COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 60	:	
v.	:	Case No. PF-C-21-24-E
CITY OF SCRANTON	:	

PROPOSED DECISION AND ORDER

On April 6, 2021, the International Association of Fire Fighters, Local 60 (Union or Local 60), filed with the Pennsylvania Labor Relations Board (Board) a charge of unfair labor practices, under the Pennsylvania Labor Relations Act (PLRA or Act), as read with Act 111, alleging that the City of Scranton (City) violated Section 6(1)(a) and (e) of the PLRA. The Union specifically alleged that the City engaged in direct dealing with Firefighter Caroline Janczak and placed her in a modified duty assignment, allegedly a mandatory subject of bargaining, to accommodate her pregnancy, when the City and the Union had been bargaining a light-duty policy.

On June 3, 2021, the Secretary of the Board issued a letter to the Union stating that no complaint would be issued on its charge. The Secretary of the Board further stated that the creation of a light-duty policy constitutes a managerial prerogative, and thus the Union failed to state a cause of action under Section 6(1)(e) of the PLRA. The Secretary of the Board also concluded that the specification of charges failed to allege sufficient facts to support an independent violation of Section 6(1)(a).

On June 22, 2021, the Union filed exceptions to the Board Secretary's administrative dismissal, and requested a 30-day extension to file a supporting brief, which the Secretary of the Board granted. On July 22, 2021, the Union filed its brief in support of exceptions. On August 17, 2021, the Board issued an Order Directing Remand to Secretary for Further Proceedings. On September 14, 2021, the Secretary of the Board issued a Complaint and Notice of Hearing, designating a hearing date of January 12, 2022, in Harrisburg. I continued the hearing twice, at the request of the City and without objection from the Union, and rescheduled the hearing for June 23, 2022. During the hearing on that date, which I conducted via Microsoft Teams Video by agreement of the parties, both parties in interest were afforded a full and fair opportunity to present testimonial and documentary evidence and to cross-examine witnesses. On October 12, 2022, the Union filed its post-hearing brief. On November 21, 2022, the City filed its post-hearing brief.

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

FINDINGS OF FACT

1. The City is a public employer and political subdivision pursuant to Act 111 and the PLRA. (Union Exhibits 1 & 6)

2. The Union is a labor organization pursuant to Act 111 and the PLRA. (N.T. 16-17; Union Exhibits 1 & 6)

3. Jim Sable is the President of Local 60 and a 34-year veteran firefighter with the City of Scranton Fire Department. He has also been the Union Treasurer, Grievance Chair, and night-shift Steward. (N.T. 16-17)

4. Caroline Janczak is a firefighter employed by the City's Fire Department. In February 2018, Firefighter Janczak became pregnant. At this time, Firefighter Janczak was the only female firefighter employed by the City. At this time, Firefighter Janczak approached the Union seeking a light-duty policy so she could continue working without exposure to toxins during firefighting. (N.T. 17-18)

5. The City and the Union are parties to a collective bargaining agreement packet (CBA) which constitutes the collective bargaining agreement from January 1, 1996 through December 31, 2002 plus subsequent arbitration awards and memoranda of understanding. (N.T. 19; Union Exhibit 1)

6. Article XXIV of the CBA provides that the parties would meet to develop and bargain a light-duty policy and states the following:

> 1. Subsequent to the effective date of this Agreement, the parties shall meet in an effort to reach agreement on whether and under what circumstances the bargaining unit shall be subject to a "light duty" policy for both work-related and non-work related injuries and illnesses.
>
> 2. If the parties are unable to agree on these issues within sixty (60) days of the effective date of this Memorandum, either party may submit the issues to arbitration in accordance with the procedure set forth herein.

(N.T. 20; Union Exhibit 1, Article XXIV)

7. As part of the CBA packet, the parties entered into a Memorandum of Understanding in 2015 (MOU). In Article 11(C) of the MOU, the parties again agreed to bargain over a light-duty policy and, in the absence of any such agreement, either party could file for arbitration. (N.T. 20-21, 103-104; Union Exhibit 4)

8. Jessica Eskra, Esquire was the City's Human Resources Director in the fall of 2015. At that time, Ms. Eskra became aware of a contract provision requiring the City and Local 60 to negotiate a light-duty policy. She began taking initiatives to revive negotiations with the Union over light duty as a way to get employes back to work. The City hired an expert to analyze where light duty might be beneficial to both the City and its employes. Ms. Eskra later transferred to the City Solicitor's Office. (N.T. 86-89, 91, 103-104)

