [the] FMLA."); *Strickland v. Water Works & Sewer Bd. of City of Birmingham*, 239 F.3d 1199, 1204 (11th Cir. 2001) (noting that the employer may not "choose whether an employee's FMLA-qualifying absence" is protected or unprotected by the FMLA). Accordingly, when an employer determines that leave is for an FMLA-qualifying reason, the qualifying leave is FMLA-protected and counts toward the employee's FMLA leave entitlement. *See* 29 C.F.R. § 825.701(a)[11] ("If leave qualifies for FMLA leave … the leave used counts

[10] 29 C.F.R. § 825.220(d) covers to "Protection for employees who request leave or otherwise assert FMLA rights" and states in pertinent part:

> (d) Employees cannot waive, nor may employers 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….

[11] 29 C.F.R. § 825.701(a) covers to "Interaction with State laws" and states in pertinent part:

> Nothing in FMLA supersedes any provision of State or local law that provides greater family or medical leave rights than those provided by

against the employee's entitlement …."); WHD Opinion Letter FMLA2003-5,[12] 2003 WL 25739623, at *2 (Dec. 17, 2003) ("Failure to designate a portion of FMLA-qualifying leave as FMLA would not preempt … FMLA protections …") [footnote 3].[13] Once the employer has enough information to make this determination, the employer must, absent extenuating circumstances, provide notice of the designation within five business days. 29 C.F.R. § 825.300(d)(1). Accordingly, the employer may not delay designating leave as FMLA-qualifying, even if the employee would prefer that the employer delay the designation.

An employer is also prohibited from designating more than 12 weeks of leave (or 26 weeks of military caregiver leave) as FMLA leave. *See*, *e.g.*, *Weidner*, 606 F. Supp. 2d at 956; *cf*. *Ragsdale*, 535 U.S. at 93-94; *Strickland*, 239 F.3d at 1204-06. Of course, "[a]n employer must observe any employment benefit program or plan that provides greater family or medical leave rights to employees than the rights established by the FMLA." 29 C.F.R. § 825.700. But providing such additional leave outside of the FMLA cannot expand the employee's 12-week (or 26-week) entitlement under the FMLA. *See*, *e.g.*, *Weidner*, 606 F. Supp. At 956. Therefore, if an employee substitutes paid leave for unpaid FMLA leave, the employee's paid leave counts toward his or her 12-week (or 26-week) FMLA entitlement and does not expand that entitlement.

> FMLA. The Department of Labor will not, however, enforce State family or medical leave laws, and States may not enforce the FMLA. Employees are not required to designate whether the leave they are taking is FMLA leave or leave under State law, and an employer must comply with the appropriate (applicable) provisions of both. An employer covered by one law and not the other has to comply only with the law under which it is covered. Similarly, an employee eligible under only one law must receive benefits in accordance with that law. If leave qualifies for FMLA leave and leave under State law, the leave used counts against the employee's entitlement under both laws….

[12] The parties did not agree to include WHD Opinion Letter FMLA2003-5 as an exhibit.

[13] In footnote 3 of his letter, Sonderling stated in full: "WHD therefore disagrees with the Ninth Circuit's holding that an employee may use non-FMLA leave for an FMLA qualifying reason and decline to use FMLA leave in order to preserve FMLA leave for future use. *See Escriba v. Foster Poultry Farms, Inc.*, 743 F.3d 1236, 1244 (9th Cir. 2014)."

> We trust that this letter is responsive to your inquiry [footnote 4].[14]
> ….

On September 10, 2019, WHD Administrator Cheryl M. Stanton (Stanton) issued opinion letter WHD FMLA2019-3-A, which stated in pertinent part:

> Dear Name*:[15]
>
> This letter responds to your request for an opinion on whether an employer may delay designating paid leave as Family and Medical Leave Act (FMLA) leave if the delay complies with a collective bargaining agreement (CBA) and the employee prefers that the designation be delayed. This opinion is based exclusively on the facts you have presented. You represent that you do not seek this opinion for any party that the Wage and Hour Division (WHD) is currently investigating or for use in any litigation that commenced prior to your request.
>
> BACKGROUND
>
> Your employer is a local government public agency. You state that the employees at your workplace are subject to CBAs that provide job protection when they use employer-provided paid leave for certain medical and family reasons. Under these CBAs, you represent that employees may, or under one of these CBAs employees must, delay taking unpaid leave, including unpaid FMLA leave, until after CBA-protected accrued paid leave is exhausted. Furthermore, you state that the period covered by the CBA-protected accrued paid leave "is treated as continuous employment" without affecting an employee's seniority status under state civil service rules. You suggest that this is not the case for a period of unpaid leave, including unpaid FMLA leave. Thus, you assert that the CBAs provide "for greater benefit" to employees and, therefore, employees would prefer to postpone using unpaid FMLA leave until after they have used their paid leave.

