

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of

TOWN OF BROOKLINE

and

BROOKLINE FIREFIGHTERS
ASSOCIATION, LOCAL 950, I.A.F.F.,
AFL-CIO

Case No.: MUP-20-8167

Date issued: September 29, 2022

Hearing Officer:

Margaret M. Sullivan, Esq.

Appearances:

Michael Downey, Esq. - Representing the Town of Brookline

John M. Becker, Esq. - Representing the Brookline Firefighters
Association, Local 950, I.A.F.F., AFL-CIO

HEARING OFFICER'S DECISION

SUMMARY

1 The issues in this case are whether the Town of Brookline (Town) violated Section
2 10(a)(5) and, derivatively Section 10(a)(1) of Massachusetts General Laws, Chapter
3 150E (Law) by: a) unilaterally changing a revised FMLA Policy that allowed members of
4 the Brookline Fire Fighters Association, Local 950, I.A.F.F, AFL-CIO (Union's) bargaining
5 unit to use accrued sick leave for bonding time after the birth or adoption of a child; and
6 b) repudiating a December 12, 2019 oral agreement with the Union when it failed to
7 adhere to the revised FMLA Policy. For the reasons described below, I find that the Town
8 violated the Law in the manner alleged.

1 Statement of the Case

2 On August 26, 2020, the Union filed a charge of prohibited practice with the
3 Department of Labor Relations (DLR) alleging that the Town violated Section 10(a)(5)
4 and derivatively Section 10(a)(1) of the Law. A DLR investigator investigated the charge
5 on October 29, 2020. On December 21, 2020, the investigator issued a complaint alleging
6 that the Town violated Section 10(a)(5), and, derivatively, Section 10(a)(1) of the Law by:
7 a) changing its revised FMLA Policy regarding the use of accrued sick leave for bonding
8 time (Count I); and b) repudiating an oral agreement to revise the FMLA policy to permit
9 the use of accrued sick leave for bonding time (Count II). The Town filed its answer on
10 January 22, 2021.

11 I conducted a hearing¹ on September 9, 2021 and October 12, 2021.² Both parties
12 had an opportunity to be heard, to call witnesses and to introduce evidence. The parties
13 submitted their post-hearing briefs on March 11, 2021. Upon review of the entire record,
14 including my observation of the demeanor of the witnesses, I make the following findings
15 of fact and render the following opinion.

16 Stipulated Facts

- 17 1. The Town is a public employer within the meaning of Section 1 of the Law.
18
19 2. The Union is an employee organization within the meaning of Section 1 of the Law.
20
21 3. The Union is the exclusive collective bargaining representative for all firefighters,
22 fire lieutenants, fire captains, and deputy chiefs employed by the Town (Unit).

¹ I conducted the hearing remotely via the WebEx videoconferencing platform pursuant to Governor Baker's teleworking directive to Executive Branch employees.

² On September 9, 2021, I allowed the parties joint motion to sequester witnesses, except for Fire Lieutenant Justin Robinson (Robinson), the Union's elected pension and welfare officer, and Fire Chief John Sullivan (Chief Sullivan).

- 1 4. The Town and the Union are parties to a collective bargaining agreement
2 (Agreement) which is effective from July 1, 2018 through June 30, 2021.
3
- 4 5. Prior to 2019, the Town promulgated a Family and Medical Leave Act Policy
5 (FMLA Policy) which is not incorporated into the Agreement but applies to all
6 members of the Unit.
7
- 8 6. The FMLA Policy specifies, in part, that the Town “will grant job protected unpaid
9 family and medical leave to eligible male or female employees for up 12 work
10 weeks per 12 month period for any one or more of the following reasons”
11
- 12 7. Under the FMLA Policy, one of the enumerated reasons the Town will grant 12
13 work weeks of leave is for “[t]he birth of a child and in order to care for such child
14 or the placement of a child with the employee for adoption or foster care (leave for
15 this reason must be taken within the 12-month period following the child’s birth or
16 placement with the employee).”
17
- 18 8. The FMLA Policy further specifies that “an employee will be required to utilize
19 accrued paid leave time under existing provisions for such leaves for any part of a
20 family/medical leave.” Paid leave taken “for the employee’s illness” shall use “sick,
21 vacation and personal leave time,” while leave taken to “care for another” shall only
22 use “vacation and personal time.”
23
- 24 9. On or about February 7, 2020, Firefighter MPL³ used twelve (12) weeks accrued
25 sick time as paid “bonding time” leave.
26
- 27 10. On or about June 24, 2020, Firefighter PD was denied permission to use twelve
28 (12) weeks accrued sick time as paid “bonding time” leave. PD was only allowed
29 to use vacation and personal leave for “bonding time.”
30
- 31 11. On or about August 17, 2020, the Town notified PD that he had used all of his
32 accrued vacation and personal leave and that any further “bonding time” leave on
33 or after September 4, 2020 would be unpaid.
34
- 35 12. As a result of the notification described in paragraph 11, PD returned to work after
36 approximately nine weeks of “bonding time.”

Findings of Fact⁴

37 RELEVANT CONTRACTUAL PROVISIONS

38

³ I have substituted initials for the unit members’ full names.

⁴ The DLR’s jurisdiction in this matter is uncontested.

1 The Union is the exclusive bargaining representative for a unit of firefighters,
2 lieutenants, captains, and deputy chiefs, who are employed by the City in its Fire
3 Department but excluding the executive officer and the chief. The City and the Union
4 were parties to a collective bargaining agreement that, by its terms, was in effect from
5 July 1, 2018 through June 30, 2021 (2018-2021 CBA). The 2018-2021 CBA contains, in
6 part, the following relevant provisions:

7 Article VI-Sick Leave and Personal Leave

8
9 Definition. Sick leave with pay means authorized absence from work granted to
10 employees when they are unable to perform their duties because of sickness, personal
11 injury not related to employment, quarantine by health authorities, or serious illness in
12 immediate family household. A day of sick leave will be deducted for each tour of duty
13 missed.

14
15 Permanent Employees. All permanent employees of the Brookline Fire Department shall
16 be entitled to sick leave, with the exceptions noted below, at the rate of seven and one-
17 half (7-1/2) working days per calendar year, credited on January 1st of each calendar year,
18 starting on January 1st of the year following employment. Employees shall be entitled to
19 accumulate year to year without limit all unused portions of their annual sick leave
20 entitlement.⁵ ...

21
22 Serious Illness in Immediate Family.⁶ In case of serious illness of husband, wife, child,
23 parent of either spouse living in the immediate household of an employee subject to these
24 rules, the employee may be granted sick leave with pay not to exceed three (3) working
25 days within a calendar year at the discretion of the Fire Chief or his/her designee.⁷ These
26 days are charged to sick leave and are part of the seven and one-half (7-1/2) days annual
27 sick leave grant. ...

⁵ Because sick leave can be rolled over from year to year, most unit members have more accumulated sick leave than vacation or personal leave.

⁶ The parties also referred to the serious illness in immediate family as family sick or sick in family (SIF) leave.

⁷ The record shows that the Town has permitted a unit member to use SIF leave if the unit member's child is temporarily sick and needs to stay home from school for a day, even though the child does not have a serious illness.