9. As of January 2018, the parties had not agreed to a light-duty policy, and neither party had submitted the matter to arbitration. In February 2018, aware of Firefighter Janczak's pregnancy, the Union decided to propose a light-duty policy that would include provisions for pregnancy. (N.T. 21)

10. In February 2018, the Union met in Council Chambers with the City officials including then Human Resources Director Danielle Canady, then Chief DeSarno and City Solicitor, Jessica Eskra. (N.T. 21-23)

11. On February 21, 2018, the Union submitted a proposal to the City regarding a modified or light-duty policy. Paragraph L of this proposal provides that "[u]pon proof of an employee being pregnant they shall immediately be provided alternative duties that do not expose the mother or child to the hazards associated with suppression activities without loss of pay or benefits." (N.T. 23-24; Union Exhibit 2)

12. On March 29, 2018, the City's attorney responded to the Union's attorney. The City's response proposed certain changes to the Union's proposals. One of the City's proposed changes stated: 'We do not believe that there is any need for Paragraph L. Pregnancy is recognized as a disability and should be handled like any other disability." (N.T. 24-25; Union Exhibit 3)

13. Following this exchange of proposals, the parties unsuccessfully continued to bargain a light-duty policy. In the meantime, Firefighter Janczak had to use up her accrued sick leave, instead of working modified duty and in lieu of working around toxins. The other firefighters donated their sick leave time to her when she ran out of time. Firefighter Janczak was out for approximately 8 or 9 months, i.e., her entire pregnancy. (N.T. 25-28)

14. Ms. Eskra credibly testified that every time the Union proposed changes, the City attempted to accommodate the Union's requests, by revising the job analyses. (N.T. 92-93)

15. On September 28, 2018, the Union's attorney emailed a proposed MOU, containing a light-duty policy, to the City's labor attorney. (N.T. 93-94; City Exhibit 3)

16. In October 2018, the parties reached a tentative agreement on a light-duty policy. Paragraph 5 of the tentative agreement provided, in relevant part, that: "The City will restore to all employees who donated leave to Caroline Janczak all hours donated, whether used or not. In addition, the donation of such leave, whether used or not, will not be held against employees for sick day bonus eligibility. In addition, Janczak will have her sick leave bank credited for all time used." The October 2018 tentative agreement was not ratified by the Union members. (N.T. 28-30, 96; Union Exhibit 4; City Exhibit 4)

17. Ms. Eskra credibly recalled several meetings and conversations between City and Union officials, since 2016, during which the City proposed several drafts of job analyses for light-duty assignments. The membership voted down the tentative agreement reached in October, 2018. After the Union members refused to ratify the MOU, the City continued to engage in discussions with the Union over light duty until the matter proceeded to arbitration. (N.T. 52, 90, 99-97; Union Exhibit 6)

18. Ms. Eskra credibly disagreed with the Union's allegation, in Paragraph 7 of its specification of charges, that the City ignored the Union's request to bargain a light-duty policy. Ms. Eskra credibly emphasized that the City attempted several times to create a meaningful light-duty policy for all bargaining unit members. The City did not want a light-duty policy for only pregnant women and the light-duty policy that the City attempted to negotiate with the Union since 2015 would have covered Firefighter Janczak's pregnancy and others' pregnancies in the future. (N.T. 99-100)

19. John J. Judge IV is the current Superintendent of the City's Fire Department and the City's Emergency Management Coordinator. Superintendent Judge is also called Chief Judge.[1] Prior to July 2020, Chief Judge was the Administrative Captain. In July 2020, Chief Judge became the interim Chief, and he was appointed to the position of Chief in December 2020. (N.T. 31, 111-112)

20. When Chief Judge became the Superintendent of the Fire Department, there were 17 firefighters off on long-term sick or injured leave, and he immediately began taking steps to create a light-duty policy based on CBA language dating back to 1996, requiring both parties to negotiate such a policy. (N.TR. 112-113)

21. The Fire Department has had many members off for long periods of time on Heart and Lung benefits. One member was receiving Heart and Lung benefits for 5 years; some other firefighters received those benefits for over 1 year and a couple of firefighters received those benefits for over 2 years. The intent of having a light-duty policy was to obtain value-added work from injured or sick employes who would otherwise receive Heart and Lung benefits. In early 2021, shortly after his permanent appointment, Chief Judge again initiated the process of negotiating a light-duty policy with the Union. (N.T. 113-115, 131)