[14] In footnote 4 of his letter, Sonderling stated, in full: ""WHD rescinds any prior statements in previous opinion letters that are inconsistent with this opinion. *See* WHD Opinion Letter FMLA-67, 1995 WL 1036738, at *3 (July 21, 1995); WHD Opinion Letter FMLA-49, 1994 WL 1016757, at *2 (Oct. 27, 1994)."

[15] In an unnumbered footnote, Stanton stated that she removed the actual name of the addressee "to protect privacy in accordance with 5 U.S.C. § 552(b)(7)."

You state that your employer recently announced a change in its leave policy, relying on guidance in WHD Opinion letter FMLA2019-1-A, issued on March 14, 2019. Per your employer's new policy, as soon as your employer becomes aware that an employee needs leave for an FMLA-qualifying reason, it will inform the employee of his or her rights under the FMLA and may require that when the employee takes CBA-protected accrued paid leave, such leave will be designated as FMLA leave, *i.e.*, that the leave is concurrently CBA-protected paid leave and FMLA leave. You ask whether your employer must designate FMLA-qualifying leave as FMLA leave when an employee would prefer to delay the start of FMLA-qualifying leave in light of your concern that taking FMLA leave before taking accrued paid leave may negatively impact the employee's seniority status under the applicable CBA and state civil service rules, as determined by your state's civil service commission.

GENERAL LEGAL PRINCIPLES

The FMLA provides eligible employees of covered employers with up to 12 weeks of unpaid job-protected leave per year for specified family and medical reasons. *See*[16] 29 U.S.C. § 2612(a). [Footnote 1 omitted.] The FMLA provides that an employer may require, or the employee may elect, to "substitute" accrued paid leave to cover any part of the unpaid FMLA entitlement period. *See* 29 U.S.C. § 2612(d)(2). Under the FMLA. "[t]he term substitute means that the paid leave provided by the employer … will run *concurrently* with the unpaid FMLA leave." 29 C.F.R. § 825.207(a) (emphasis added).

Within five business days of learning of a FMLA-qualifying leave request from an employee, an employer must provide critical information to the employee about the FMLA, *e.g.*, whether the employee is eligible for FMLA leave, whether the employee has to obtain a medical certification, and whether the employee has to make arrangements for health insurance to continue. *See* 29 C.F.R. §§ 825.300, 825.301. The employer is responsible in all circumstances for designating leave as FMLA-qualifying, and giving notice of the designation to the employee in writing. *See* 29 C.F.R. §825.300(d). Failure to follow the FMLA's notice requirements may constitute an interference with, restraint on, or denial of the exercise of an employee's FMLA rights. *See* 29 C.F.R. §§ 825.300(e) and 825.301(e).

Once an eligible employee communicates a need to take leave for an FMLA-qualifying reason, neither the employee nor the employer may

[16] All italics appear in original Opinion Letter.

> decline FMLA protection for that leave. *See* WHD Opinion Letter FMLA2019-1-A, 2019 WL 1514982, at *2 (Mar. 14, 2019) (*citing* 29 C.F.R. § 825.220(d) and *Strickland v. Water Works, Sewer Bd. of City of Birmingham*, 239 F.3d 1199, 1204 (11th Cir. 2001)) [footnote 2].[17] Thus, an employer may not delay the designation of FMLA-qualifying leave as FMLA leave. *See id*.
>
> An employee's entitlement to benefits other than group health benefits, such as the accrual of seniority, during a period of FMLA leave is determined by the employer's established policy for providing such benefits when the employee is on other forms of leave (paid or unpaid, as relevant). *See* 29 C.F.R. § 825.209(h) [footnote 3].[18] If the employer's established leave policies do not permit the accrual of seniority during an unpaid leave of absence, for instance, these same policies would apply to unpaid FMLA leave. *See* WHD Opinion Letter FMLA-109, 2000 WL 33157360 at *1 (Sept. 8, 2000). However, if the employer's established leave policies do provide for the accrual of seniority during a paid leave of absence, then the employer must permit, consistent with its policies, the accrual of seniority during any portion of FMLA leave that is substituted for paid leave, *i.e.*, during FMLA leave that runs concurrently with paid leave. *See id.* In other words, an employer may not treat employees who take FMLA leave in a manner that discriminates against them. *See* 29 U.S.C. § 2615; 29 C.F.R. §§ 825.209(h), 825.220(c) ("For example, if an employee on leave without pay would otherwise be entitled to full benefits other than health benefits, the same benefits would be required to be provided to an employee on unpaid FMLA leave.") [footnote 4].[19]