1 FAMILY AND MEDICAL LEAVE POLICY⁸

2 On or about 1999,⁹ the Town promulgated a Family and Medical Leave Policy,
3 which remains in effect and which states in pertinent part:

4 The policy of the Town of Brookline is to conform to the Family Medical
5 Leave Act (FMLA)¹⁰ and any regulations promulgated thereto; if there are
6 any omissions or conflicts between this policy and the FMLA the provisions
7 of the FMLA will govern.
8

9 In accordance with the Family and Medical Leave Act, the Town of
10 Brookline will grant job protected unpaid family and medical leave to eligible
11 male or female employees for up to 12 work weeks per 12-month period for
12 any one or more of the following reasons:
13

14 The birth of a child and in order to care for such a child or the placement of
15 a child with the employee for adoption or foster care (leave for this reason
16 must be taken within the 12-month period following the child's birth or
17 placement with the employee); or
18

19 In order to care for a spouse, child, or parent of the employee if the spouse,
20 child, or parent has a serious health condition; or
21

22 The employee's own serious health condition that makes the employee
23 unable to perform the functions of his/her position.
24

25 If the Town is made aware of a need for FMLA leave and the employee has
26 not requested it, the Town will initiate implementation of the FMLA for the
27 employee.
28

29 DEFINITIONS
30

⁸ The Town's Family and Medical Leave Policy is a separate document that has not been incorporated into the parties' various collective bargaining agreements.

⁹ Leslea Noble (Noble), the Town's Assistant Director of Human Resources, testified that the Town promulgated the policy in 1999 and the Select Board adopted the policy in 2002. However, Robinson testified that the Town promulgated the policy in 1998 or 1999. I need not reconcile the differences in Noble's and Robinson's testimony as it is not pertinent to the outcome of this case.

¹⁰ The FMLA referred to here is the federal Family and Medical Leave Act of 1993, 29 CFR 825.

1 “12-Month Period”-means a rolling 12-month period measured backward
2 from the date leave is taken and continuous with each additional leave day
3 taken.
4

5 “Spouse”-is a wife or husband. If both spouses work for the Town of
6 Brookline, their total leave in any 12-month period may be limited to an
7 aggregate of 12 weeks if the leave is taken for either the birth or placement
8 for adoption or foster care of a child or to care for a sick parent.
9

10 “Child”-means a son or daughter under 18 years of age or 18 years of age
11 or older who is incapable of self-care because of a mental or physical
12 disability. An employee’s “child” is one for whom the employee has actual
13 day-to-day responsibility for care and includes a biological, adopted, foster
14 or stepchild, a legal ward, or a child of a person standing in loco parentis.
15

16 “Serious Health Condition”-means an illness, injury, impairment, or a
17 physical or mental condition that involves:
18

19 Inpatient care in a hospital hospice or residential medical care facility; or
20

21 Any period of incapacity requiring absence from work for more than three
22 calendar days AND that involves continuing treatment by a health care
23 provider, or
24

25 Continuing treatment by a health care provider for a chronic or long-term
26 health condition that is incurable or which, if left untreated, would likely
27 result in period of incapacity of more than three calendar days; or
28

29 Prenatal care by a health care provider or any period of incapacity due to
30 pregnancy.
31

32 “Continuing Treatment”-means:
33

34 Two or more visits to a health care provider; or
35

36 Two or more treatments by a health care provider, by a nurse or physician’s
37 assistant under direct supervision of a health care provider, or by a health
38 care provider (e.g. physical therapist) under orders of, or on referral by, a
39 health care provider, or
40

41 A single visit to a health care provider that results in a regimen of continuing
42 treatment or
43

44 In the case of a serious long-term or chronic condition or disability that
45 cannot be cured, being under the continuous supervision of, but not
46 necessarily being actively treated by a health care provider.

1 COVERAGE AND ELIGIBILITY

2
3 To be eligible for family/medical leave an employee must:

4
5 Be an employee of the Town of Brookline:

6
7 Have worked for the Town at least 12 months; and

8
9 Have worked at least 1250 hours the previous 12 month period ...

10
11 SUBSTITUTION OF PAID LEAVE

12
13 As provided for in the FLMA an employee will be required to utilize accrued
14 paid leave time under the existing provisions for such leaves for any part of
15 a family/medical leave. For leave taken for the employee's illness, the
16 employee will be required to use sick, vacation and personal leave time.
17 For leave taken to care for another, the employee will be required to use
18 vacation and personal leave time. Additionally, an employee may use up
19 to seven days of his/her own sick leave in the event of serious illness in the
20 employee's immediate family, as defined by the applicable provision of an
21 employee's collective bargaining agreement, (three and one-half days for
22 Firefighters) or in the case of non-union employees, section twelve of the
23 policies governing sick leave use as it appears in the special provisions of
24 the classification and pay plan. In such cases FMLA leave will run
25 concurrently with the paid leave.

26
27 When an employee has used accrued paid vacation or personal time for a
28 portion of family/medical leave, the employee may request an additional
29 period of unpaid leave to be granted so that the total of paid and unpaid
30 leave provided equals 12 weeks.

31
32 NOTICE REQUIREMENT

33
34 An employee is required to give 30 days' notice in the event of foreseeable
35 leave. A "Request for Family/Medical Leave" form (see attached) should
36 be completed by the employee and returned to his/her Department Head.
37 In unexpected or unforeseeable situations, an employee should provide as
38 much notice as is practicable, usually verbal notice within one or two
39 business days of when the need for leave becomes known, followed by a
40 completed "Request for Family/Medical Leave" form. If the employee is
41 unable to give notice due to a serious health condition, a spouse or other
42 family member may give such notice.

43
44 If an employee fails to give 30 days' notice for a foreseeable leave with no
45 reasonable excuse for the delay, the leave may be denied until 30 days after
46 the employee provides notice.

1 Events Prior to December 12, 2019

2 Birth of a Child or Placement of a Child for Adoption

3

4 Pursuant to the Town's Family and Medical Leave Policy above, the Town allowed

5 unit members to take up to twelve weeks of leave (FMLA leave) for the birth of a child,

6 but the leave was unpaid. However, when female unit members requested FMLA leave

7 for the birth of a child, the Town permitted them to use their accumulated sick leave as

8 well as any accumulated vacation and personal leave to receive pay during their FMLA

9 leave.¹¹ If male unit members requested FMLA leave for the birth of a child or the

10 placement of a child for adoption, the Town permitted them to use their accumulated

11 vacation and personal leave as well as the three contractual SIF days to receive pay

12 during their FMLA leave. Male unit members could not use their accumulated sick leave,

13 other than their three SIF days, to receive pay during FMLA leave for birth of a child.

JL

14 On December 2, 2015, Noble responded via email (December 2, 2015 email) to

15 unit member JL, who the day before had sent a general inquiry via email about FMLA

16 leave for the birth of his child. Noble in her December 2, 2015 email stated in relevant

17 part:

18 For FMLA, you can take up to 12 weeks of job protected leave for the birth

19 of a child. Please complete the attached request form for your leave,

20 indicate the estimated dates of requested leave, and have the Chief sign.

21 The form comes back to our office.

22

23 For your pay, you may use up to 3.5 tours of sick leave for the illness of a

24 family member. You may also use personal leave and vacation. Our FMLA

¹¹ The Town did not require female unit members or their newborn babies to have a serious medical condition or illness in order for the female unit members to use accumulated sick leave for the full twelve weeks of FMLA leave after childbirth.

1 policy requires that you use all available leave time (with the exception of
2 family sick as noted) and you may not go unpaid if you are out of work on
3 FMLA unless you may not “save” vacation time and go unpaid.
4

5 I hope that answers your questions, again, I wish you and your family all the
6 best in the arrival of this new little person! Feel free to call with questions.

7 Also, on June 6, 2016, Noble sent a letter to JL stating in pertinent part:

8 Under the provisions of the Family Medical Leave Act, you are entitled to a
9 maximum of 12 weeks of job protected leave for the birth of a child. Per
10 your request dated May 27, 2016, we¹² have approved 4 weeks of FMLA
11 leave for the birth of your child. The approximate dates of your leave are
12 June 27, 2016 to July 25, 2016.
13

14 Contractually, you are allowed to use a portion of your sick leave each
15 calendar year for family medical related absences. After your allotted
16 Family Sick is exhausted, you may use your other leave (e.g., Vacation and
17 Personal leave).¹³

18 KH

19 In late October 2019, unit member KH requested FMLA leave for up to six weeks
20 for the birth of his child, which the Town approved with the leave to begin on October 30,
21 2019.¹⁴ On November 14, 2019 at 9:57 a.m., Noble sent an email to Chief Sullivan stating
22 in relevant part:

¹² The Town’s Human Resources Department would review and approve an employee’s FMLA request, and the employee’s payroll office would designate whether the employee was using SIF, sick, vacation or personal leave, or if the employee was going without pay during the FMLA leave.

