This decision was vacated on appeal per July 23, 2010 Supreme Court order in *Appeal of Pittsfield,* NH Supreme Court Case No. 2009-635.

STATE OF NEW HAMPSHIRE
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

PITTSFIELD TOWN EMPLOYEES, AFT-NH, LOCAL #6214

COMPLAINANT

v.

TOWN OF PITTSFIELD

RESPONDENT

CASE NO. G-0060-4

DECISION NO. 2009-067

APPEARANCES

Representing the Petitioner: Emmanuel Krasner, Esq., Krasner Law Office
Farmington, NH

Representing the Respondent: Thomas J. Flygare, Esq., Flygare, Schwarz & Closson, PLLC
Exeter, NH

BACKGROUND

Certain municipal employees in the Town of Pittsfield (the "Town") are represented by AFT-NH, Local #6214, AFT, AFL-CIO (the "Union") which filed an unfair labor practice complaint against the Town on October 29, 2008. The Union claims that the Town, by requiring an employee to exhaust his vacation time prior to utilizing leave under the federal Family

Medical Leave Act ("FMLA"), changed an existing practice governing working conditions which violates Articles 1 and 26 of the parties' Collective Bargaining Agreement ("CBA"). The Union contends that, as a result, the Town violated RSA 273-A:5, I (h). The Union requests that the PELRB: (1) order the Town to cease and desist from requiring its employees to utilize vacation time before they take paid sick leave and unpaid leave under the FMLA; (2) order the Town to restore any vacation leave used under its order to the employee; and (3) because of procedural particularities that came to light in the Union's contemplation of seeking relief on behalf of its members under the present Collective Bargaining Agreement between the parties rule that the parties may name the PELRB as the final arbiter of grievance disputes and that such disputes may be submitted to the PELRB for resolution without being captioned as an unfair labor practice complaint.

On December 4, 2008 the Town filed its answer denying the Union's charge of unfair labor practice. The Town also claims that the Union's complaint is untimely. The Town requests that the PELRB: 1) dismiss the charge because (a) the Union failed to comply with the filing deadline required by Step 5 of the grievance procedure, (b) no violation has been alleged because no employee has been adversely affected by the Town's interpretation of the FMLA policy, and (c) Step 5 of the grievance procedure is unlawful; and 2) award the Town its fees and expenses in defending the charge.

The PELRB conducted a pre-hearing conference on December 30, 2008 at which time counsel for both parties indicated that meaningful settlement negotiations were transpiring that may affect the schedule set for the subsequent evidentiary hearing. In compliance with an interim order regarding continuances, the parties did request and were granted a continuance of the

original January 21, 2009 evidentiary hearing until March 17, 2009. On the day of the evidentiary hearing both parties were present and represented by counsel. Each party was given the opportunity to present evidence through exhibits, offers of proof and testimony and had the opportunity to cross-examine witnesses. The parties stipulated to several facts prior to the hearing and these facts appear below as Findings of Fact numbers 1 through 10. At the conclusion of the evidence counsel requested, and were granted, leave to submit post-hearing memoranda of law. The record was left open until April 1, 2009 to allow such submissions.

Following the closure of the record, the hearing officer considered all of the evidence affording each piece of evidence its appropriate weight and considered the credibility of all witnesses and found as follows:

FINDINGS OF FACT

1. That the Town of Pittsfield is an Employer as defined under the New Hampshire Public Employee Labor Relations Act.
2. That the Pittsfield Town Employees are the collective bargaining representative of certain of the Employees of the Employer.
3. That the parties have entered into a Collective Bargaining Agreement effective January 1, 2008 and remaining in force until December 31, 2010.
4. That the Collective Bargaining Agreement has a provision concerning Sick Leave which is set forth in Article 20 of the agreement.

5. That the Collective Bargaining Agreement has a provision concerning use of Family Medical Leave Act, Unpaid Leave, which is set forth in Article 26.
6. That Article 26 Subsection 5 refers to the use of Paid Leave and Vacation Time in conjunction with leave taken under the Family Medical Leave Act.
7. That a dispute has arisen between the parties involving the use of Sick Leave and Vacation Leave in conjunction with the Family Medical Leave Act for an employee known as James "Jim" Gerard.
8. That the parties' Collective Bargaining Agreement has a grievance procedure which is set forth in Article 11 of the agreement.
9. That the final step in the written agreement provides that if the Union is not satisfied with the Employer's last resolution, it may "...submit the grievance in writing to the Public Employee Labor Relations Board (PELRB) within seven (7) calendar days if (sic) the receipt of the written decision or within seven (7) calendar days of when the decision of the Board of Selectmen should have been received."
10. That in the instant case the Public Employee Labor Relations Board rejected the submission of the grievance and the Union subsequently filed an Unfair Labor Practice Complaint.
11. The Union filed its unfair labor practice complaint on October 29, 2009 signed by its then president, Richard C. Walter, in which it requested relief in the form of a cease and desist order from the PELRB to effectively prohibit the Town from requiring employees to use paid sick leave prior to using leave provided under the terms of the Family Medical Leave Act (FMLA).