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[17] In footnote 2 of her letter, Stanton stated in full: "As noted in FMLA2019-1-A, WHD disagrees with the Ninth Circuit's holding that an employee may decline to use FMLA leave for an FMLA-qualifying reason in order to preserve FMLA leave for future use. *See Escriba v. Foster Poultry Farms, Inc.*, 743 F.3d 1236, 1244 (9th Cir. 2014).

[18] In footnote 3 of her letter, Stanton stated in full: "In addition, any benefits an employee accrues prior to a period of FMLA leave cannot be lost as a result of the leave and must be available when he or she returns from leave. *See* 29 U.S.C. § 2614(a)(2); 29 C.F.R. §825.215(d)(2)."

[19] In footnote 4 of her letter, Stanton stated in full:

> We acknowledged that this statute explicitly provides that an employee may, but is not entitled to, accrue seniority while taking FMLA leave. *See* 29 U.S.C. §2614(a)(3); 29 C.F.R. § 825.215(d)(2). However, the prohibition

The FMLA applies in addition to or along with an employer's policies or any CBAs. Employers may adopt, retain, or amend leave policies, including policies that provide more generous leave, policy, benefit program, or plan, including a CBA, may not reduce or deny FMLA benefits and protections. *See* 29 U.S.C. §§ 2652-53; 29 C.F.R. § 825.700.

OPINION

Once your employer has enough information to determine that an employee's leave request qualifies as FMLA leave, your employer must designate the leave as FMLA leave. As noted in WHD Opinion Letter FMLA2019-1-A, once an eligible employee communicates a need to take leave for an FMLA-qualifying reason, an employer may not delay designating such leave as leave. *See* WHD Opinion Letter FMLA2019-1-A, at *1; *see also* 29 C.F.R. §827.700(a) ("[T]he rights established by the Act may not be diminished by any employment benefit or program" including a CBA); WHD Opinion Letter FMLA2003-5, 2003 WL 25739623, at *2 (Dec. 17, 2003) ("Failure to designate a portion of FMLA-qualifying leave as FMLA would not preempt … FMLA protections …."). This is the case, for instance, even if the employer is obligated to provide job protections and other benefits equal to or greater than those required by the FMLA pursuant to a CBA or state civil service rules. *See* 29 U.S.C. §§ 2652-53; 29 C.F.R. § 825.700.

You have indicated that your employer now requires employees to substitute FMLA leave for accrued paid leave, which means that the leave is both FMLA leave and CBA-protected paid seniority when employees are utilizing accrued paid leave, it must permit employees to accrue seniority when they are substituting FMLA leave for paid leave. Failure to permit an employee to accrue seniority when the employee is substituting FMLA leave for accrued paid leave, if the employee would otherwise be permitted to accrue seniority when utilizing accrued paid leave, would constitute interference with the employee's FMLA rights, in violation of [S]ection 105(a) of the Act. *See* 29 U.S.C. § 2615(a); 29 C.F.R. §§ 825.209(h), 825.220(c). Thus, your employer is properly applying the FMLA by requiring that FMLA-qualifying leave be designated as FMLA leave. However, given your employer's policies regarding accrual of seniority, when an employee

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against discriminating against employees who take FMLA leave described above, which also appears in the statutory text, *see* 29 U.S.C. § 2615, requires that the employer's established policy for providing benefits when the employee is on other forms of leave (paid or unpaid, as relevant to the circumstances) be applied to FMLA leave.

> takes FMLA leave that runs concurrently with CBA-protected accrued paid leave, the employee's seniority status would be the same as it would if the employee took only CBA-protected accrued paid leave [footnote 5].[20]
>
> We trust that this is responsive to your inquiry.
> ….

DECISION

Section 6 of the Law requires public employers to negotiate in good faith with respect to wages, hours, standards of productivity and performance, and any other terms and conditions of employment. The statutory obligation to bargain includes the duty to give the exclusive collective bargaining representative notice and an opportunity to bargain to resolution or impasse before changing an existing condition of employment or implementing a new condition of employment involving a mandatory subject of bargaining. Commonwealth of Massachusetts v. Labor Relations Commission, 404 Mass. 124, 127 (1989); School Committee of Newton v. Labor Relations Commission, 388 Mass. 557 (1983). The duty to bargain extends to both conditions of employment that are established through a past practice as well as conditions of employment that are established through a collective bargaining agreement. Spencer-East Brookfield Regional School District, 44 MLC 96, 97, MUP-15-4847 (Dec. 5, 2017) (citing Town of Wilmington, 9 MLC 1694, 1699, MUP-4688 (March 18, 1983)).