¹³ Union president Paul Trahon (Trahon) indicated at hearing that he was unaware that JL had been on FMLA leave in 2018 and that frequently unit members do not inform the Union when they request FMLA leave.

¹⁴ KH had not notified the Union before making his FMLA request.

1 I just wanted to alert you that Kimi [Aldin]¹⁵ had a conversation with [KH]
2 regarding FMLA. He had sent in a WH-380 certification,¹⁶ which was an
3 outdated version. Kimi reached out to him to let him know that we do not
4 need the WH-380 for the birth of a child and that the version was outdated.
5 He told her that he got the form from a union website.
6

7 Also-when Kimi reviewed available paid leave with him, she reminded him
8 that he could use up to 3 days of sick leave for a family member, and that he
9 would need to use personal leave or vacation leave for the remainder of his
10 leave (he has no time). He stated that he did not believe her and that he
11 was going to the union.

12 On or about that date, KH had approached the Union to inquire why he could not use his
13 accumulated sick leave while on FMLA leave. Also, on November 14, 2019, Robinson
14 spoke with Chief Sullivan about the Town's refusal to allow KH to use his sick leave while
15 on FMLA leave for the birth of his child.

16 Robinson also raised with Chief Sullivan the issue of whether the Town would be
17 willing to incorporate bonding time into its FLMA policy.¹⁷ Robinson, who had been
18 working on a number of FMLA-related issues on behalf of the Union, saw that the federal
19 FLMA provided for bonding time. Bonding time allows up to twelve weeks of consecutive
20 leave for a parent to bond with a child, i.e., to develop an emotional connection with the
21 child, within one year of the child's birth or adoption. Robinson asserted that because the
22 emotional connection is as beneficial to the parent's well-being as well as it is to the child's

¹⁵ Aldin was the Town's Human Resources Coordinator.

¹⁶ WH-380 is the federal form that the employee's health care provider completes when the employee is requesting FMLA leave.

¹⁷ Trahon testified that KH had not used the term bonding time when he requested FMLA leave, while Ann Hess Braga (Braga), the Town's Human Resources Director, testified that KH had requested bonding time. I credit Robinson's and Trahon's testimonies on this point because their testimonies are consistent with Noble's November 14, 2019 email that only references KH's FMLA leave request for birth of a child.

1 well-being, the parent should be allowed to use accrued sick leave during the FMLA leave.
2 Subsequently on November 14, 2019, Robinson sent a letter to Chief Sullivan stating in
3 pertinent part:

4 Thank you for taking the time to talk with me today regarding FMLA use for
5 [KH]. I appreciate the offer to further clarify the issue regarding designation
6 letters from HR explaining application of time to be used when requested
7 time has been approved. I believe that a meeting with yourself and a
8 representative from HR [Human Resources] is in order to further clarify
9 FMLA designations with regards to accrued time off. It is the union[']s
10 position that at no time should a member go without a paycheck when said
11 member has accrued time available to maintain pay.
12

13 It has been the long-held belief that the federal designation of FMLA is to
14 serve as a base and should not infringe upon collectively bargained for
15 benefits that surpass benefits of FMLA. I bring this up as illustration that
16 human resources has continually stripped firefighters of benefits maintained
17 not only by MGL chapter 41 sec. 111F but also Art. 15 sec. C of our
18 collective bargaining agreement, by running injured on duty firefighters
19 concurrent with FMLA. It is our belief that not allowing a firefighter to utilize
20 accrued time to care for a family member and having said firefighter go
21 without pay, creates an undue stress that runs contrary to the intent of
22 FMLA.
23

24 It is my concern that human resources is misapplying FMLA both in practice
25 and in spirit by stripping injured on duty firefighters of the ability to accrue
26 benefits as if they were working, which is guaranteed by law, as well as
27 in spirit by not allowing a firefighter to maintain a paycheck when they have
28 accrued benefit time to cover requested time off. Given the fact that [KH]
29 will very shortly be going without a paycheck and may have issues
30 maintaining his portion of health insurance due to lack of pay, the eboard
31 feels that that a meeting should take place sooner than later.

32 On November 15, 2019, Aldin sent an email to Braga stating in pertinent part:

33 Chief Sullivan called regarding KH. KH doesn't have any available accruals
34 left to cover his FMLA/birth of a child leave. ...
35

36 Chief Sullivan called me today to discuss. He wanted to know the process
37 of how the HR office approves FMLA. He asked if a part of the HR office's
38 FMLA approval process included verifying how much and what type of leave
39 they had available to cover FMLA. I explained to him, no, we check if they
40 qualify for FMLA under FMLA eligibility requirements, if they do, we approve
41 it and send this approval to the Dept. Head and CC the payroll clerks. We

1 cc the payroll clerks (we cc Kevin Mascoll (Mascoll) for Police and Fire)¹⁸
 2 for the reason they are responsible for monitoring how they are paid while
 3 on FMLA (a part of what they do is assure they do not surpass available
 4 sick and family in the calendar year). He said that the union is arguing that
 5 bonding with a child is allowed in this situation, and they are questioning
 6 why bonding with a child is not mentioned in the policy (I'm assuming the
 7 FMLA policy??) I agreed that the FMLA law allows bonding with a child,
 8 and we were not denying this. In fact, we approved the full 12 weeks for
 9 KH but reminded the Chief FMLA is an unpaid leave according to the law.
 10 He understood this. Additionally, the union is asserting that he should have
 11 3 additional sick in family [SIF] days for the bonding of a child. He also
 12 mentioned that KH had already used his 3 sick and family days for this year,
 13 but KH stated that I told him via telephone that he did have 3 sick and family
 14 to use. The Chief seems to understand the FMLA leave law, and the
 15 language for family sick leave in the contract and was trying to reason with
 16 the union. But I think he was looking to speak with you/Leslea regarding
 17 how to proceed.

18 On November 21, 2019, Chief Sullivan sent an email regarding KH to Deputy Chief

19 Robert Nelson (Nelson) of Suppression Group 2¹⁹ that stated in pertinent part:

20 Chief-I have been in contact with [KH]²⁰ as well as Local 950²¹ regarding
 21 KH's FMLA request and have explained what benefit time options he might
 22 have under this request. Unfortunately, KH has used all of his Sick in
 23 Family time for 2019 and is not eligible to use any sick time for this FMLA
 24 request.

¹⁸ Mascoll is the business manager of the Town's Public Safety Office, which processes the Police and Fire Departments' payrolls. The Fire Department uses a computer program called Firehouse that tracks employee attendance, which is recorded by the deputy chiefs on each shift, and that designates the leave codes for employees who are absent from work. The Public Safety Office produces daily printouts of employee attendance and leave usage, and each week the Public Safety Office converts the data in Firehouse to the Town's Munis payroll system.

¹⁹ Nelson would submit the daily attendance for Suppression Group 2, which was KH's work group.

²⁰ Chief Sullivan spoke with KH directly to confirm KH's decision to remain on FMLA leave without pay.

²¹ Trahon confirmed at hearing that as of November 21, 2019, he was aware that KH was on unpaid FMLA leave, although KH had not contacted him directly.

1 KH has opted to continue his FMLA without pay for the foreseeable time,
2 therefore his status should be FMLA-NP for Suppression until his return or
3 until otherwise notified. KH was advised as per the FLMA paperwork to
4 contact payroll for any deductions that would need to continue.