12. The respondent Town initially requested an extension of time to respond until December 6, 2008.

13. Counsel for both parties discussed the instant matter at least during the period January 5, 2009, the date of a consented motion to continue the initially scheduled adjudicative hearing, and the eventual conduct of the rescheduled evidentiary hearing on March 17, 2009.

14. Article 26 Section 2 of the CBA makes specific reference in its "Statement of Policy" that "effective August 5, 1993, the Town will grant job protection paid and/or unpaid family and medical leave to eligible male and female Employees for up to 12 weeks per 12 month period..."

15. Article 26 - Family Medical Leave Section 2, Statement of Policy, of the CBA states in relevant part that the Town will grant leave in accordance with the Family Medical Leave Act "for any one or more of the following reasons: A. The birth of a child and in order to care for such child...or B. In order to care for an immediate family member...if such immediate family member has a serious health condition..."

16. Article 26 Family Medical Leave Section 5, Substitution of Paid Vacation and Sick Leave, of the CBA provides as follows:

> A. An Employee will be required to substitute all unused paid vacation and all unused paid sick leave first for family/medical leave taken for a reason prior to any unpaid leave being taken.

17. No priority or sequential order of type of leave use is expressly established by Article 26, Section 5.

18. Article 11 Section 2 Fifth Step, "Grievance Procedure", provides as follows:

> If the Union is dissatisfied with the decision received under the Fourth Step of this grievance procedure, the Union may submit the grievance in writing to the Public Employee Labor Relations Board (PELRB) within seven (7) calendar days if [sic] the receipt of the written decision or within seven (7) calendar days of when the decision of the Board of Selectmen should have been received. The Public Employee Labor Relations Board (PELRB) shall respond in writing within thirty (30) calendar days and such decision shall be final and binding on both the Town and the Union.

19. James Girard is a full time Emergency Medical Technician employed within the Town's fire department since 2003 who, for all times relevant to these proceedings, was married.

20. In anticipation of his wife giving birth in or about August of 2008, Mr. Girard complied with the Town's instructions by completing and submitting a request for "Family/Medical Leave" on May 14, 2008 in advance of the anticipated need. See Town Exhibit #3.

21. Mr. Girard chose selection "A" on the Town's form from among the several permitted reasons. That selection provided that his reason was for the "birth of a child and in order to care for such child…"

22. On the Town's request form he also explained that the date the leave was to begin as: "The kids are due at the end of August. Dr's say they will go early so any time in August.

23. The Board of Selectmen approved Mr. Girard's request on May 20, 2008.

24. On July 22, 2008 approximately three weeks before the twins were born the Board of Selectmen, without negotiation with the Union, implemented what was characterized as a "clarification" relating to the application of Family/Medical Leave.

25. Prior to Mr. Girard's absence, two other employees within his department were allowed to apply paid sick leave to their use of Family/Medical Leave. Several others within other departments of the Town also were permitted to apply unused paid sick leave to their use of Family/Medical Leave.

26. Of an estimated 7 Town employees who preceded Mr. Girard in the use of Family/Medical Leave since 2005, 4 were women who were pregnant for a portion of their time absent from work but allowed to use unused sick leave during their leave. At least one was for a father to use his unused sick leave as his child was premature; no record of another request could be found by the Town.

27. Of all 8 Town employees, including Mr. Girard, who used Family/Medical Leave since 2005 only Mr. Girard was forced by the Town to apply his unused paid vacation instead of unused paid sick leave. (See Union Exhibit #2)

28. Mr. Girard's wife delivered the twins prematurely early and due to the premature birth weight they were required to remain in the hospital for seven days; prior to delivery the mother had been hospitalized for hypertension and diabetes and her total stay in the hospital was eight weeks. The consequence was that the children were not feeding and the mother could not care for them.

29. Mr. Girard filed his time sheets during his absence indicating that he was using his paid sick leave. However the fire chief modified these submissions preventing the application of paid sick leave to his time away from work for "Family/Medical Leave."