To establish a unilateral change violation, the charging party must show that: (1)

[20] In footnote 5 of her letter, Stanton stated in full: "We offer no opinion regarding whether the CBAs at issue, as you have explained their operation prior to your employer's new policy adopted in light of WHD Opinion Letter FMLA2019-1-A, were compliant with the FMLA."

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 and an opportunity to bargain. City of Boston, 20 MLC 1545, 1552, SUP-3460 (May 13, 1 1994). Sick leave is a mandatory subject of bargaining. Town of Hull, 19 MLC 1780, 1784, MUP-7771 (April 20, 1993) (citing City of Boston, 3 MLC 1450, MUP-2647 (Feb. 4, 1977)). The criteria for granting leave and the way an employer distributes a benefit, such as paid and unpaid leave, are also mandatory subjects of bargaining. City of Boston, 46 MLC 146, 148, MUP-17-5924 (Jan. 7, 2020); Massachusetts Port Authority, 26 MLC 100, 101, UP-2624 (Jan. 14, 2000); Commonwealth of Massachusetts, 21 MLC 1637, 1641, SUP-3587 (March 20, 1995).

Here, there is no dispute that the Committee's decision to designate FMLA-qualifying paid leave to run concurrently with FMLA unpaid leave affected a mandatory subject of bargaining. Nor is there any dispute that the Committee made the change without providing the Union prior notice or opportunity to bargain over the decision and its impacts. The only dispute is whether the Committee was excused from bargaining based on the DOL's WHD Opinion Letters which issued on March 14, 2019 and September 10, 2019.

Relying on Escriba,[21] above, and on Brotherhood of Maint. of Way Employees v.

[21] In Escriba, an employee sued her former employer alleging violations of the FMLA, *inter alia*. The lower court entered judgment for the employer which argued that the employee had affirmatively declined to exercise her FMLA rights to preserve her leave for future use. The appeals court affirmed, recognizing that while "the FMLA does not expressly state whether an employee may defer the exercise of FMLA rights under the

CSX Transp., Inc., 478 F.3d 814 (7th Cir. 2007),[22] the Union argues that substitution of paid leave for FMLA leave is permissive rather than mandatory, and that public employers in Massachusetts are not legally required to designate paid leaves as running concurrently with FMLA leave. The Union also argues that when the Committee made the change it was not specifically compelled by any third-party authority over which it had no control because the interpretations of the FMLA contained in the Opinion Letters did not create binding law and lack persuasive value. Even if the Committee was specifically compelled to act—thereby excusing its duty to bargain over the decision—it remained obligated to bargain over the impacts.

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statute….an employee can affirmatively decline to use FMLA leave even if the underlying reason for seeking the leave would have invoked FMLA protection." Id., 743 F.3d at 1243-1244 (citing Ridings v. Riverside Med. Ctr., 537 F.3d 755, 769 n. 3 (7th Cir. 2008) ("If an employee does not wish to take FMLA leave but continues to be absent from work, then the employee must have a reason for the absence that is acceptable under the employer's policies, otherwise termination is justified.")) [Emphasis omitted]. Thus, the Escriba court held 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.

[22] In Brotherhood, the court found that the Railway Labor Act (RLA), 45 U.S.C. § 151, *et seq.*, required the employer to bargain with the union before substituting paid leave for FMLA unpaid leave. The court reconciled the FMLA, "which in some cases allows substitution of paid leave for FMLA leave," with the RLA, "which prohibits an employer from unilaterally changing working conditions except by following certain procedures," and with the CBAs that establish how the employer awarded certain paid leave. Id., 478 F.3d at 817. Finding that Section 2612 of the FMLA was neither a prohibition nor a requirement but merely made "clear that substitution is not forbidden," the court opined that "[i]t would seem odd" to wipe out decades of bargaining by unilateral action based on a statute that says employees and employers "may" require substitution without clarifying "the process for instituting a substitution requirement." Id. at 818-819. Thus, the Brotherhood court concluded that Section 2612 of the FMLA did not allow the employer to violate its contractual obligations protected by the RLA by unilaterally substituting paid leave for FMLA unpaid leave. Id. at 820.