5
6 We have made the necessary change for today's attendance and have
7 changed 11/17/19 to reflect straight sick time which he was on since
8 11/5/19.

9
10 If you have any questions, feel free to call.

11 On November 22, 2019, Chief Sullivan sent an email to Robinson stating in pertinent part:

12 Justin-thank you for the email-I apologize for the delayed response, I was
13 looking for another email and found this in the "junk" email folder. I know
14 we've covered these issues already so I set up a meeting with HR and we
15 can try and hammer out these issues.

16 December 12, 2019 Meeting

17 On December 12, 2019, the Town and the Union met to discuss a number of issues
18 concerning FMLA leave and injured on duty (IOD) leave. The meeting lasted
19 approximately two hours. Chief Sullivan,²² Braga, and Keith Flaherty (Flaherty), the Fire
20 Department's Chief of Operations,²³ attended on behalf of the Town. Four executive

²² Chief Sullivan has been the Town's Fire Chief and Emergency Management Director since 2018.

²³ Flaherty did not testify at the hearing.

1 board members Trahon,²⁴ Robinson,²⁵ Patricia Cripe (Cripe),²⁶ the vice-president, and
2 James Clinton (Clinton), the secretary-treasurer,²⁷ attended on behalf of the Union.²⁸
3 Regarding the issues related to the FMLA, Chief Sullivan characterized those issues at
4 hearing as problems with forms and process issues. The Union expressed concerns that
5 the FMLA leave request form that was contained in the 2018-2021 CBA was an older
6 form and no longer in use. The Town agreed to update its website to make sure that the
7 current forms were available to its unit members.²⁹ The Union also challenged the Town's
8 requirement that a unit member who had requested FMLA leave for a serious illness must
9 be evaluated for light duty first before the FMLA leave could be approved. The Town
10 agreed that in the future that the paperwork would be changed. The Union challenged
11 the Town's refusal to grant FMLA leave to a unit member who had been on IOD leave
12 because the City contended that the unit member had not worked the necessary 1250

²⁴ Trahon has worked for the Town's Fire Department since 1984 and has been a fire lieutenant since 2008. He was elected Union president in 2013 and previously was the vice-president for several years as well as secretary treasurer for an unidentified period of time.

²⁵ Robinson has worked for the Town's Fire Department since 1997 and has been a fire lieutenant since 2007. He has been the Union's pension and welfare officer for five plus years.

²⁶ Cripe has been a firefighter for twenty-one years and was elected vice-president in November 2019. The December 12, 2019 meeting was the first meeting with the Town that she attended as vice-president.

²⁷ Clinton has been a firefighter for twenty years and has been secretary-treasurer for ten years. He also was Union vice-president about seventeen years ago.

²⁸ Braga had been the Town's Director of Human Resources since Summer of 2019.

²⁹ Trahon's contemporaneous notes indicate that the Town referenced conducting an FMLA policy review with all unions.

1 hours to be eligible for FMLA leave.³⁰ The parties reached no consensus on that issue.
2 The Union also asserted that the three SIF days referenced in Article VI of the 2018-2021
3 CBA and the three and one-half days of sick leave that unit members could use on behalf
4 of a sick family member pursuant to the Town's FMLA Policy were separate and that unit
5 members with family members with serious illnesses should be able to use the days
6 consecutively. The Town informed the Union that it was not willing to discuss that
7 proposal.

8 Robinson then asked about bonding time under the Town's FMLA policy, which
9 Robinson believed did not address bonding time. He inquired whether the Town would
10 permit unit members who requested bonding time to use all of their accrued leave,
11 vacation, personal and sick leave, because bonding time benefited the parent as well as
12 the child. Chief Sullivan and Braga each responded³¹ by describing their experiences in

³⁰ The Town's handling of the FMLA requests of unit members, who previously had been on IOD leave, has been the subject of a longstanding dispute between the parties. The Town previously had designated FMLA leave as running concurrently with IOD leave. On September 20, 2018, the Union and the Town met to discuss the Town's claim that a unit member was ineligible for FMLA leave to care for a family member with a serious medical condition because he had exhausted his FMLA leave while on IOD leave and that he had not been on active duty for the necessary 1250 hours because he had been on IOD leave.

³¹ The Union contends in its post-hearing brief that the discussion of bonding time occurred after Chief Sullivan and Braga's described how employees in Boston and Worcester were allowed to use their accumulated sick time for FMLA leave to care for other family members but before Robinson asked about bonding time and that Braga conflated the order of the discussion in her testimony. However, Robinson, Trahon, and Chief Sullivan also testified that Robinson initially asked about bonding time before Chief Sullivan and Braga described their prior experiences. Thus, I have concluded that Braga correctly described that Robinson asked about bonding time first.

1 jobs they previously held in Worcester³² and Boston respectively, where employees could
2 use their accumulated sick leave even if it was for the care of another family member.³³
3 Braga then stated, “if you’ve got the time take it.”³⁴ Robinson then asked again, for
4 bonding time, are you allowed to use your own time including sick leave, and Braga
5 responded affirmatively. Braga also noted that “we need to bring the Town into the
6 twenty-first century.” The Union and the Town also discussed the manner in which unit
7 members could use accumulated sick leave for bonding time. Bonding time leave would
8 be consecutive. Also, if a unit member took bonding time for less than twelve weeks in a
9 year, they could not take additional bonding time leave that year.³⁵ The Town and the

³² Worcester’s practice only applied to the firefighters’ bargaining unit and employees were required to use their accumulated vacation and personal leave before using their accumulated sick leave.

³³ At hearing, Chief Sullivan characterized Worcester’s practice as a misreading of the FMLA statute. However, the record does not indicate whether he made that statement at the December 12, 2019 meeting.

³⁴ Cripe, in part, testified that Braga said if you have got the time, you should be able to take it. However, Trahon’s contemporaneous notes of the December 12, 2019 meeting described the statement as printed above, and Trahon credibly testified that the statement attributed to Braga was a direct quote. Further, Chief Sullivan corroborated at hearing that Braga made the statement as Trahon described it. Thus, I credit Trahon’s description of the statement.

³⁵ Chief Sullivan testified that at some point in the December 12, 2019 meeting, Braga stated that any changes to the FMLA regarding the use of accrued time would need to be bargained with all of the unions and not unilaterally with the fire union. However, when Braga was asked at hearing about her alleged statement, she responded that Human Resources had talked internally about looking at the FMLA policy with all the unions. When asked specifically whether negotiations with other unions about the use of sick leave for bonding time had been discussed on December 12, 2019, she replied that she could not recall that conversation. Because that statement would have lent support to the Town’s argument that there had been no agreement with the Union, it is likely that Braga would have recalled it. Also, none of the witnesses’ contemporaneous notes, i.e., Robinson, Trahon or Braga, reference that subject. Thus, I decline to credit that portion of the Fire Chief’s testimony.

1 Union did not execute any agreement about bonding time or any other issue at the end
2 of the meeting.³⁶ After the meeting, Trahon and Robinson conferred with each other and
3 both reached the same conclusion that the Town had agreed to allow unit members to
4 use their accumulated leave, including sick leave, for up to twelve weeks of FMLA leave
5 for bonding time after the birth or adoption of a child.

6 The Union previously had scheduled a meeting for the membership on the evening
7 of December 12, 2019. Approximately, a dozen unit members were present at the
8 December 12, 2019 meeting when the Union announced that a new benefit was now
9 available to members. Unit members could now request FMLA leave for bonding time
10 and use their accumulated sick leave to receive pay during that FMLA leave. The Town
11 encouraged unit members to inform other unit members, who had not attended the
12 December 12, 2019 meeting, about the new benefit.