30. On or about September 2, 2008 Linda Small signed a letter addressed to Mr. Girard wherein she made several references to the federal Family Medical Leave Act and

various provisions of collective bargaining agreements to which the Town was a party. She characterized action taken by the Board of Selectmen on July 22, 2008 as a "clarification of the current contract" and which the union characterized as constituting a "new policy." (See Town Exhibit #4)

31. Ms. Small's letter also states, "The Board believes that the policy on FMLA and the substitution of sick leave within the contract(s) is being misinterpreted."

32. At an unknown future date, Mr. Girard was requested by someone to produce a medical letter confirming the situation and which indicated that his wife had delivered premature twin boys by c-section on 8/14/08." (See Union Exhibit #1)

DECISION SUMMARY

This matter comes to the PELRB as a statutory violation of RSA 273-5:I (h) alleging a breach of the parties' agreement. Since at least 2005, the Town had allowed employees on approved Family medical Leave to apply unused sick leave during their absence. However, after receiving an employee request on May 15, 2008 and approving that leave on May 20, 2008 which ultimately allowed him to attend to his family, including his wife who had delivered premature twins by caesarean, the Town modified its policy. In doing so it compelled the employee to first apply unused vacation time while absent on Family Medical leave in August and September of 2008 where in all previous Family Medical Leave situations undertaken by others, the application first of unused sick leave was permitted. Such action by the Town constitutes a unilateral change in the parties' past practice that amounts to a breach of their agreement. The parties are to specifically address related provisions in their next collective bargaining agreement

through mutually acceptable terms achieved through negotiation and the Town is to restore or reimburse the employee for all vacation leave that he was to caused to use and, in return, an equivalent amount of sick leave is to be deducted from the employee's paid unused sick leave.

JURISDICTION

The Public Employee Labor Relations Act (RSA 273-A) provides that the PELRB has primary jurisdiction to adjudicate claims and to order relief it deems necessary (RSA-273-A:6 I, VI) between the duly elected "exclusive representative" of a certified bargaining unit comprised of public employees, as that designation is applied in RSA 273-A:10, and a "public employer" as defined in RSA273-A:1,I. In this case, the CBA does not contain a workable grievance procedure through the final step and otherwise attempts to supersede RSA 273-A in dictating timeliness of both a hearing and decision. The Union has complained that actions of the Town constitute violations of RSA 273-A:5,I (h) which prohibits either party from breaching the provisions of their Collective Bargaining Agreement (CBA). Here the violation is based upon the alleged actions of the Town in compelling an employee to apply unused paid vacation time prior to applying unused paid sick leave when utilizing family medical leave where such a policy had not been followed in previous family medical leave instances involving other Town employees.

DISCUSSION

The Town and the Union are proper parties to a collective bargaining agreement (CBA) that contains a grievance procedure which states that the last step in the grievance process is to file a grievance with the PELRB. The PELRB is an administrative body established by statute

wherein no express authority is granted to undertake arbitration of grievances. For that reason, the PELRB refused to accept, for hearing, the underlying dispute between the parties in this matter when presented by the Union as a grievance. The PELRB does have express authority to consider complaints alleging breaches of the parties' contract and accepts this instant complaint based upon the allegation that the contract between the parties has been statutorily breached as, notwithstanding any previous decisions of the PELRB, the parties' CBA does not contain a workable grievance procedure. While some parties to CBA's have agreed in their grievance procedure that an aggrieved party may submit an unfair labor practice complaint to the PELRB as a last step in their procedure and agree to be bound by that decision, the instant parties language does not provide for that. As the Union's complaint was filed on October 29, 2009 it is deemed timely filed and Mr. Girard's claim can be considered as the Town's alleged actions in compelling him to apply unused sick leave occurred within the prior six months pursuant to RSA 273-A:6, VI.

At hearing the parties agreed that the issue in dispute is the same as was the basis for the earlier attempt to file a grievance with the PELRB. While the Town agreed to go forward on the so-called "merits" of the complaint, it objected to being compelled to proceed to defend against the specific relief requested in the instant complaint, specifically "That the Town restore any vacation leave used under its order to the employee." The complaint was filed on October 29, 2008. The Town was granted an extension until December 6, 2008 (PELRB Decision No. 2008-241) to review the complaint and formulate its answer. A pre-hearing conference was conducted between the parties on December 30, 2008 at which time "the parties indicated that they are engaged in meaningful discussions which may lead to a settlement..." and where one of the issues framed by the hearing officer from the pleadings and discussion of the parties was

"Whether the Town committed an unfair labor practice in violation of RSA 273-A:5, I (h) by requiring an employee to use up his vacation time prior to utilizing leave under the FMLA."(PELRB Decision No. 2008-266). Further, the Town assented to the Union's request for a continuance of the adjudicatory hearing which was granted and the rescheduled adjudicatory hearing was conducted on March 17, 2009, approximately five months after the original complaint and providing reasonable time for both parties to be prepared to address issues of merit or requested relief. Further, on March 10, 2009 a stipulation of facts statement was submitted as evidence of the parties having conferred on matters at issue in this case. The Town's objection is denied as due notice of the relief requested is present and there is insufficient evidence of prejudice to the Town.

