COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

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In the Matter of the Arbitration Between:	*	
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CITY OF PITTSFIELD	*	
	*	ARB-19-7709
-and-	*	
	*	
PITTSFIELD SUPERVISORY AND	*	
PROFESSONAL EMPLOYEES ASSOCIATION	*	
	*	

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Arbitrator:

Sara Skibski Hiller, Esq.

Appearances:

Kimberly Roche, Esq. - Representing the City of Pittsfield

Mitchell Greenwald, Esq. - Representing the Pittsfield Supervisory and Professional Employees Association

The parties received a full opportunity to present testimony, exhibits and arguments, and to examine and cross-examine witnesses at a hearing. I have considered the issues, and, having studied and weighed the evidence presented, conclude as follows:

AWARD

The grievance is allowed. The City did not have the right to instruct James Esoldi (Esoldi) on October 21, 2019 to stop using a city vehicle for commuting to and from work. The City is ordered to remedy the violation in a manner consistent with this decision.

Sara Skibski Hiller

SARA SKIBSKI HILLER, ESQ.
ARBITRATOR
Dated: February 9, 2021

INTRODUCTION

The Pittsfield Supervisory and Professional Employees Association (Association), seeking to resolve a dispute with the City of Pittsfield (City), filed a Petition to Initiate Grievance Arbitration on November 22, 2019 with the Department of Labor Relations (DLR), which docketed the matter as ARB-19-7709. Under the provisions of M.G.L. c. Chapter 23, Section 9P, the DLR appointed Sara Skibski Hiller, Esq. to act as a single neutral arbitrator with the full power of the DLR. The undersigned Arbitrator conducted a hearing on September 14, 2020.[1] At the hearing, both parties had the opportunity to present testimony, exhibits and arguments and to examine and cross-examine witnesses. The parties filed post-hearing briefs on October 30, 2020.

THE ISSUE

The parties were unable to agree on a stipulated issue and gave the arbitrator the authority to determine the issue in this matter. The Association proposed the following issue: "Did the City have the right to instruct Mr. Esoldi to stop bringing his vehicle home every night as he had been doing since he started employment five years previously? And if not, what shall be the remedy?" The City proposed the following issue: "Did the City have the right to instruct Mr. Esoldi to stop bringing home a city vehicle? And, if not, what shall be remedy?"

As the parties were unable to agree on a stipulated issue, I find the appropriate issue to be: Did the City have the right to instruct Mr. Esoldi to stop bringing home a city vehicle? If not, what shall be remedy?

[1] Due to the Governor's teleworking directive to executive branch employees, I conducted the arbitration hearing via WebEx videoconference.

RELEVENT CONTRACT LANGUAGE

The Association and the City are parties to a collective bargaining agreement effective July 1, 2019 through June 30, 2022 (Contract). The Contract contains the following pertinent provisions:

2. MANAGEMENT RIGHTS

In the interpretation of this Agreement, the City shall not be deemed to have been limited in any way in the exercise of the regular and customary functions of municipal management or governmental authority and shall be deemed to have retained and reserved unto itself all powers, authority, and prerogatives of municipal management or governmental authority including but not limited to the following examples: the operation and direction of the affairs of the Departments in all of their various aspects: the determination of the level of services to be provided; the direction, control, and supervision of the employees; the determination and interpretation of job descriptions, but not including substantive changes; the planning, determination, direction and control of all the operations and services of the Departments (and their units and programs); the increase, diminishment, change or the revising of processes, systems, or equipment; the alteration, addition, or elimination of existing methods, equipment, facilities, or programs; the determination of the methods, means, location, organization, number and training of personnel of the Department, or its units or programs; the assignment and transfer of employees; the enforcement of normal (non-overtime) working hours; the determination of the existence of overtime work and call-in work; the determination of whether goods should be made, leased, contracted, or purchased on either a temporary or a permanent basis; the hiring, appointment, promotion, demotion, suspension, discipline, discharge, or relief of employees due to lack of funds or of work, or the incapacity to perform duties for any other reasons; the making, implementation, amendment, and enforcement of such rules, regulations, and operating and administrative procedures from time to time as the City deems necessary and subject to the provisions of Massachusetts General Laws, Chapter 31; and the power to make appropriation of funds; all except to the extent abridged by a specific provision of this Agreement or law. Nothing in this Article shall be interpreted or deemed to limit or deny any rights of management provided by the City by law.