13 Other December 2019 Events

14 On December 19, 2019, Robinson sent an email to Chief Sullivan regarding FMLA
15 processes and procedures that stated in pertinent part:

16 Again I offer my thanks to you chief for your help in clarifying the evolving
17 FMLA process today. While the eboard still has an objection to the specific
18 type of form sent to our member[s] regarding a return to work evaluation
19 preceding his FMLA use, we understand that for now the office is trying to
20 dot the "i's" and cross the "y's" as best it can pending filling the position Ann
21 spoke of during our last meeting. We look forward to further discussions
22 with both HR and yourself regarding FMLA benefits and procedure
23 development.

24 MPL
25

³⁶ Both Chief Sullivan and Braga claimed at hearing that they had not committed to allowing the Union's unit members to use their accumulated sick leave for bonding time.

1 On January 30, 2020, unit member MPL submitted a request for FMLA leave for
2 twelve weeks beginning on February 3, 2020. MPL checked the box stating that his leave
3 request was for the birth of a child and to care for such a child. Prior to submitting his
4 request, MPL contacted the Union's executive board to inquire about how he could
5 request bonding time. The Union informed him to request bonding time in the email that
6 he submitted with his FMLA leave request and ask to use his sick leave.³⁷ Thereafter,
7 the Town approved his FMLA request and notified Chief Sullivan of the approval. On or
8 about February 7 2020, MPL used twelve weeks of accrued sick time³⁸ as paid bonding
9 time.³⁹ At hearing, Chief Sullivan and Braga contended that a clerical error resulted in
10 MPL being allowed to use his accrued sick leave for bonding time. Chief Sullivan
11 acknowledged that every four days that he would have received printouts showing that

³⁷ Although the Town entered MPL's FMLA leave request form into evidence, neither party submitted into the record a copy of the email that the Union suggested that MPL submit with his FMLA request form.

³⁸ Chief Sullivan and Braga contended at hearing that a clerical error was the reason that MPL was permitted to use twelve weeks of sick leave for bonding time. However, the record before me does not show that the Town notified MPL that it had made a mistake when it allowed him to use his accrued leave for bonding time or that it notified the Union about the error prior to the July 31, 2020 meeting, which is discussed below. The facts before me also do not show that the Town required MPL to substitute other forms of paid leave for the sick leave that he had used, although Braga commented at the hearing that the Town considered whether to take action in response to the alleged error.

³⁹ Trahon referred at hearing to another unit member TJ, whom the Town allegedly allowed to use accumulated sick leave for bonding time for a period of time before the Town ceased to allow him to do so. However, because the hearing record contains no specific details about TJ's alleged use of sick leave for bonding time, including the date of his FMLA leave request, the date of the Town's approval, the length of his FMLA leave, and the number of sick days that the Town allegedly permitted him to use while he while he was on FMLA leave, I decline to make any findings concerning TJ's alleged use of his accumulated sick leave for bonding time.

1 MPL was on FMLA leave and that he was using accrued sick leave,⁴⁰ but indicated
2 because of the start of the pandemic that he did not thoroughly review the printouts.

3 May 2020 Email Exchange Regarding Town's Erroneous Payment of three SIF days to
4 KH

5 On May 18, 2020 at 1:59 p.m., Aldin sent an email to Chief Sullivan and Flaherty
6 that stated in pertinent part:

7 Hello,

8

9 I am trying to determine how much FMLA time KH has let left within the current
10 FMLA period. I know he used some end of last year for the birth of his child.

11

12 I am confused when looking at the payroll. It looks like he possibly used 5 weeks
13 of FMLA time, but his pay was coded incorrectly under sick time (code 311/370
14 are for employee sick time) for pay dates 11/14, 11/21 and 11/27. Should this
15 have been coded under 373 (FMLA family sick time, not to exceed 3 days
16 according to his contract)?

17

18 Please confirm as soon as possible as we need to issue FMLA for his injury this
19 week.

20 Nine minutes later, Chief Sullivan responded to Adin by stating: "No-KH had depleted his
21 373 allotment [SIF leave] for 2019 in May of that year." Aldin then sent an email
22 commenting:

23 Yes, that's what I thought. Will you please find out why those pay codes
24 were used?" Was he ill (even if he was ill code 373, FMLA sick self,
25 shouldn't have been used as he was never approved for FMLA for his own
26 illness), or was this a payroll error? If it was a payroll error, this has to be
27 corrected.

28

29 It matters right now because I need to know how much FMLA time he used
30 for the birth of his child.

31 Soon after, Chief Sullivan replied via email stating:

32

33 KH is listed as the following in our records (Firehouse)

⁴⁰ Chief Sullivan would receive printouts showing MPL's leave status and sick leave usage every four days because the printouts coincided with MPL's shift rotation.

1
2 10/28 & 11/1-Vacation
3
4 11/5, 11/9, 11/13, 11/17-Sick Leave
5
6 11/21, 11/25, & 11/29-FMLA-NP (no pay)
7
8 KH chose to go on a “no pay” status as the FMLA request he originally
9 applied for was unsubstantiated.
10
11 If Kevin [Mascoll] needs to have Phil change any of the pay codes to match-
12 we can do that.

13 On May 20, 2020, Aldin sent an email to Chief Sullivan stating in pertinent part:

14 Hi Chief,
15
16 Yes a correction needs to be made. KH requested FMLA beginning 10/30
17 up to 6 weeks. Any sick time used after that day up to 12/9, the pay period
18 he returned to work, should be corrected. It can be taken from A-day or
19 vacation time, which he now has available. ...

20 PD

21 On or about June 2020, PD, who was a member of Trahon’s fire company,
22 approached Trahon because PD’s wife was expecting a baby and his wife’s physician
23 had requested that PD quarantine before the baby’s birth to avoid possible COVID-19
24 exposure. Trahon recommended that PD use his sick leave for the pre-birth quarantine,
25 but the Town subsequently denied PD’s request. Trahon also suggested that PD apply
26 for bonding leave under the Town’s FLMA policy in order that PD could use his
27 accumulated sick leave to receive pay while on FMLA leave after the birth of his child.
28 On or about June 24, 2020, the Town denied PD permission to use twelve weeks of his
29 accrued sick time for bonding time and only allowed PD to use his accrued vacation and
30 personal leave. Trahon became aware that the Town had denied PD’s request to use his

1 accrued leave for bonding time on or about August 17, 2020, when PD contacted the
2 Union as referenced below in Trahon's August 17, 2020 letter.

3 July 31, 2020 Meeting

4 On July 31, 2020, the Union and the Town met to discuss issues pertaining to the
5 Family Friendly Coronavirus Relief Act (FFCRA) and the Town's FMLA policy.⁴¹ Trahon,
6 Robinson, Cripe, and Clinton represented the Union,⁴² while Braga represented the
7 Town. The meeting lasted approximately two hours. Near the end of the meeting, Braga
8 brought up the issue of bonding time. She noted that Noble had informed her that the
9 Town's prior practice was to allow male unit members to only use three SIF days as well
10 as their vacation and personal leave for bonding time and not to allow them to use their
11 other accumulated sick time. Braga also commented that the Town would go back to that
12 practice. Robinson protested that bonding time was for the parent to make a connection
13 with the child. He also asked whether the Town was breaking the agreement that it made
14 with the Union on December 12, 2019. Braga did not answer.⁴³

15 Mid-August 2020

16
17 On or about August 17, 2020, the Town notified PD that he had used all of his
18 accrued vacation and personal leave and that any further bonding time leave on or after

⁴¹ The July 31, 2020 meeting lasted approximately two hours.

⁴² Robinson testified at hearing that Union president Khan was present at the July 31, 2020 meeting. However, Robinson's contemporaneous notes and Trahon's testimony indicate that Trahon was at the meeting as Union president. Thus, I find that Trahon was there as Union president.