Mr. Girard was employed by the Town in 2003 and was a full time Emergency Medical Technician when he learned that his wife was pregnant with twins. His uncontroverted testimony that he was required by the Town to request "Family/Medical Leave" in advance led to him completing a Town form entitled "Request for Family/Medical Leave". (Town Exhibit #3) He submitted his completed request and submitted it on May 14, 2008 indicating that he was requesting leave for "[t]he birth of a child and in order to care for such child..." He further expressed using the Town's form that he did not have a day certain upon which the leave was to begin because, "[t]he kids are due at the end of August Dr's say they will go early so any time in August. He expected his leave to be of 3-4 weeks in duration." His request was approved by the Board of Selectmen on May 20, 2008. At that time, he did not know that the birthing situation would turn serious with his wife's condition causing her to be hospitalized for an extended period of time due to hypertension and diabetes or that the twins would have to be delivered prematurely by caesarian section. He also did not know that the twins would not feed properly or

that his wife would not be immediately able to care for the children following their birth on August 14, 2008.(Union Exhibit #1) Simply put, with life's circumstances laid out for him in that manner, he cared for everyone in his new household who needed it.

To consider whether or not the actions of a party to a collective bargaining agreement constitutes a breach of the terms and conditions mutually agreed to by those parties the PELRB looks to determine the terms and conditions of work to which the parties have agreed. The determination of what constitutes the terms and conditions of work calls for an examination, in the context of organized labor relations, of the terms of the parties' collective bargaining agreement and the recognition of other terms and conditions of work that may have arisen through the existence of "past practice". The application and substantial effect of "past practice" on the working relationship between two parties to an agreement is unique to labor law. It is generally defined as "a practice which is not subject to change except by mutual agreement." Roberts, Harold S., Roberts' Dictionary of Industrial Relations, p.573 (4th ed. 1994). The two aspects of a past practice's existence that have been traditionally considered are its length of duration and the depth to which it is ingrained in the employment. The key purposes of the "past practice" doctrine relevant to this matter are "to provide the basis of rules governing matters not included in the written contract ...or to support allegations that clear language of the written contract has been amended by mutual action or agreement." Id. Thus, we must look to whether the "practice" of Town employees applying unused sick leave during their use of Family/Medical Leave qualifies as past practice.

In this specific case, the parties' collective bargaining agreement, effective January 1, 2008, Article 26, Section 2 states in relevant part:

> [E]ffective August 5, 1993, the Town will grant job protection paid and/or unpaid family and medical leave to eligible male and female Employees for up to 12 weeks per 12 month period…

and further is Section 2, that the Town will grant leave in accordance with the Family Medical Leave Act

> [F]or any one or more of the following reasons: A. The birth of a child and in order to care for such child…or B. In order to care for an immediate family member…if such immediate family member has a serious health condition…

A fair reading of these two provisions evidences that the Town agreed more than fifteen years ago that it would grant family and medical leave to the employees covered by CBA's for the reasons enumerated and that such leave could be either paid or unpaid. It is uncontroverted that EMT Girard is an employee eligible for such leave and that he exercised his rights under the parties' CBA when he requested leave and was such leave was approved on May 20, 2008.

The same article later provides in Section 5 that,

> A. An Employee will be required to substitute all unused paid vacation and all unused paid sick leave first for family/medical leave taken for a reason prior to any unpaid leave being taken.

A fair reading of this provision evidences that the parties intended that before an employee could take unpaid leave to address his or her own illness or that of a family member, the employee had to "substitute" all of their unused paid vacation and sick leave. However it does not specifically assign any rank order or priority between the two types of paid leave that are to be used. It is reasonable to believe that both types could be applied and if it were important to the parties they

could have more clearly delineated that one type of paid leave was to be exhausted and then a second type of paid leave was to be exhausted and then unpaid leave entitlement would begin or some other language of condition precedent or of sequence. The parties did not provide for this, but there is evidence of what the parties' practice was.