22. AUTOMOBILE LIABILITY INDEMNIFICATION

The City shall indemnify all authorized employees from any liability in connection with their use of City vehicles on City business (including commuting), and their use of personal vehicles on City business to the extent not covered by the employee’s automobile insurance. Employees

may continue to commute to and from work in City vehicles where permitted by ordinance or authorized by the Department Head.

FACTS

James Esoldi (Esoldi) is employed by the City as a Project Supervisor in the Building Maintenance Department. Esoldi is also a member of the Association. In or around 2015, Esoldi applied for the vacant position of Working Foreman and attended two interviews. The first interview was conducted by a three-member panel, consisting of Director of Facilities Peter Sondrini (Sondrini), Assistant Director of Facilities Edward Cooney and Office Manager Michael Dean. During this interview, the panel told Esoldi that the Working Foreman position required the use of a city-owned vehicle to meet with contractors, facilitate abatement work and respond to off-duty and after-hours alarms and emergencies. Similarly, the Working Foreman job description, drafted in 2012, indicates that the employee would be expected to be on-call for any and all emergencies.[2] The interview panel expressly told Esoldi that he would be allowed to use the city-owned vehicle on a daily basis during business hours and for commuting to and from work.

On or about January 5, 2015, Esoldi accepted the position of Working Foreman, and the City provided Esoldi with a black Ford F250 truck marked with the City's emblem and municipal license plates (city vehicle). Since 2015, Esoldi has driven the city vehicle on a daily basis between his workplace in Pittsfield and his home in North Adams, a community approximately 20 miles north of Pittsfield.

In or around 2016, the City hired Brian Filiault (Filiault) as Director of Building Maintenance. As Director, Filiault served as Esoldi's direct supervisor and was aware that

[2] In or around 2017, Esoldi's job title was changed from Working Foreman to Project Supervisor and the job description was modified to include "respond to off-duty / after-hours alarm(s) issues and be available for emergency situations."

Esoldi commuted to and from work each day in his city vehicle. In addition to Esoldi, the City has historically authorized other bargaining unit members to use city vehicles for commuting, including Fleet Manager Jeff Howes, Parking Garage Director Frank Anello, Superintendent of the Water Department Jason Murphy, and Superintendent of the Highway Department Vinnie Barbarotta.[3] These bargaining unit members use their city vehicles for commuting on a regular or infrequent basis because their job duties require that they come into work early, stay late or respond to other emergencies or call-ins after hours.

On September 29, 2019, a mayoral candidate running against the incumbent Mayor held a political event in the City. Shortly after the event, Filiault observed a letter posted by a local online publication indicating that two attendees at the event witnessed a city vehicle, matching the description of Esoldi's vehicle, parked at the event.[4] On or about October 15, 2019, Filiault contacted Esoldi and showed him the letter. Esoldi denied that he attended the event in the city vehicle. Esoldi explained to Filiault that on September 29th, he stayed late in order to breakdown polling stations from a special election and then proceeded straight home. The City did not investigate the allegation further and did not take any disciplinary action against Esoldi.

Shortly after his meeting with Esoldi, Filiault decided to examine Esoldi's use of the city vehicle by reviewing his history of responding to after-hour call-ins and emergencies. Thereafter, Filiault determined that there was no business need for Esoldi's

[3] The City has also authorized a non-bargaining unit member, the Commissioner of Building Inspectors Jeff Clemmons, to use a city vehicle for commuting purposes.

[4] The online publication later retracted the letter because they had reason to believe the authors provided false names and addresses.

city vehicle to be traveling back and forth to North Adams each day because Esoldi had not been called into work after hours since February 18, 2017. On October 21, 2019, the City, through Filiault, informed Esoldi that while he could continue to use his city vehicle during normal working hours, he would no longer be allowed to take the vehicle home at night. Should Esoldi need to respond to an after-hours call-in or emergency, the City instructed him to travel to his workplace in his personal vehicle and then get in his city vehicle to respond to the emergency. The City did not notify the Association of its intent to rescind Esoldi's use of the city vehicle for commuting purposes and did not bargain with the Association. On October 28, 2019, the Association filed a grievance with the City alleging that the City violated an established past practice when it informed Esoldi that he could no longer take his city vehicle home. The City denied the grievance and the Association filed a demand for arbitration with the DLR on December 3, 2019. As a result of the City's conduct, Esoldi has commuted to and from work in his personal vehicle since October 21, 2019 and has personally paid any expenses associated therewith.