⁴³ Braga stated at hearing that she did not recall the specific facts of the July 31, 2020 meeting other than it involved the Town's FMLA policy.

1 September 4, 2020, would be unpaid. On August 17, 2020, Trahon sent a letter to Braga
2 stating in pertinent part:

3 I am writing to protest the Town's recent decision to place PD on unpaid
4 leave after September 4, 2020, as he informed the Local this morning in a
5 telephone conversation, for the remainder of his FMLA leave, even though
6 he has adequate sick leave to cover the rest of his leave. PD was required
7 to use vacation and personal leave but has not been permitted to use sick
8 leave. This decision violates the Town's FMLA policy as agreed at a
9 December 12, 2019 impact bargaining session, where the policy was
10 outlined by you. According to that policy, Union members would be
11 permitted to use vacation, personal and sick time for time with a newborn or
12 a newly adopted child, including bonding time. As you know, the FMLA
13 provides only a floor and employers (after appropriate negotiation with
14 affected unions) may agree to provide more benefits than provided by the
15 statutory minimum.

16
17 Consistent with the policy as agreed in the December 2019 meeting, the
18 Town permitted MPL to use 12 weeks of his sick time to spend with his
19 newborn child in February, March, and April of 2020.⁴⁴ The Town's position
20 with regard to PD violates that agreement. The Town cannot unilaterally
21 change its FMLA policy to prohibit the use of sick leave for care of a newborn.
22 If the Town seeks to change the policy, it must first provide the Union with
23 notice and an opportunity to bargain over the proposed changes. Failure to
24 do so would be grounds for an unfair labor practice charge.

25
26 Please revert PD's personal and vacation time back to use sick leave and
27 continue sick leave usage for the remainder of his FMLA leave, consistent
28 with the Town's policy and past practice or the Union will take whatever
29 action is appropriate to enforce its rights and the rights of its members.

30 The Union received no response from the Town. On August 26, 2020, the Union filed the
31 prohibited practice charge in the present case. As the result of the Town's August 17,

⁴⁴ The Town in its post-hearing brief contends that Braga was unaware that MPL had used his accrued sick leave for bonding time until she received Trahon's August 17, 2020 letter. However, a review of Braga's testimony instead shows that she stated that she was unaware in February, March, and April 2020 that MPL had used his accrued sick leave. She does not affirmatively state that she was unaware of MPL's use of sick leave until she received Trahon's letter.

1 2020 notification to PD, he returned to work after taking approximately nine weeks of
2 bonding time.

3 Guidelines for Workplace Injury and Illness

4 In July 2021, the Union and the Town held a meeting regarding another case filed
5 at the DLR.⁴⁵ The Town provided a document to the Union entitled “Guidelines for
6 Workplace Injury and Illness”, (Guidelines) which the Town was providing to newly hired
7 employees.⁴⁶ Section IX of the Guidelines, which is entitled Family and Medical Leave
8 Act (FMLA), states:

9 The Family and Medical Leave Act (FMLA) was enacted by Congress in 1993
10 and requires covered employers to provide eligible employees with unpaid,
11 job-protected, job restoration, and continuation of medical and dental benefits
12 for specified family and medical reasons. Eligible employees may take up to
13 12 work weeks of leave in a 12-month period for one or more of the following
14 reasons:

- 15 • The birth of a child or placement of a child for adoption or foster care;
- 16
- 17 • To bond with a child (leave must be taken within 1 year of the child’s
18 birth or placement);⁴⁷
- 19
- 20 • To care for the employee’s spouse, child, or parent who has a
21 qualifying serious health condition;
- 22

⁴⁵ The record contains no other information about that case or the reason why the Town provided this document to the Union at that time.

⁴⁶ The cover page of the Guidelines has the name of Ryan Kasala (Kasala), the Town’s Disability Leave Specialist. However, Noble testified that the Guidelines have been around for many years before the Town employed Kasala, who began his employment with the Town in April or May of 2020, and that the Town’s former occupational health division of the Human Resources Department had written the guidelines. Robinson and Trahon indicated that they had not seen the Guidelines before July 2021.

⁴⁷ Noble stated at hearing that the phrase to “bond with a child” was included in the Guidelines for employees who were unfamiliar with FMLA leave. She asserted that bonding time was a subset of birth of a child under the Town’s FMLA policy.

- 1 • For the employee's own qualifying serious health condition that
2 makes the employee unable to perform the employee's job;
3
- 4 • For qualifying exigencies related to the foreign deployment of a
5 military member who is the employee's spouse, child or parent.
6

7 An eligible employee who is a covered servicemember's spouse, child,
8 parent, or next of kin may also take up to 26 weeks of FMLA leave in a
9 single 12-month period to care for the servicemember with a serious injury
10 or illness.

11
12 An eligible employee is limited to a **combined** [Emphasis in the original]
13 total of 26 work weeks of leave for **any** qualifying reason during the single
14 12-month period.

15
16 An employee does not need to use leave in one block of time. When it is
17 medically necessary or otherwise permitted, employees may take leave
18 intermittently or on a reduced schedule.

19
20 Employees may choose or the Town of Brookline may require use of
21 accrued paid leave while taking FLMA leave.⁴⁸ The employee must:

- 22 • Have worked for the Town of Brookline for at least 12 months; and
23
- 24 • Have at least 1,250 hours of service in the 12 months before taking
25 leave.
26

27
28 Generally, employees must give 30-days advance notice of the need for FMLA
29 leave. If it is not possible to give 30-days' notice, an employee must notify the
30 Town of Brookline as soon as possible and generally follow the Town of Brookline's
31 usual procedures.

32 Opinion

33 The issues before me are whether the Town: a) unilaterally changed a revised
34 FMLA Policy that allowed unit members to use accrued sick leave for bonding time; and

⁴⁸ When asked on cross-examination whether this portion of the Guidelines meant that unit members could use their accumulated sick leave for birth of a child, Noble answered negatively and indicated that the guidelines were only instructive and that the collective bargaining agreement between the Town and the Union would supersede the Guidelines.

1 b) repudiated the December 12, 2019 oral agreement by failing to adhere to the revised
2 FMLA Policy.

3 Unilateral Change

4 A public employer violates Section 10(a)(5) of the Law when it implements a
5 change in a mandatory subject of bargaining without first providing the employees'
6 exclusive collective bargaining representative with prior notice and an opportunity to
7 bargain to resolution or impasse. School Committee of Newton v. Labor Relations
8 Commission, 338 Mass. 557 (1983). The duty to bargain extends to both conditions of
9 employment that are established through a past practice as well as conditions of
10 employment that are established through a collectively bargained agreement. Town of
11 Burlington, 35 MLC 18, 25, MUP-04-4157 (June 30, 2008), aff'd sub nom. Town of
12 Burlington v. Commonwealth Employment Relations Board, 85 Mass. App. Ct. 1120
13 (2014); Commonwealth of Massachusetts, 20 MLC 1545, 1552, SUP-3460 (May 13,
14 1994).

15 To establish a unilateral change violation, the charging party must show that: 1)
16 the employer altered an existing practice or instituted a new one; 2) the change affected
17 a mandatory subject of bargaining; and 3) the change was established without prior notice
18 and an opportunity to bargain. City of Boston, 20 MLC 1603, 1607, MUP-7976 (May 20,
19 1994).

20 Here, it is undisputed that prior to December 12, 2019, male unit members could
21 not use their accrued sick leave while on leave for the birth or adoption of a child pursuant
22 to the Town's FMLA policy but could only use their accrued vacation and personal leave.
23 The Union contends that at the December 12, 2019, meeting, the parties orally agreed to

1 revise the Town's FMLA policy. The revised FMLA policy permitted male unit members
2 to use their accrued sick leave as well as their vacation and personal leave for bonding
3 time after the birth or adoption of a child. Conversely, the Town asserts that its
4 representatives never agreed at the December 12, 2019 meeting to revise the FMLA
5 policy and instead were only expressing their personal beliefs in support of the Union's
6 proposal.