22. On March 12, 2021, Chief Judge approached Union President Sable to again address the light-duty policy. On March 24th or 25th, 2021, Firefighter Janczak met with the Chief in his office. She informed him that she was pregnant for the second time and that she did not want to use her sick time, she wanted to work in the office, and that she did not want to work in the fire station. At that same meeting, Chief Judge informed Firefighter Janczak that he would "look to get her into the office." The Chief knew that Firefighter Janczak was scheduled to be off until April 3, 2021, approximately 9 days away. On March 30, 2021, the Chief spoke to President Sable about Firefighter Janczak. A few days later, Chief Judge met with President Sable. (N.T. 33, 35-36, 96-98, 132-134; Union Exhibit 5)

23. Chief Judge approached Solicitor Eskra regarding Firefighter Janczak's request. The City believed that it was important to take swift action to keep Firefighter Janczak and her unborn child safe and protected in the absence of a light-duty policy. Firefighter Janczak provided medical documentation from her physician specific to her pregnancy. The City treated Firefighter Janczak's request as an ADA accommodation. (N.T. 96-98)

24. During the conversation between Chief Judge and President Sable on March 30, 2021, President Sable did not mention needing an MOU regarding Firefighter Janczak's light-duty assignment. Indeed, President Sable said that he did not have a problem with it. In an email the following day, on March 31, 2021, President Sable stated that an MOU would be appropriate. The City and the Union never reached an agreement on an MOU. (N.T. 132-133, 135-136)

[1] The City's Fire Department also has duty chiefs who are subordinate to Chief (i.e., Superintendent) Judge.

25. During this time, the Chief consulted with City Solicitor Eskra and labor counsel. On March 31, 2021, the Chief notified Firefighter Janczak's duty chief of her new office assignment. In response to Firefighter Janczak's accommodation request, Chief Judge gave her an opportunity to remain in the workforce in an administrative capacity within the Fire Department. Chief Judge did not consult or negotiate with the Union the terms of Firefighter Janczak's new job duties. At some point, Chief Judge told President Sable that he would rather have a grievance from the Union than a lawsuit from Firefighter Janczak. (N.T. 41, 98, 106, 134-136)

26. Firefighter Janczak worked in her light-duty assignment for approximately 8 or 9 months beginning April 3, 2021. The parties did not reach agreement on a light-duty policy. (N.T. 41-43, 73; Union Exhibit 6)

27. On April 23, 2021, The Chief wrote a letter to President Sable discussing the appointment of Firefighter Janczak to a light-duty assignment and attached a Memorandum of Understanding for the Union to sign. (City Exhibit 1)

28. In the letter, Chief Judge stated, in pertinent part, as follows:

> At my request, the City's counsel prepared the attached MOU (short and to the point, as you requested) relating to modified duties for Fire Fighter Janczak. In light of our prior discussions, I hope and expect it will be acceptable to the Union; if so, please execute it on behalf of the Union and return it to me. If not, please advise me as well. As you know, the City has already assigned Fire Fighter Janczak to perform the modified duties described in the MOU in compliance with the law.
>
> In a larger sense, this and our other recent discussions highlight the importance and need to have, once and for all, modified duties for members of our Fire Department when necessary. As my March 12th [2021] letter noted, the City has been trying to resolve this issue with the Union for more than 20 years, but the Union continues to refuse to agree to any light duty job descriptions. We are filing today for arbitration, as the contract provides, but I'm still hopeful the Union will engage in meaningful discussions to enact a light duty policy. If so, please let me know or your attorney can let Bob Ufberg know.
>
> Finally, please know that Fire Fighter Janczak's request for modified duty due to her medical condition is legally protected. . . .

(City Exhibit 1)

29. The attached proposed MOU provides, in relevant part, as follows:

> 2. AGREEMENT. The parties hereby agree that the City will provide Fire Fighter Janczak with the modified duties described in the job description attached as Exhibit A until the earlier of (a) a modification of Fire Fighter Janczak's work restrictions by her physician which makes such modified duties inappropriate, (b) Fire Fighter Janczak commences maternity leave; or (c) the City no longer has modified duty work for Fire Fighter Janczak to perform.