Conversely, the Committee argues that it was not obligated to bargain over the decision or its impacts because it was compelled to make the change based on the Opinion Letters. Relying first on the March 14, 2019 Opinion Letter, the Committee points to the finding that "[o]nce an eligible employee communicates a need to take leave for an FMLA-qualifying reason, neither the employee nor the employer may decline FMLA protection for that leave" and that "an employer is prohibited from delaying the designation of FMLA-qualifying leave as FMLA leave." The Committee also points to 29 C.F.R. 825.220(d), which states that "[e]mployees cannot waive, nor may employers induce employees to waive, their prospective rights under the FMLA." Next, relying on the September 10, 2019 Opinion Letter, the Committee points to the finding that "the FMLA applies in addition to or along with an employer's policies or any CBAs," and that under 29 C.F.R. 825.301(a), "[o]nce the employer has acquired knowledge that the leave is being taken for a FMLA-qualifying reason, the employer must notify the employee as provided in [29 C.F.R.] 825.300(d)" that it is designating the CBA-protected accrued paid leave as FMLA leave. Additionally, the Committee argues that Article 16 of the CBA expressly permitted it to make the change by its language which states, in full, that "[t]he School Committee shall comply with the revisions of the Family and Medical Leave Act of 1993. This leave shall be unpaid."

1. Administrative Opinions

The Committee relies on Christensen v. Harris County (Christensen), 529 U.S. 576, 587 (2000) to assert that the Opinion Letters are "entitled to respect" as administrative opinions. The Committee's assertion is correct, but only in part. In

Christensen, the United States Supreme Court held that while interpretations contained in opinion letters issued by the DOL's WHD were "entitled to respect" pursuant to Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944),[23] such respect is warranted "only to the extent that those interpretations have the 'power to persuade'." Id., 529 U.S. at 587. Ultimately, the Christensen court concluded that the interpretations were "unpersuasive" because the DOL had reached them without "a formal adjudication or notice-and-comment rulemaking." Id.

In Massachusetts and at the federal level, it is well-established that administrative opinions, rulings, and interpretations are not binding law. See, e.g., Niles v. Huntington Controls, Inc., 92 Mass. App. Ct. 15, 21 (2017) (under state administrative law, opinion letters do not have the force of law unlike formal regulations promulgated according to G.L. c. 30A); Lemieux v. Holyoke, 740 F. Supp. 2d 246, 255, n.4 (D. Mass. 2010) (class action suit involving the Fair Labor Standards Act (FLSA),[24] held DOL WHD opinions are not binding on the courts but may be treated with "persuasive effect"); see also Skidmore, 323 U.S. at 139-140 (DOL administrative rulings, interpretations and opinions are not binding on the courts, but rather "constitute a body of experience and informed judgment"

[23] In Skidmore, the United States Supreme Court found that administrative rulings were neither "conclusive" nor "binding;" holding, instead, that proper weight is given to administrative opinions by looking to the "thoroughness evident in the opinion's consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." Id. at 139-140.

[24] 29 U.S.C. 201, *et seq.*

on which courts may rely as "guidance");[25] see generally, Sun Capital Partners III, LP v. New England Teamsters & Trucking Indus. Pension Fund, 724 F.3d 129, 140 (1st Cir. 2013) (letter issued by sub-regulatory agency Pension Benefit Guaranty Corporation owed no more than Skidmore deference, i.e., the power to persuade). Based on this legal precedence, I am unpersuaded by the Committee's argument that the Opinion Letters are binding because they do not establish authoritative law, and there's no evidence in the record that the Letters were issued pursuant to a Skidmore adversarial hearing.[26]

[25] In Skidmore, the Court ruled in favor of employees who sued under the FLSA after finding that the DOL WHD administrator had issued an "interpretive bulletin" that was unfavorable to the employees without first conducting an adversarial proceeding that involved findings of fact or drawing conclusions of law based on those factual findings. Id., 323 U.S. at 139.

[26] Although both Sonderling and Stanton stated in their Opinion Letters that their opinions were based "exclusively on the facts" presented by their respective addressees, the Committee failed to show how the fact patterns and parties in those Letters effect the facts and legal issues here.