7 As I threshold issue, I must first determine whether the Union and the Town
8 reached an oral agreement on December 12, 2019, to revise the FMLA policy to allow
9 male unit members to use accrued sick leave for bonding time after the birth or adoption
10 of a child. In determining whether an employer and a union reached an agreement, the
11 Commonwealth Employment Relations Board (CERB) considers whether there has been
12 a meeting of the minds on the actual terms of the agreement. Town of Ipswich, 11 MLC
13 1403, 1410 (1985), aff'd sub nom. Town of Ipswich v. Labor Relations Commission, 21
14 Mass. App. Ct. 1113 (1986). To achieve a meeting of the minds, the parties must manifest
15 an assent to the terms of the agreement. Suffolk County Sheriff's Department, 30 MLC 1,
16 6, MUP-2630 (August 19, 2003). The CERB has long recognized that a meeting of the
17 minds can occur without anything having been reduced to writing or having been signed
18 by either party. Chief Justice for Administration and Management of the Trial Court, 35
19 MLC 171, 173, SUP-04-5150 (January 30, 2009) (an oral agreement between a public
20 employer and a union is effective and enforceable under the Law if the agreement is
21 otherwise valid) (citing Service Employees International Union, Local 509 v. Labor
22 Relations Commission, 410 Mass. 141, 145 (1991)).

1 Upon review of the record, I conclude that the parties' statements at the December
2 12, 2019 meeting, and their subsequent conduct demonstrate a meeting of the minds to
3 revise the Town's FMLA policy to allow all unit members to use their accrued sick leave
4 for bonding time after the birth or adoption of a child. The four Union representatives,
5 who attended the meeting, Trahon, Robinson, Cripe, and Clinton, credibly testified about
6 what took place at the December 12, 2019 meeting. Trahon and Robinson also provided
7 contemporaneous notes in support of their testimony. The Union provided evidence of
8 the specific words that Braga used at the meeting that caused them to believe that Braga
9 had agreed to revise the FMLA policy to allow unit members to use accrued sick leave
10 for bonding time. See City of Boston/Boston Public Library, 26 MLC 215, 217, MUP-2081
11 (May 31, 2000) (declining to find an oral agreement where union did not introduce into
12 evidence the words the library president had used that caused union to believe that he
13 agreed to a smoking lounge). When Robinson asked whether the Town would permit unit
14 members who requested bonding time to use all of their accrued leave, including sick
15 leave, Chief Sullivan and Braga described their prior experiences in Worcester and
16 Brookline respectively, where employees could use their accumulated sick leave to care
17 for another family member. Braga then stated, "if you've got the time take it". Robinson
18 then asked again, for bonding time, are you allowed to use your own time including sick
19 leave, and Braga responded affirmatively. Braga also noted that "we need to bring the
20 Town into the twenty-first century." Compare Town of Hanson, 39 MLC 158, 159, MUP-
21 11-1064 (December 13, 2012) (declining to find an oral agreement because town
22 manager's statements were not specific enough to show that he had assented despite
23 union's belief to the contrary).

1 Although Chief Sullivan and Braga testified at the hearing that they had not
2 committed to revising the FMLA policy to allow the use of sick leave for bonding time, the
3 statements that Braga made at the December 12, 2019 meeting contravene that
4 assertion. Also, while the Town contended in its post-hearing brief that Braga was only
5 expressing her personal beliefs about employee use of sick leave for bonding time, her
6 statements do not reflect that qualification. Finally, the Town has not challenged the
7 Union assertion's that Chief Sullivan and Braga, as the head of the Fire Department and
8 the Director of Human Resources respectively, were agents of the Town and were
9 authorized to speak on behalf of the Town.

10 Later, in the evening of December 12, 2019, the Union held a regularly scheduled
11 Union meeting. At that meeting, Trahon informed the unit members in attendance about
12 the oral agreement with the Town. He also encouraged them to notify other unit
13 members, who were not present, that they could request to use accrued sick leave for
14 bonding time after the birth of a child under the revised FMLA policy. Thereafter, unit
15 member MPL became aware of the oral agreement and contacted the Union about how
16 to request to use his accrued sick leave for bonding time after the birth of his child. On
17 January 30, 2020, approximately forty-eight days after the December 12, 2019 meeting,
18 MPL submitted a request to take FMLA leave for twelve weeks beginning on February 3,
19 2020.

20 The manner in which the Town handled MPL's request is consistent with the
21 parties reaching a meeting of the minds that unit members could use accrued sick leave
22 for bonding time. The Town permitted MPL to use his accrued sick leave for all twelve
23 weeks of bonding time. Compare Suffolk County Sheriff's Department, 30 MLC at 6

1 (promoting unit members on a temporary basis consistent with the parties' oral
2 agreement) and City of Everett, 26 MLC 25, 28, MUP-1452 (July 22, 1999) (fire chief's
3 delivering a verbal warning consistent with the parties' oral agreement). The Town, at
4 hearing, characterized MPL's use of sick leave for bonding time as a clerical error.
5 However, this claim is inconsistent with the Department's stated practice since 2019 of
6 carefully monitoring unit members' use of sick leave and SIF leave. Further, Chief
7 Sullivan acknowledged that the Town's Human Resources Department notified him that
8 MPL was on FMLA leave, and that he would have received printouts every four days
9 showing that MPL was using sick leave during this FMLA leave. While the Chief indicated
10 he did not thoroughly review the printouts because of the start of the pandemic, MPL's
11 FMLA leave began in early February 2020, prior to the pandemic shutdowns. Further,
12 the Town never notified MPL that it erroneously allowed him to use sick leave for bonding
13 time or required him to substitute other forms of paid leave for the twelve weeks that he
14 had used sick leave. Also, the Town never notified the Union of the purported error until
15 the July 31, 2020 meeting.

16 Although the Town acknowledges that an oral agreement may be legally binding,
17 the Town posits that because its FMLA policy was in writing, any agreed upon changes
18 to that policy would have been in writing. Thus, the parties had no oral agreement.
19 However, the fact that the revised FMLA policy was not reduced to writing is consistent
20 with the manner in which the Town handled two other parts of its FMLA policy, the FMLA
21 policy that was in place prior to December 12, 2019. The Town previously permitted male
22 unit members to use their three SIF days after the birth or adoption of a child, even though
23 the FMLA policy contained no reference to the use of SIF days for this purpose. Also,

1 the Town previously designated unit members who were on IOD leave as being
2 concurrently on FMLA leave, even though the FMLA policy did not refer to this concurrent
3 designation.

4 Additionally, the Town cites to events involving KH as support for its argument that
5 MPL's use of sick leave for bonding time was a mistake. In May 2020, the Town required
6 KH to substitute four days of vacation or personal leave for sick leave that it mistakenly
7 paid him while on FMLA leave for the birth of a child in November 2019. However, the
8 facts of KH's FMLA leave for the birth of his child are distinguishable from MPL's FMLA
9 leave for bonding time. KH started his five weeks of FMLA leave in late October 2019
10 and concluded his leave in late November 2019 before the Town and the Union reached
11 the December 12, 2019 oral agreement. The parties did not even reference KH at the
12 December 12, 2019 meeting. Second, after KH went out on his FMLA leave, Chief
13 Sullivan contacted KH to let him know that much of the leave would be unpaid because
14 KH had very little accrued vacation or personal leave and previously had used his SIF
15 days. KH then agreed to go on unpaid leave.