(City Exhibit 1)

30. The attached job description reveals that the duties of Firefighter Janczak's light duty assignment are firefighter duties and responsibilities necessary to the function of the Fire Department. The job description provides, in pertinent part, as follows:

- The employee would be working in an office environment. . . .
- In the office, the employee may be required to perform administrative functions at the discretion of the Fire Chief or his designee. The employee may be required to schedule fire prevention and fire drill activities. . . .
- The employee may be required to perform errands for the fire department such as providing a ride to a member of the office staff and performing light deliveries to other fire departments within the Scranton area. . . .
- The employee may be required to assist in providing the community with fire prevention education which would consist of speaking with groups in the community such as nursing homes, long term care facilities, and schools. . . . The employee may be required to provide a short talk and education materials to the groups. At times, another fire fighter may accompany the employee, and may bring the fire truck to show to school students as part of the educational process.
- The employee may be required to complete field work as it relates to the pre-planning of buildings within a 26 mile radius of the City of Scranton limits. . . . The activity of pre-planning a building is completed in order to document and describe the layout of a commercial building. This documentation assists firefighters in knowing the contents and layout of a building when fighting a fire. . . . Information documented on forms would include location of sprinkler systems, a hatch on the roof of a building, doors, hazards, and other such information. The employee may be required to walk from room to room documenting this information, sketching, measuring, taking photos, walking through doors and walking from room to room in order to document information. . . .

(City Exhibit 1)

31. President Sable did not sign the Chief's proposed MOU because it only addressed Firefighter Janczak and not all eligible female firefighters who were on the eligibility list for positions in the Department. President Sable wanted a blanket policy that all female firefighters would receive modified duty. (N.T. 77-79: City Exhibit 2)

32. Prior to the Chief's April 23, 2021 proposed MOU, President Sable gave the Chief a handwritten note setting out a short light-duty policy that would apply to all firefighters. (N.T. 78-79).

33. The note stated as follows:

> A firefighter who is under the care of a doctor and is temporarily unable to perform his/her duties may request a temporary office position from the Superintendent. Those requests should be submitted to the [Superintendent] and Local 60, and at no time shall the [Superintendent] discriminate against any bargaining unit member.

(City Exhibit 2)

34. On April 29, 2021, the City filed a demand for arbitration concerning the development and implementation of a light-duty policy, pursuant to the parties' CBA. An arbitration hearing was held before Arbitrator Robert C. Gifford, Esquire on October 20, 2021. Arbitrator Gifford issued an award (Gifford Award) implementing a light-duty policy on February 23, 2022. (Union Exhibit 6)

DISCUSSION

The Union argues that the City engaged in direct dealing with an employe over her terms and conditions of employment without involving the exclusive collective bargaining representative. (Union Brief 11-12). The Union further contends that, even if the City's one-person accommodation constituted implementation of a policy, and it would have been a managerial prerogative under Board law, the City bargained away that right, and the parties' CBA obligates the City to bargain over a light-duty policy, thereby making unilateral implementation of such a policy a contract violation. The Union maintains that giving one person a light-duty assignment, either without a policy or by unilaterally creating one, violates the City's bargaining obligation. (12-13, 15-16, 18). The City, argues the Union, did not make available employment conditions that were already available to other employes. Instead, the City created a single light duty-policy for one employe. (Union Brief 14-15). Local 60 asserts that there is no dispute in this case that a pregnant employe should be offered the same light duty accommodation that might be available to other employes dealing with an off-duty sickness or injury. However, here there was no light duty policy in existence to apply in an equal non-discriminating manner.

The Union posits that the City unlawfully bypassed Local 60 when Chief Judge dealt directly with Firefighter Janczak over her working conditions. Firefighter Janczak sought a specific accommodation, and Chief Judge bargained with her directly to determine a modification in her working conditions even where the City was under no obligation to accommodate her at all. (Union Brief 16-17). The Union further posits that, where the City was under no obligation to accommodate Firefighter Janczak, it could have required her to use sick leave, as it had done in 2018, for her previous pregnancy and as with any other nonwork-related injury or illness. (Brief at 22-23)

Although the Board has held that the implementation of a light-duty policy is a managerial prerogative, the City in this case was contractually bound to bargain a light-duty policy. The City has, for many years, attempted to bargain in good faith with the Union over a light-duty policy, but the parties could not reach an agreement. When Firefighter Janczak became pregnant for the first time, she had to use all of her accrued leave, and the donated leave from other firefighters, for the duration of her pregnancy. The second time she became pregnant, she gave the Chief medical documentation from her doctor that she could not work in fire suppression, where she and

her unborn child would be exposed to toxic chemicals and other hazards, and told Chief Judge that she wanted to continue working. This constituted a request for an accommodation. The Chief immediately reached out to the Union, but the parties still could not reach an agreement on a Department light-duty policy that could also apply to Firefighter Janczak. Time was of the essence, and Firefighter Janczak could not be exposed to toxins in her condition, so the City transferred her to a Fire Department position that did not expose her to toxins and other hazards.