POSITIONS OF THE PARTIES

THE UNION

The Union argues that an established past practice exists between the Association and the City by which Esoldi was allowed to use a city vehicle to commute to and from work. This practice existed during Esoldi's entire period of employment and for his predecessor. The practice was known and specifically permitted by the City. Both Filiault and former Director Sondrini knew of the practice and did not object to it prior to October of 2019. The Union argues that in Town of Dedham, the Commonwealth Employment Relations Board determined that "the convenience and commuting cost savings which an employee may derive from free use of the employer's vehicle constitutes a mandatory

subject of bargaining." 16 MLC 1235, 1242, MUP-6562 (September 8, 1989). Further, the Union argues that even if the City had made the decision to revoke the benefit for economic reasons, such does not absolve the City of its requirement to bargain. Further, the Union argues the City's decision to rescind Esoldi's use of the city vehicle for commuting purposes was retaliatory, motivated by the City's belief that Esoldi attended a political event supporting the Mayor's challenger in the 2019 election.

THE EMPLOYER:

The City argues that it had the authority to revoke Esoldi's use of his city vehicle for commuting purposes. No written agreement exists between the parties granting Esoldi the right to use the city vehicle to commute to and from work. At the time he was hired, Esoldi did not sign a contract or other agreement granting him the benefit. Further, the Contract contains no language granting Esoldi the right to use the vehicle for commuting. The City argues that under the Management Rights provision in Section 2 of the Contract, the City has the right to revise equipment, including eliminating the existing use of equipment such as a city vehicle. Further, Section 22 of the Contract regarding Automobile Liability Indemnification states that a bargaining unit member may use a city vehicle for commuting so long as it is "authorized by the Department Head." The City argues that this language indicates that Filiault may revoke his authorization where there is no continued business need for such use of the vehicle.

The City further asserts that Esoldi was allowed to use the city vehicle for commuting so that he may respond to after-hours call-ins and emergencies. However, after a review of Esoldi's records, Filiault determined there was no longer a business need for Esoldi to use his city vehicle to commute because he had not been called to respond

to an emergency after-hours since February of 2017. The City also argues that Esoldi's use of the city vehicle for commuting has a significant economic impact on the City.

Finally, the City argues that Esoldi's continued use of a city vehicle to commute may violate the Municipal Finance Law under M.G.L. c. 41 § 56 because Esoldi would receive compensation for services, namely responding to emergencies, which are not being rendered. In addition, the City maintains that Filiault's decision to revoke Esoldi's use of a city vehicle for commuting was not retaliation against Esoldi for allegedly attending a political event. Filiault found Esoldi to be truthful when he said he did not attend the event and subsequently suspended his investigation without issuing any disciplinary action.

OPINION

The issue before me is: Did the City have the right to instruct Esoldi to stop bringing home a city vehicle? And, if not, what shall be remedy? For all the reasons stated below, the City did not have the right to instruct Esoldi on October 21, 2019 to stop using the city vehicle for commuting to and from work. By doing so, the City violated the parties' practice, and thereby violated the Contract.

The evidence indicates that the City, in agreement with the Association, has authorized a number of bargaining unit members to use a city vehicle to commute to and from work if they choose to do so. In Section 22 of the Contract, the City expressly agrees that "employees may continue to commute to and from work in city vehicles where permitted by ordinance or authorized by the Department Head." Here, both the City and the Association have historically recognized Esoldi's position as one of those positions so authorized. For a past practice to exist, it must be: (1) unequivocal; (2) clearly enunciated and acted upon; and (3) readily ascertainable over a reasonable period of time as a fixed

and established practice accepted by both parties. Prior to Esoldi's employment with the City, employees in the Working Foreman position were authorized to use a city vehicle to commute to and from work. When he began working for the City in 2015, the City clearly and unequivocally offered Esoldi the same as an employment benefit associated with the position. Further, the evidence indicates that the City, including the past and present Directors who supervised Esoldi's work, were aware of the practice. Here, the City's identification of Esoldi as an employee so authorized under Section 22 of the Contract to use his city vehicle for commuting is a practice that was clearly understood, maintained over a reasonable time and accepted by both parties.