The Town has allowed, at least since 2005 (Union Exhibit #2), other employees to apply unused paid sick leave against Family/Medical Leave which those employees had requested and whose requests were approved. Mr. Girard was aware of the Town's actions on some of these previous occasions and consulted with, Captain Jennifer Tedcastle, who is his day to day supervisor. Capt. Tedcastle testified that when requested by EMT Girard she told him to fill out his leave slip indicating that he was first applying unused paid sick leave. Captain Tedcastle had, herself, done the same a year earlier when she took Family/Medical Leave while in the Town's employ. (Union Exhibit #2) Reference to the listings on Union Exhibit #2 reveal that of the eight employees who were approved for Family Medical Leave since 2005, EMT Girard is the only employee who was compelled to first apply his unused paid vacation time during his leave due to his paternity of the premature twins and to act as primary care parent until his wife could care properly for the twins. Her ability to provide immediate care was delayed due to her overall health condition and the surgery.

The Town asserted at hearing that for purposes of the use of sick leave, pregnancy is considered a sickness. The Town made this assertion as support for its practice of allowing employees to first apply unused paid sick leave to the leave requested under Family/Medical Leave provisions. However, the assertion cannot offset the Town's practice of continuing to allow its female employees to apply their unused paid sick leave beyond the birth of their child when they were no longer pregnant and therefore under the Town's interpretation no longer

eligible for sick leave. Nor does it counter the evidence that male Town employees previous to EMT Girard were also allowed to apply unused paid sick leave for leave requested under Family/Medical Leave. (See Union Exhibit #2 and Town Exhibit #5, p.2).

EMT Girard did not learn until approximately three months after the approval of his Family/Medical Leave request that he would not be allowed to apply unused paid sick leave to his absence when the Fire Chief changed the time card he submitted from sick to vacation time. This occurred approximately at the time of the twins birth and certainly too late for him to have any reasonable opportunity to otherwise address this Town action by undertaking any extraordinary steps to care for his family. It is worthwhile noting again that prior to action undertaken by the Board of Selectmen on or about July 22, 2008 which Ms. Small characterized as a "clarification" of policy the practice of allowing the application of unused sick leave by the Town at least since 2005 under the circumstances presented by EMT Girard's leave was mutually recognized by both parties to the CBA.

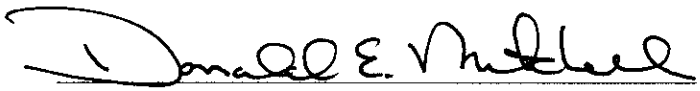
Under these facts, I find that the manner by which the Town compelled EMT Girard to first apply unused vacation leave during his absence represented a unilateral change in policy implementation previously granted to all requesting employees until Mr. Girard's attempt to avail himself of the ability to apply unused paid sick leave. I find that Ms. Small's letter is not a clarification of past practice, but is an attempt to change without negotiation what had become past practice between the parties previously exercised under the language in Article 26, Section 5 of their CBA which becomes ambiguous in this and similar circumstances. Nor do I find the parties' past practice diminished or less unequivocal by the Town's reliance on language in

Article 20, Section 2 which itself, if it were critical to this decision, would appear subject to more than one reasonable reading.

Having found that the Town's actions constitute a unilateral departure from past practice between the parties I find it in statutory breach of the parties' agreement. As a result of this decision, (1) the Town is to cease and desist from compelling employees to first exhaust unpaid vacation leave before they can apply unused sick leave while absent on Family Medical Leave; (2) the Town is to restore the number of vacation days utilized by EMT Girard for any Family Medical Leave he was caused to expend during the period August 14, 2008 through September 11, 2008, or at the Town's sole election to reimburse EMT Girard the money equivalent to the vacation days utilized for this purpose and in return, the Town shall be entitled to deduct an equivalent number of days of the employee's unused sick leave; (3) during negotiations for their next collective bargaining agreement, the parties are to negotiate clear and express language embodying their mutual position on the specific manner by which unused paid leave of any kind may be applied during Family Medical Leave; (4) the parties are to likewise amend their Grievance Procedure to have as the last step in that procedure that either party, if remaining aggrieved, after the last internal step can submit a complaint of improper labor practice to the PELRB, provide for binding arbitration to a third party or some other workable conclusion to the grievance process; and (5) the Town is to post a copy of this decision in at least one location to which the general public has access and historically has relied upon to view public notices of Town boards and commissions as well as other significant documents and in at least two locations calculated to inform its employees of the contents of this decision. All such notices are to be maintained in place for a period of thirty (30) days.

So ordered.

April 7, 2009.



Donald E. Mitchell, Esq.
Presiding Officer

Distribution:
Emmanuel Krasner, Esq.
Thomas Flygare, Esq.