16 Having determined that the parties reached an oral agreement on December 12,
17 2019 to revise the FMLA policy to allow male unit members to use their accrued sick leave
18 for bonding time after the birth or adoption of a child, I turn to consider whether the Town
19 subsequently changed that policy. In June 2020, at the urging of Trahon, PD requested
20 FMLA leave for bonding time after the birth of his child and to use his accrued sick leave
21 to cover that bonding time. The Town allowed PD's request to take FMLA leave for the
22 birth of his child but denied his request to use his accrued sick leave for bonding time
23 while he was on FMLA leave. At a July 31, 2020 meeting with the Union, Braga confirmed

1 that the Town had reverted to the FMLA policy that existed prior to December 12, 2019,
2 specifically that male unit members could not use accrued sick leave for bonding time
3 after the birth or adoption of a child. On August 17, 2020, the Town informed PD that as
4 of September 4, 2020, he would need to go without pay for the remainder of his FMLA
5 because his vacation and personal leave would be depleted. As the result of the Town's
6 August 17, 2020 notification to PD, PD returned to work after taking approximately nine
7 weeks of bonding time. The Town's decision not to allow PD to use his accrued sick
8 leave for bonding time, coupled with its confirmation that it was reverting back to the FLMA
9 policy that was in place prior to December 12, 2019, constitutes a unilateral change. Paid
10 leave, including the criteria for granting it, is a mandatory subject of bargaining, which
11 was impacted by the Town's unilateral change. Town of Lexington, 37 MLC 115, 120,
12 MUP-08-5313 (December 9, 2010). Finally, it is uncontroverted that the Town did not
13 provide the Union with notice and an opportunity to bargain to resolution or impasse
14 before implementing the change.

15 Accordingly, the Town has violated Section 10(a)(5) and, derivatively, Section
16 10(a)(1) of the Law by changing its revised FMLA policy, which permitted unit members
17 to use accrued sick leave for bonding time, without providing the Union with prior notice
18 and an opportunity to bargain to resolution or impasse.

19 Repudiation

20 Section 6 of the Law requires public employers and unions that represent their
21 employees to meet at reasonable times to negotiate in good faith regarding wages, hours,
22 standards of productivity and performance, and any other terms and conditions of
23 employment. The statutory obligation to bargain in good faith includes the duty to comply

1 with the terms of a collectively bargained agreement. Commonwealth of Massachusetts,
2 26 MLC 165, 168, SUP-3972 (March 13, 2000) (citing City of Quincy, 17 MLC 1603, MUP-
3 6710 (March 20, 1991); Massachusetts Board of Regents of Higher Education, 10 MLC
4 1196, SUP-2673 (September 8, 1983)). A public employer's deliberate refusal to abide
5 by an unambiguous collectively bargained agreement constitutes a repudiation of that
6 agreement in violation of the Law. Town of Falmouth, 20 MLC 1555, 1559, MUP-8114
7 (May 16, 1994), aff'd sub nom. Town of Falmouth v. Labor Relations Commission, 42
8 Mass. App. Ct. 1113 (1997).

9 I have determined above that the Town and the Union reached an oral agreement
10 on December 12, 2019, to revise the Town's FMLA policy by permitting male unit
11 members to use their accrued sick leave for bonding time after the birth or adoption of a
12 child. The Town repudiated that agreement in June 2020 by ceasing to apply the revised
13 FMLA policy when it denied PD's request to use his accrued sick leave for bonding time
14 after the birth of his child. Therefore, the Town has violated Section 10(a)(5) and,
15 derivatively Section 10(a)(1) of the Law by repudiating the December 12, 2019 oral
16 agreement.

17 Conclusion

18 Based on the record and for the reasons stated above, I conclude that the Town
19 violated Section 10(a)(5) of the Law in the manner alleged in both counts of the Complaint.

20 Order

21 WHEREFORE, based on the foregoing, IT IS HEREBY ORDERED that the

22 Employer shall:

23 1. Cease and desist from:
24

- 1 a. Unilaterally changing the revised FMLA policy by no longer permitting
2 male unit members to use their accrued sick leave for bonding time
3 after the birth or adoption of a child.
4
- 5 b. Failing to bargain in good faith by repudiating the December 12, 2019
6 oral agreement with the Union.
7
- 8 c. In any like or related manner interfering with, restraining or coercing
9 employees in the exercise of their rights guaranteed under the Law.
10
- 11 2. Take the following affirmative action:
12
- 13 a. Restore the revised FMLA policy permitting male unit members to
14 use their accrued sick leave for bonding time after the birth or
15 adoption of a child.
- 16 b. Bargain in good faith to resolution or impasse with the Union about
17 changing the revised FMLA policy that permitted male unit members
18 to use their accrued sick leave for bonding time after the birth or
19 adoption of a child.
20
- 21 c. Credit PD with the vacation and personal leave that he had used
22 because he was denied the use of his accrued sick leave for FMLA
23 leave for bonding time and deduct sick leave for those dates.
24
- 25 d. Make whole any other affected unit members who requested, on or
26 after June 24, 2020, to use their accrued sick leave for bonding time
27 after the birth or adoption of a child but were not permitted to do so
28 and instead used other leave or went unpaid.
29
- 30 e. Immediately abide by the December 12, 2019 oral agreement.
31
- 32 f. Immediately post signed copies of the attached Notice to Employees
33 in all conspicuous places where members of the Union's bargaining
34 unit usually congregate, or where notices are usually posted,
35 including electronically, if the Town customarily communicates with
36 these unit members via intranet or email and display for a period of
37 thirty (30) days thereafter, signed copies of the attached Notice to
38 Employees.

- 1 g. Notify the DLR in writing of the steps taken to comply with this
2 decision within ten (10) days of receipt of this decision.

SO ORDERED.

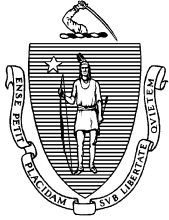
COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS



MARGARET M. SULLIVAN,
HEARING OFFICER

APPEAL RIGHTS

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



NOTICE TO EMPLOYEES

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

A hearing officer of the Massachusetts Department of Labor Relations (DLR) has held in Case No. MUP-20-8167 that the Town of Brookline (Town) violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E (the Law) when it unilaterally changed its revised FMLA policy to permit unit members to use their accrued sick leave for bonding time after the birth or adoption of child and repudiated the December 12, 2019 oral agreement to revise the FMLA policy to permit the use of accrued sick leave for bonding time.

Section 2 of M.G.L. Chapter 150E gives public employees the following rights:

to engage in self-organization to form, join or assist any union; to bargain collectively through representatives of their own choosing; to act together for the purpose of collective bargaining or other mutual aid or protection; and to refrain from all of the above.

WE WILL NOT unilaterally change the revised FMLA policy by refusing to permit unit members to use their accrued sick leave for up to twelve weeks of bonding time after the birth or adoption of a child.

WE WILL NOT fail to bargain in good faith by repudiating the December 12, 2019 oral agreement with the Union.

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

WE WILL take the following affirmative action that will effectuate the purposes of the Law:

- Restore the revised FMLA policy permitting unit members to use their accrued sick leave for twelve weeks of bonding time after the birth or adoption of a child.
- Bargain in good faith to resolution or impasse with the Union about changing the revised FMLA policy that permitted unit members to use their accrued sick leave after the birth or adoption of a child.
- Credit unit member "PD" with the vacation and personal leave that he had used because he was denied the use of accrued sick leave for FMLA leave for bonding time and deduct sick leave for those dates.
- Make whole any other affected unit members who requested, on or after June 24, 2020, to use accrued sick leave for the birth or adoption of a child but were not permitted to do so and instead used other leave or went unpaid.
- Immediately abide by the December 12, 2019 oral agreement.

Town of Brookline

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 of Labor Relations, 19 Staniford Street, 1st Floor, Boston, MA 02114 (Telephone: (617) 626-7132).