Esoldi's use of the city vehicle for commuting is an established past practice and an implied term of the Contract. An established past practice is binding upon the parties during the term of a collective bargaining agreement. Should an employer intend to discontinue a past practice, it has a contractual obligation to notify the union of its intent not to continue the practice and to bargain that issue during successor negotiations.[5] Here, the City's notice to Esoldi, and not the Association, is insufficient. Further, the City's decision to discontinue the practice mid-term without fulfilling its bargaining obligations violates the established past practice, and in turn, the Contract.

Contrary to the City's arguments, the language in the Management Rights clause and Section 22 of the Contract does not give the City the right to discontinue the past practice without fulfilling its bargaining obligations. The language in the Management Rights clause is vague and does not unambiguously identify this benefit or the City's

[5] I note that in its brief, the Association argues that the use of a vehicle for commuting purposes is a mandatory subject of bargaining under M.G.L. c. 150E. While I find a bargaining obligation exists, this obligation is contractual and not derived from the responsibilities of public sector employers under M.G.L. c. 150E.

authority to revoke the benefit unilaterally. Although the Management Rights clause gives the City the right to eliminate or alter existing methods and use of equipment, to read this language to authorize the City to revoke the use of city vehicles for commuting purposes would directly contradict the more precise language in Section 22. Moreover, when read as a whole, the clause in Section 22 stating: "where permitted by ordinance or authorized by the Department Head" serves to define which employees may continue to commute in their city vehicles. The City offered no other contract language, evidence of past practice or bargaining history, indicating that the reference to "authorization by the Department Head" allows Filiault to unilaterally revoke the benefit.

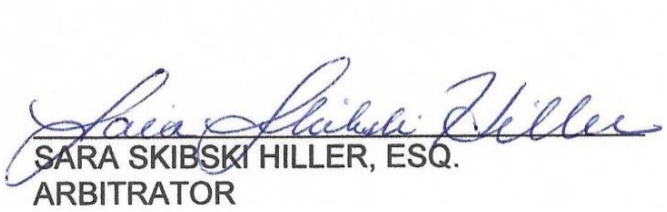
Finally, I do not find that the City's decision to revoke the benefit from Esoldi was made in retaliation based on the belief that he attended the political rally for the incumbent Mayor's challenger. While the allegation brought Esoldi's use of the vehicle to Filiault's attention, I have no evidence before me to conclude that Filiault's decision was retaliatory. Furthermore, the City's argument that Esoldi's use of the city vehicle for commuting violates the Municipal Financial Law is unconvincing. The City argues that the benefit violates M.G.L. c. 41 § 56 because by continuing the benefit, Esoldi would receive compensation for services which are not being rendered. However, the City did not change Esoldi's job duties to remove the requirement that he respond to after-hours call-ins or emergencies. The evidence indicates that the City expects Esoldi to perform the same services by driving his personal vehicle to the workplace first before responding in a city vehicle, instead of responding directly from his home.

AWARD

The grievance is allowed. The City did not have the right to instruct Esoldi on October 21, 2019 to stop using the city vehicle for commuting to and from work. The City is ordered to remedy the violation in a manner consistent with this decision.

REMEDY

As a remedy, I order the City to restore to Esoldi the use of a city vehicle for commuting between his home and the workplace, so long as the practice remains binding. Further, I order the City make Esoldi whole for the mileage and transportation expenses incurred, if any, as a result of not being able to use the city vehicle for travel between his workplace and his home for the period of October 21, 2019 to the date the benefit is restored to him. Such mileage should be reimbursed at the rate applicable to business use of private vehicles by City employees, pursuant to the practice of the parties, or if none, at the applicable United States Internal Revenue Service mileage rate for business use.



SARA SKIBSKI HILLER, ESQ.
ARBITRATOR

Dated: February 9, 2021