The Union is alleging that the City directly dealt with Firefighter Janczak over her terms and conditions of employment while the City was bargaining with the Union over a light-duty policy. First, the City's temporary transfer of Firefighter Janczak to a light-duty position within the Department was within its managerial right to assign personnel and its managerial obligation under federal law to make an individual accommodation. The accommodation of Firefighter Janczak did not constitute the unilateral implementation of a light-duty policy for the Department or even one person. Moreover, to the extent that the City had an obligation to bargain Janczak's temporary transfer, which it did not, the City was relieved of that obligation under the Board's recognized exigent circumstances doctrine.

Time was of the essence to remove Firefighter Janczak from exposure to toxins and other hazards after the parties engaged in good-faith bargaining for many years. Accordingly, the City did not violate a duty to bargain a light-duty policy, the temporary transfer of Firefighter Janczak did not constitute a single-person light-duty policy, and it did not constitute direct dealing, where an immediate accommodation was paramount and there was no bargained-for policy in place that the City violated or changed to accommodate Firefighter Janczak. In the absence of a bargained-for light-duty policy, the City was free to transfer firefighters to maintain productivity and service from its workforce and allow the City to operate its firefighting enterprise. Firefighter Janczak was not similarly situated to other firefighters who were injured on duty and receiving full Heart and Lung benefits. There is no evidence that the City had not or would not accommodate an individual firefighter who experienced an off-duty injury and was unable to receive Heart and Lung benefits.

Alternatively, if the City were deemed to have engaged in direct dealing over a one-person light-duty policy with Firefighter Janczak and if the exigent circumstances exception to bargaining did not apply to Firefighter Janczak, the charge in that case would be moot. The parties have subsequently reached a collectively bargained resolution, through arbitration, pursuant to the parties' CBA, and now the parties have a light duty policy. Hempfield School District, 34 PPER 75 (Proposed Decision and Order, 2003)(charge alleging unlawful direct dealing with employes during collective bargaining properly dismissed as moot after parties enter into a successor collective bargaining agreement); Temple Association of University Professionals, Local 4531 AFT v. Temple University, 23 PPER 23118 (Proposed Decision and Order, 1992)(charges alleging employer direct dealing, failure to provided requested information for bargaining, the unilateral declaration of impasse and the employer implementation of final, best offer were properly dismissed as moot after the parties' post-charge ratification of a successor collective bargaining agreement); TAUP v. Temple, 40 PPER 129 (Proposed Decision and Order, 2009)(charge alleging that the employer unlawfully engaged in direct dealing, misrepresenting negotiations to employes and denigrating the union to employes was properly dismissed when the parties entered into a post-charge collective bargaining agreement and where the

union controlled mootness by choosing to agree or disagree to a contract during litigation); AFSCME District Council 33 v. City of Philadelphia, 36 PPER 158 (Final Order, 2005)(charge alleging the City's refusal to proceed to interest arbitration for its prison guards was properly dismissed as moot after the parties entered into a negotiated collective bargaining agreement covering those employes post charge).

The Union additionally contends that the ADA does not remove disability accommodations from collective bargaining. (Union Brief at 13-14). However, the City had a legal obligation, and therefore a managerial prerogative, to engage in the interactive process under the ADA and provide Firefighter Janczak with an available accommodation, with or without bargaining, where time was of the essence after years of unproductive good-faith bargaining. The Union cannot control whether an employer complies with federal law, and its legal obligation to attempt to accommodate an employe with a qualifying disability, by refusing to grant permission to the employer to transfer and assign a single employe, where there is no bargained-for policy in place and which single transfer did not constitute a Department policy. The CBA requires the City to bargain a light-duty policy, which it had been doing for years. The CBA does not contain such a policy. The City met those bargaining obligations. Therefore, the City did not violate the CBA by transferring Firefighter Janczak to a position performing administrative duties within the Fire Department in the absence of an agreed upon policy and after years of bargaining with the Union.