Moreover, the disputed Opinion Letters appear to overturn legal precedent established in Escriba without first conducting a Skidmore adversarial hearing. For instance, in footnote 3 of his March 14, 2019 letter, Sonderling stated simply that "WHD therefore disagrees with the Ninth Circuit's holding [in Escriba] that an employee may use non-FMLA leave for an FMLA qualifying reason and decline to use FMLA leave in order to preserve FMLA leave for future use." Although Sonderling relied on the Eleventh Circuit Court's reasoning in Strickland to reach this conclusion, he failed to reconcile why the 2001 decision issued in that case carried more weight than the 2014 decision issued in Escriba. He also failed explain why the WHD had overturned Escriba without conducting a hearing or providing further legal analysis. Similarly, in footnote 5 of his Letter, Sonderling stated that the "WHD rescinds any prior statements in previous opinion letters that are inconsistent with this opinion," again without providing any substantive legal analysis, procedural background, or explanatory reasoning. Comparably, in Stanton's September 10, 2021 Letter, she stated in footnote 2 that based on Sonderling's Letter in "FMLA2019-1-A, WHD disagrees with the Ninth Circuit's holding" in Escriba. Like Sonderling, Stanton appeared to overturn established legal precedent without first conducting an adversary hearing as required by Skidmore.

2. Third-Party Authority

The Committee next contends that it is not obligated to bargain with the Union over the decision because the FMLA, as an external federal law and as interpreted by the Opinion Letters, compelled it to make the change. To support its contention, the Committee relies on Standard Candy Co., 147 NLRB 1070 (1964), Murphy Oil USA, 286 NLRB 1039 (1987), and Exxon Shipping Co., 312 NLRB 566 (1993).

In Standard Candy, the National Labor Relations Board (NLRB) found that while the employer did not violate the National Labor Relations Act (NLRA) by unilaterally increasing wages of its lowest paid employees pursuant to a new minimum wage rate established by the FLSA, it did violate the NLRA by unilaterally granting pay increases to the remaining employees which exceeded the minimum wage rate and were granted for the purpose of maintaining wage differentials. Id., 147 NLRB at 1073. In Murphy Oil, the NLRB found that the employer was legally "bound" to comply with the requirements of the Occupational Health and Safety Act[27] by requiring employees not to consume food or beverages in areas exposed to toxic material. Id., 286 NLRB at 1042. In Exxon Shipping, after giving "substantial weight" to an interpretation of the statutory provisions governing allotments from seamen's wages[28] submitted by the Commandant of the United States Coast Guard, the NLRB again found no violation where the employer unilaterally adopted a rule to restrict use of a "draw check" order system to comply with federal maritime law.

[27] 29 U.S.C. ch. 15, § 651, *et seq*.

[28] 46 U.S.C. § 101, *et seq.*

Id., 312 NLRB at. 567. However, the NLRB conditioned its finding on the fact that "employment in this industry is uniquely subject to pervasive regulation by [f]ederal maritime statutes, and that the Act often must be accommodated to those statutes." Id.

The NLRB decisions in Standard Candy, Murphy Oil, and Exxon Shipping are distinguished. The first two cases pertained to unilateral changes made pursuant to direct statutory mandates unrelated to the FMLA, while the third case involved an industry uniquely subject to "pervasive" regulation and statutory accommodations (i.e., maritime shipping). Here, the Committee implemented the disputed change pursuant to DOL WHD administrative opinions that interpreted the FMLA in March and September of 2019, but not pursuant to direct statutory mandates related to the FMLA. Further, the Committee failed to offer evidence demonstrating that state and local public elementary and secondary education is an industry so unique to warrant pervasive regulation and statutory accommodations that require frequent administrative interpretations, rulings, and opinions.

The Commonwealth Employees Relations Board (CERB) holds that where a third party, over which a public employer has no control, exercises its authority to change employees' terms and conditions of employment, that employer may not be required to bargain over the decision to make that change. Higher Education Coordinating Council, 22 MLC 1662, 1668, SUP-4078 (April 11, 1996) (citing City of Malden, 20 MLC 1400, 1405, MUP-7998 (Feb. 23, 1994); Massachusetts Correctional Officers Federated Union v. Labor Relations Commission (MCOFU), 417 Mass. 7, 9 (1994)). Nevertheless, while the Law does not require employers to bargain over the "elimination of practices deemed

illegal by statute," Commonwealth of Massachusetts, 8 MLC 1894, 1902, SUP-2195 (March 5, 1982), the Committee failed to offer any case law to support its argument that either the plain language of the FMLA or the Opinion Letters compelled any change to bargaining unit members' leaves of absence. Rather, the Committee relies on Sonderling's and Stanton's interpretations of the FMLA in their 2019 Opinion Letters to justify changing its Policy. As discussed above, the Opinion Letters do not constitute binding law; and, thus, the interpretations contained in those Letters cannot legally compel the Committee to act because they do not represent a third-party authority over which the Committee has no control. Contrast Higher Education Coordinating Council, 22 MLC at 1668 (no obligation to bargain where Legislature directed employer to establish optional retirement program); MCOFU, 417 Mass. at 9 (held employer had no obligation to bargain over the decision by the Group Insurance Commission (GIC) to alter employees' health insurance coverage where employer had no authority or control over the GIC).

