COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS
BEFORE THE COMMONWEALTH EMPLOYMENT RELATIONS BOARD

In the Matter of:	*	
	*	Case Number: SUP-16-5594
COMMONWEALTH OF MASSACHUSETTS	*	
	*	
and	*	Date Issued: May 1, 2020
	*	
MASSACHUSETTS ORGANIZATION OF STATE ENGINEERS AND SCIENTISTS	*	

Board Members Participating:

Marjorie F. Wittner, Chair
Katherine G. Lev, CERB Member
Joan Ackerstein, CERB Member

Appearances:

Melinda Willis, Esq. Representing Commonwealth of Massachusetts

Catherine Costanzo, Esq. Representing Massachusetts Organization of State Engineers and Scientists

CERB DECISION ON REVIEW OF HEARING OFFICER'S DECISION

SUMMARY

Summary

The Massachusetts Organization of State Engineers and Scientists (MOSES or Union) has appealed one aspect of the decision that a Department of Labor Relations (DLR) Hearing Officer issued on January 16, 2020. The Hearing Officer held that the Commonwealth of Massachusetts, acting through the Department of Public Safety (Employer or DPS), committed a prohibited practice within the meaning of Section 10(a)(5) and, derivatively, Section 10(a)(1) of M.GL. c. 150E (the Law) when it changed

how it reimbursed mileage for certain state inspectors who used their personal vehicle to travel to their daily inspection assignments. After reviewing the hearing record, including the decision and the parties' supplementary statements, the Commonwealth Employment Relations Board (CERB) affirms the decision.

Facts

The facts set forth in the Hearing Officer's decision[1] are not in material dispute. We therefore adopt those facts pursuant to 456 CMR 13.19(3)(b) and summarize only those facts necessary to our decision, reserving some details for further discussion in the Opinion section of this decision.

The inspectors at issue here are State Building Inspectors and District Engineering Inspectors who are members of statewide bargaining unit 9. Their inspection duties require regular, often daily travel around the state. Each inspector is assigned to a geographic district within the Commonwealth. Each inspector also has an assigned office, which is not necessarily in their assigned district.[2] Inspectors are expected to report to their assigned office when they are not on the road.

Before the May 2016 change at issue here, the inspectors had been calculating, and the DPS[3] had been approving and paying, mileage reimbursement in one of two ways: 1) the "door to door" method, which reimbursed inspectors for all of their daily mileage, from the moment they left home until they returned at the end of the day; and 2)

[1] The full text of the Hearing Officer's decision is reported at 46 MLC 134 (2020).

[2] We discuss the basis of this finding in the Opinion portion of the decision.

[3] DPS was eliminated as of March 27, 2017, and the inspectors at issue were transferred to other departments/divisions. This fact does not affect the outcome of this matter.

the "lesser of" method, which reimbursed inspectors pursuant to Article 11, Section 11.1 (B) of the parties' 2014-2017 collective bargaining agreement (CBA).[4] Section 11.1 (B) states:

> An employee who travels from his/her home to a temporary assignment rather than to his/her regularly assigned office shall be allowed transportation expenses for the distance between his/her home and his/her temporary assignment or between his/her regularly assigned office and his/her temporary assignment whichever is less.

Around mid-April 2016, the Employer met with the Union to discuss what it believed was a failure to comply with the mileage reimbursement language set forth in Article 11.1. The parties reached no agreement because they interpreted the provision differently. In particular, the Union contended that Section 11.1 did not apply to the inspectors because they did not have an assigned office.

On April 21, 2016, the Employer issued letters to inspectors indicating that effective May 9, 2016, it would process mileage reimbursement requests in accordance with Article 11, Section 11.1(C) of the CBA. Section 11.1(C) states:

> Employees shall not be reimbursed for commuting between their home and office or other regular work location. With the approval of the Chief Human Resources Officer an employee's home may be designated as his/her regular office by his/her appointing authority for the purpose of allowed transportation expenses in cases where the employee has no regular office or other work location.

[4] The Hearing Officer's decision included a description of travel reimbursement forms that seven different inspectors submitted during the first quarter of 2016. All seven were signed and approved by the inspectors' respective supervisors. Five of the seven inspectors claimed door to door mileage, including four inspectors who claimed mileage to and from their home to either their assigned work location or a DPS office. Two claimed mileage according to the lesser of formula, including one inspector who used his office, rather than his home, address for his starting and ending location.