Ms. Janczak provided Chief Judge with a medical note stating that she could not be exposed to hazardous toxins encountered in her fire suppression assignment. She specifically told Chief Judge that she could not work in the fire station and that she did not want to use up her leave like she did with her first pregnancy. Indeed, she requested an accommodation so she could continue working as a firefighter in a productive capacity. The Chief reassigned her firefighter duties that did not expose her to hazards and toxins, and he gave her the accommodation, after consulting with Ms. Eskra, the City’s attorney. Moreover, the City continued to bargain for a Department light-duty policy with the Union after reassigning Firefighter Janczak.

The Union asserts that federal courts have concluded that pregnancy itself is not a disability under the ADA. (Union Brief at 13-14). However, as the City points out, pregnancy related health conditions are indeed qualifying. These decisions turn on the unique facts and circumstances of each case under consideration. A pregnant firefighter is not in the same condition as a pregnant office worker, considering the environmental differences. In the case sub judice, Firefighter Janczak’s work environment and job duties as a firefighter made her pregnancy a disability that prevented her from performing fire suppression duties that she was otherwise qualified and experienced to perform.

In Dinger v, Bryn Mawr Trust, 2022 WL 6746260 (E.D. 2022), the United States District Court for the Eastern District of Pennsylvania opined that “medical conditions that often accompany pregnancy may fall within the ADA such that a woman is entitled to the same protections that would be afforded any other disability under the statute.” In Brown v. Aria Health, 2019 WL 1745653 (E.D. 2019), the United States District Court for the Eastern District of Pennsylvania opined that “[a]lthough pregnancy, alone, does not constitute a disability under the ADA, certain impairments that a woman experiences as a result of pregnancy may qualify as a disability for purposes of the statute.” Id. at 4.

In Koci v. Central City Optical Co., 69 F.Supp. 3d 483 (E.D. Pa. 2014), the United States District Court for the Eastern District of Pennsylvania noted that under the amendments to the ADA, a plaintiff could bring a discrimination claim under the ADA based upon a "perceived disability." Id. The Court stated: "When a plaintiff alleges a perceived disability, the question is not the plaintiff's actual condition but rather her condition as perceived by her employer, including the 'reactions and perceptions of the persons interacting or working with [her],'" as long as the perceived disability would last more than 6 months. Id. (citation omitted).

In her Law Review Article titled: Accommodating Pregnancy in the Workplace, Deborah A. Calloway researched and detailed the limitations caused by pregnancy for women with strenuous job duties. In summary, Ms. Calloway noted that "the physical changes caused by pregnancy interfere with a pregnant woman's ability to perform physical work." Ms. Calloway documented the changes and increases in certain hormones produced during pregnancy. These hormonal changes cause the ligaments to soften and stretch which further causes muscle weakness and fatigue, thereby increasing the risk of injury. The redistribution of body mass and hormonal changes interfere with balance, equilibrium and stability. Although Ms. Calloway cautions that generalizations should be avoided, many pregnant women are unable to run, climb ladders, poles or stairs, and they are unable to lift heavy objects or reach above their heads, as a result of their physical changes. Calloway, 25 Stetson L. Rev. 1 (1995)(citations omitted).

Additionally, Ms. Calloway cited authority that maternal exposure to chemicals or toxins in the workplace have resulted in fetal injury and death. Many hazardous substances cross the placenta. Exposure to metals such as lead or mercury may cause neurological disorders in the unborn child. Chromosomal damage has resulted in the offspring of workers exposed to solvents like benzene, rubber cement, nylon and detergents. Fetal damage and miscarriage have also resulted from the mother's exposure to pesticides and hydrocarbons (i.e., fuels). Calloway, 25 Stetson L. Rev. 1 (1995)(citations omitted).

In her assignment to the fire station as a first responder for fire suppression and related activities, Firefighter Janczak was exposed to toxins. Firefighter Janczak's fire suppression duties in burning structures or vehicles would expose her and her unborn child to toxic fumes and gases from burning building materials such as fiberglass, wood, vinyl, lead plumbing, electrical wiring, varnished flooring, paint, insulation and upholstery materials, and heating and vehicle fuels, threatening the health and life of her unborn child. In fact, the Union recognized these dangers in its February 21, 2018 proposal for a light-duty policy. In Paragraph L of that document, the Union proposed that "[u]pon proof of an employee being pregnant they shall immediately be provided alternative duties that do not expose the mother or child to the hazards associated with suppression activities without loss of pay or benefits." (emphasis added).