3. Statutory Interpretation

The CERB examines other statutes when, as in this case, a respondent raises such statues as an affirmative defense to what would otherwise be a prohibited practice. Commonwealth of Massachusetts, 8 MLC at 1903 (citing NLRB v. C & C Plywood Corp., 385 U.S. 421 (1967)). In interpreting statutes, the CERB relies on the plain language of the statute, along with general principles of statutory construction. Higher Education Coordinating Council, 22 MLC 1662, 1671-72 n. 8, SUP-4078 (April 11, 1996) (citing Hashimi v. Kalil, 388 Mass. 607, 609 (1983); see also Eve Plumb v. Debora A. Casey,

469 Mass. 593, 595 (2014) (citing Champigny v. Commonwealth, 422 Mass. 249, 251 (1996) (the object of all statutory construction is to ascertain the true intent of the legislature from the words used)). To construe a statute as "a consistent and harmonious whole," the Massachusetts Supreme Judicial Court considers the text of the statute in relation to its historical development and prior legislation. Plumb, 469 Mass. at 595 (citing Quincy City Hosp. v. Rate Setting Comm'n, 406 Mass. 431, 443 (1990); EMC Corp. v. Commissioner of Revenue, 433 Mass. 568, 574 (2001)). "A statute should be construed so as to give effect to each word, and no word shall be regarded as surplusage" (i.e., excessive or nonessential). Plumb, 469 Mass. at 598 (citing Ropes & Gray LLP v. Jalbert, 454 Mass. 407, 412 (2009)).

Section 2612 of the FMLA states that eligible "employee[s] *may* elect, or an employer *may* require the employee to substitute any…accrued paid… leave." [Emphasis added.] Generally, statutory use of the word "may" is permissive but not mandatory because it signals a simple authorization to act rather than an imperative to act. See, e.g., School Comm. of Greenfield v. Greenfield Educ. Ass'n, 385 Mass. 70, 81 (1982) ("It is axiomatic in statutory construction that the word 'shall' is an imperative [while]…the word 'may' does not impose a mandate but simply authorizes an act"); see also RCA Development, Inc. vs. Zoning Board of Appeals of Brockton, 482 Mass. 156, 161 (2019) (citing Commonwealth v. Dalton, 467 Mass. 555, 558 (2014) (use of the word "may" in a statute is generally permissive, reflecting the Legislature's intent to grant discretion or permission to make a finding or authorize an act)). Based on my plain reading of Section 2612, I find that while the statute permits the substitution and designation of FMLA-

qualifying paid leave to run concurrently with FMLA unpaid leave, it does not does not expressly prohibit employers or employees from choosing to make that substitution. My finding is based on the facts that the word "may" appears more than once in Section 2612 while the words "must" or "shall" do not appear in this part of the statute. Compare, Amanda S. Oberlies vs. Attorney General, 479 Mass. 823, 838 (2018) (it is well-established that use of the word "shall" generally indicates a mandatory duty); Hashimi v. Kalil, 388 Mass. 607, 609 (1983) (the word "shall" is ordinarily interpreted as having a mandatory or imperative obligation)

Last, the Committee contends that Article 16 of the CBA expressly permits it to make the disputed change based on its contractual obligations to "comply with the revisions of the Family and Medical Leave Act of 1993." However, the Committee offered no evidence showing whether Congress revised, amended, or repealed Section 2612 or any other part of the FMLA to eliminate practices related to substituting or designating FMLA-qualifying paid leave to run concurrently with FMLA unpaid leave. Nor is there any evidence showing how the Opinion Letters constitute a statutory "revision[ ]" under the principles of statutory construction, G.L. c. 150E, or other law or legal doctrine. Thus, after construing the plain language of the FMLA, I find no evidence mandating the Committee to change its paid leave Policy or alter its interpretation of the CBA to conform with the Opinion Letters. Higher Education Coordinating Council, 22 MLC at 1671-72 n. 8; Plumb, 469 Mass. at 595, 598; see also 29 U.S.C. § 2652(b) ([t]he 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).