On May 9, 2016, the Employer sent a second letter to the inspectors clarifying that starting May 9, 2016, it would calculate mileage starting with the assigned work location or the first inspection/work assignment. In practice, this meant that, as of May 9, 2016, the Employer ceased mileage reimbursement for travel undertaken from the inspectors' homes to either their assigned office or their first inspection assignment.

On May 13, 2016, the parties met a second time to discuss the reimbursement issue. MOSES reiterated its position that Section 11.1 did not apply to the inspectors because they did not have assigned offices. The parties reached no agreement. The Union filed this charge on November 16, 2016.[5]

Opinion[6]

A public employer is prohibited under Section 10(a)(5) of the Law from making changes to bargaining unit members' terms and conditions of employment without first giving notice and an opportunity to bargain to resolution or impasse to the employees' exclusive representative. School Committee of Newton v. Labor Relations Commission, 388 Mass. 557 (1983). An employer's obligation to bargain before changing conditions of employment extends to working conditions established through past practice as well as those specified in a collective bargaining agreement. Spencer-East Brookfield Regional School District, 44 MLC 96, 97, MUP-15-4847 (December 5, 2017) (citing Town of Wilmington, 9 MLC 1694, 1699, MUP-4688 (March 18, 1983)). In determining terms

[5] The Union also filed two grievances in May 2016 relating to mileage reimbursement. The hearing record did not reflect the status of those grievances.

[6] The CERB's jurisdiction is not contested.

and conditions of employment, a past practice cannot overcome explicit contract language. City of Somerville, 44 MLC 123, 125, MUP-16-5023 (January 30, 2018).

The key issue in the case below was whether the method of calculating mileage set forth in the May 9, 2016 memo constituted a bargainable change. The Union argued that it did because it deviated from the door to door reimbursements its members had been receiving. The Employer argued that it did not because the May 9th memo simply brought mileage reimbursement into compliance with Section 11.1(C) of the CBA. The Union disagreed that Article 11.1's terms applied because the inspectors had no assigned offices.

The Hearing Officer disagreed with both parties' viewpoints, finding that Section 11.1, read as a whole, clearly and unambiguously set forth the terms and conditions under which bargaining unit members using their personal vehicles for work-related travel would be reimbursed for mileage. He therefore rejected the Employer's contention that Section 11.1(C) allowed it to discontinue reimbursing mileage to inspectors who traveled from their home to a work location because that ignored the lesser of method set forth in Section 11.1(B). The Hearing Officer thus concluded that the Employer violated Section 10(a)(5) of the Law when it implemented this new method of calculating mileage without first giving the Union an opportunity to bargain to resolution or impasse. [7]

The Hearing Officer also rejected the Union's contention that the Employer violated the Law by not continuing to pay inspectors pursuant to the door to door method The Hearing Officer found that because this method ignored Section 11.1(B)'s lesser of formula, and also allowed inspectors to claim mileage to and from their homes in violation

[7] The Employer did not appeal this ruling.

of Section 11.1(C), it did not constitute a binding past practice under the City of Somerville decision cited above.

In so finding, the Hearing Officer rejected as "factually unsupported" the Union's assertion that Section 11.1 was ambiguous with respect to the inspectors because they do not have assigned offices. Rather, based on the testimony of Gordon Bailey, a State Building Inspector and current MOSES steward, and Penny O'Reilly, who was DPS' Human Resources Officer during the events at issue, the Hearing Officer found that there was unequivocal record evidence establishing that the inspectors have assigned offices.

Although the Union does not specifically challenge this finding in its supplementary statement, it claims that the inspectors do not have a regular work location but rather, work "almost exclusively in temporary assignments and do not report to regularly assigned offices." As such, the Union argues that the Hearing Officer committed an error of law when he determined that Section 11.1 was clear and unambiguous with respect to the inspectors, and that he further erred when concluding that there could be no binding practice of applying the door to door formula.