As a firefighter involved in fire suppression duties, Firefighter Janczak would have to carry very heavy equipment, climb ladders, stairs in buildings, and carry people to safety. As a result of her pregnancy, she could lose her balance or strength climbing stairs or ladders and fall, thereby injuring her unborn child, other firefighters and victims. Firefighters depend on each other to work together in life threatening circumstances. If a pregnant Firefighter Janczak was suddenly unable to perform strenuous duties at an emergency scene, it could threaten the health,

safety and welfare of other firefighters and the victims who depend on their service. Therefore, pregnancy impairs a firefighter's ability to perform normal first responder, fire suppression duties. For a firefighter, pregnancy is a qualifying disability under the ADA, and the City had an obligation to engage in the interactive process with Firefighter Janczak to accommodate her pregnancy, where the Fire Department had a reasonable accommodation for her. Although pregnancy is a natural function, other government entities explicitly recognized pregnancy as a condition that impairs an employe's ability at work requiring an accommodation if available.[2]

Clearly, management, the Union and co-workers perceived Firefighter Janczak's pregnancy as a disability with respect to performing the essential functions of fire suppression, which was a major life function for Firefighter Janczak and which would last for more than 6 months. Based on that perception, Chief Judge expressed a real concern that the City could be subject to a discrimination lawsuit if he did not provide an accommodation for Firefighter Janczak. Accordingly, under Koci, supra, Firefighter Janczak's pregnancy was a qualifying perceived disability under the ADA in the context of performing fire suppression duties, and the City complied with its legal obligation under the ADA to entertain, consider and grant her request for an accommodation to perform less physically demanding firefighting duties in a toxin- and hazard-free environment, where the City had an accommodating position available within the Fire Department.

In sum, the City did not violate the CBA because the individual accommodation of Firefighter Janczak for her pregnancy did not constitute the unilateral implementation of a Department light-duty policy; it was rather a managerial transfer and reassignment of a firefighter within the prerogatives of management. Additionally, the City met its obligation to bargain a light-duty policy with the Union for years before and months after Firefighter Janczak's second pregnancy. Even if Firefighter Janczak's transfer is construed as implementing a light-duty policy during impasse, the Board's exigent circumstances exception would excuse the implementation in this case, especially considering the overriding potential liability under the ADA for Firefighter Janczak's perceived disability. Furthermore, if the City directly dealt with Firefighter Janczak over a one-person light duty policy, the alleged bargaining or contractual violation became moot upon the issuance of the Gifford Award. Therefore, the City did not engage in unlawful direct dealing in violation of Section 6(1)(a) and (e) of the PLRA, as read with Act 111, and the City continued to bargain in good faith with the Union before, during and after Firefighter Janczak's temporary reassignment to accommodate her pregnancy.

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[2] Although not binding on the City of Scranton, Section 9-1128 of the City of Philadelphia Fair Practices Ordinance explicitly provides that: (1) It shall be an unlawful discriminatory employment practice for an employer to fail to provide reasonable accommodations to an employee for needs related to pregnancy . . . provided (i) the employee requests such accommodations and (ii) such accommodations will not cause an undue hardship to the employer." This Section further provides that reasonable accommodations include, but are not limited to, restroom breaks, periodic rest for those who stand for long periods of time, assistance with manual labor, leave for a period of disability arising from childbirth, reassignment to a vacant position, and job restructuring.

CONCLUSIONS

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

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

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

3. The Board has jurisdiction over the parties hereto.

4. The City has not committed unfair labor practices within the meaning of Section 6(1) (a) or (e) of the PLRA, as read *in pari materia* with Act 111.

ORDER

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

HEREBY ORDERS AND DIRECTS

That the charge is dismissed, the complaint is rescinded and that in the absence of any exceptions filed with the Board pursuant to 34 Pa. Code § 95.98(a) within twenty (20) days of the date hereof, this order shall be and become final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this fourteenth day of December, 2022.

PENNSYLVANIA LABOR RELATIONS BOARD

JACK E. MARINO/S

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JACK E. MARINO, Hearing Examiner