Further, I find that the plain language of Sections 2652(a) and Section 2653 buttress both the CBA and the Policy by providing "greater" and "more generous" benefits to bargaining unit members than those provided by the FMLA. Specifically, the CBA imparts "greater" benefits to employees by providing them with accrued paid sick leave separate from and/or in addition to certain unpaid leave including unpaid "Adoption and Paternity Leave" which members may take pursuant to the FMLA. Likewise, the Committee's Policy provides "more generous" benefits through Sections A and B which require an eligible employee to exhaust all available paid leave benefits before taking any leave without pay. In contrast, the interpretations stated in the Opinion Letters purport to reduce employee benefits (i.e., total amount of available paid and unpaid leave) by conflating the concurrent use of paid leave and FMLA unpaid leave when both leaves are FMLA-qualifying events.

Consequently, because the Committee is unable to demonstrate how portions of its Policy are specifically compelled by the FMLA or the Opinion Letters, it remains obligated to bargain with the Union over the decision to change its Policy and the impacts of that decision. Compare, Commonwealth of Massachusetts, 8 MLC at 1904 (employer may not unilaterally interpret a law, and then impose a rule reflecting its interpretation).

CONCLUSION

In conclusion, I find that the Employer violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law when it designated employees' leaves of absence as FMLA leave to run concurrently with employees' paid sick leave without providing the 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.

ORDER

WHEREFORE, based on the foregoing, IT IS HEREBY ORDERED that the 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 FMLA-qualifying paid sick leave to run concurrently with FMLA unpaid leave;

    b) Designating FMLA-qualifying paid sick leave to run concurrently with FMLA unpaid 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; and

    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) Upon request, bargain collectively with the Union over the criteria for granting for granting paid and unpaid leave, including designating FMLA-qualifying paid sick leave to run concurrently with FMLA unpaid leave;

    b) Rescind those portions of the paid leave policy that designates FMLA-qualifying paid sick leave to run concurrently with FMLA unpaid leave until the Committee has bargained to resolution or impasse regarding the criteria for granting paid and unpaid leave;

    c) Restore to all affected employees any unpaid FMLA leave designated to run concurrently with FMLA-qualifying paid sick leave beginning in September of 2019 until the Committee has bargained to resolution or impasse with the Union over the criteria for granting paid and unpaid leave;

    d) Refrain from interfering with, restraining or coercing employees in the exercise of their rights under Section 2 of the Law;

e) 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 where notices are usually posted, including electronically if the Committee customarily communicates with these unit members via intranet or email, and display for a period of thirty (30) days thereafter; and

f) Notify the DLR in writing of the steps taken to comply with this Order within ten (10) days of its receipt.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

_____

KENDRAH DAVIS, ESQ.
HEARING OFFICER

APPEAL RIGHTS

The parties are advised of their right, pursuant to M.G.L. Chapter 150E, Section 11 and 456 CMR 13.19, to request a review of this decision by the Commonwealth Employment Relations Board by filing a Request for Review with the Department of Labor Relations within ten days after receiving notice of this decision. If a Request for Review is not filed within ten days, this decision shall become final and binding on the parties.

THE COMMONWEALTH OF MASSACHUSETTS
NOTICE TO EMPLOYEES POSTED BY ORDER OF A HEARING OFFICER OF THE MASSACHUSETTS DEPARTMENT OF LABOR RELATIONS AN AGENCY OF THE COMMONWEALTH OF MASSACHUSETTS

The Medford School Committee (Committee) has violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E (the Law) by unilaterally designating employees' contractual leaves of absence as Family Medical Leave Act (FMLA) leave to run concurrently with employees' paid 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 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 FMLA-qualifying paid sick leave to run concurrently with FMLA unpaid leave;

WE WILL NOT designate FMLA-qualifying paid sick leave to run concurrently with FMLA unpaid 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, upon request, bargain collectively with the Union over the criteria for granting for granting paid and unpaid leave, including designating FMLA-qualifying paid sick leave to run concurrently with FMLA unpaid leave;

WE WILL rescind those portions of the paid leave policy that designates FMLA-qualifying paid sick leave to run concurrently with FMLA unpaid leave until the Committee has bargained to resolution or impasse regarding the criteria for granting paid and unpaid leave;

WE WILL restore to all affected employees any unpaid FMLA leave designated to run concurrently with FMLA-qualifying paid sick leave beginning in September of 2019 until the Committee has bargained to resolution or impasse with the Union over the criteria for granting paid and unpaid leave;

WE WILL refrain from interfering with, restraining or coercing employees in the exercise of their rights under Section 2 of the Law.

_____ _____
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, Charles F. Hurley Building, 1st Floor, 19 Staniford Street, Boston, MA 02114 (Telephone: (617) 626-7132).