We disagree. The Hearing Officer found, and the Union does not specifically dispute, that every inspector had an assigned office and that when inspectors are not on the road, they are expected to be at their assigned office. In support of its claim that Article 11.1 does not apply to the inspectors, the Union relies solely on its contention that inspectors worked almost entirely at temporary assignments and did not report to their assigned offices. However, this conclusory statement provides insufficient grounds to

overturn the Hearing Officer's well-supported findings, particularly where, as the Hearing Officer pointed out, there is no evidence that Section 11.1 does *not* apply to inspectors.[8]

Moreover, Section 11.1(C) specifically contemplates the situation that the Union posits by allowing bargaining unit members, including inspectors, to seek approval to designate their homes as their regular office. As the Hearing Officer pointed out, however, there was no evidence that any of the inspectors had ever availed themselves of this option. Under those circumstances, we affirm the Hearing Officer's conclusion that the door to door method was not a binding past practice because it conflicts with the clear and unambiguous language of Sections 11.1(B) and (C).[9] Nothing in the Union's supplementary statement provides any basis to conclude otherwise.

CONCLUSION

For the foregoing reasons, and those stated in the Hearing Officer's decision, we affirm the decision in its entirety and issue the following Order.

ORDER

WHEREFORE, based upon the foregoing, IT IS HEREBY ORDERED that the Commonwealth shall:

[8] Although the Union claims that the Hearing Officer made an error of law when he determined that Section 11.1 was clear and unambiguous, this argument really rests on the Union's assertion that inspectors do not have regularly assigned offices. Since that is a question of fact, pursuant to 456 CMR 13.19(3)(a), the Union was required in its supplementary statement to "clearly identify all record evidence supporting [its] proposed findings of fact, including specific references to page and line numbers of the transcript when one is available." The Union did not comply with this requirement, and, we therefore decline to modify any of the Hearing Officer's findings regarding this issue.

[9] Although not challenged by either party, we note that the economic remedy in this case is therefore appropriately limited to making bargaining unit members whole for any losses suffered by inspectors who were entitled to, but did not receive, mileage reimbursement pursuant to the lesser of formula set forth in Section 11.1(B), plus applicable interest.

1. Cease and desist from:

   a. Unilaterally imposing a mileage reimbursement policy that deviates from and conflicts with the "lesser of" mileage reimbursement policy contained in Article 11, Section 11.1(B) of the parties' 2014-2017 CBA.

2. Take the following affirmative action that will effectuate the purposes of the Law:

   a. Rescind the unilateral imposition of a mileage reimbursement policy that deviates from and conflicts with the "lesser of" mileage reimbursement formula contained in Article 11, Section 11.1(B) of the parties' 2014-2017 CBA.

   b. Make whole every State Building Inspector and District Engineering Inspector who was entitled to, but did not receive, after May 9, 2016, mileage reimbursement in accordance with the "lesser of" formula contained in Article 11, Section 11.1(B) of the parties' 2014-2017 CBA. The Commonwealth's obligation to make Inspectors whole includes the obligation to pay interest on all monies owed at the rate specified in M.G.L. c. 231, Section 6I, compounded quarterly.

   c. Post immediately in all conspicuous places where members of MOSES' bargaining unit usually congregate, or where notices are usually posted, including electronically if the Commonwealth customarily communicates with these members via intranet or email, and display for a period of thirty (30) days thereafter, signed copies of the attached Notice to Employees.

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

SO ORDERED.

COMMONWEALTH EMPLOYMENT
RELATIONS BOARD

Marjorie F Wittner

_____
MARJORIE F. WITTNER, CHAIR

Joan Lev

_____
KATHERINE G. LEV, CERB MEMBER

Joan Ackerstein

_____
JOAN ACKERSTEIN, CERB MEMBER

APPEAL RIGHTS

Pursuant to M.G.L. c. 150E, Section 11, decisions of the Commonwealth Employment Relations Board are appealable to the Appeals Court of the Commonwealth of Massachusetts. To claim such an appeal, the appealing party must file a notice of appeal with the Commonwealth Employment Relations Board within thirty (30) days of receipt of this decision. No Notice of Appeal need be filed with the Appeals Court.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS
COMMONWEALTH EMPLOYMENT RELATIONS BOARD

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE COMMONWEALTH EMPLOYMENT RELATIONS BOARD
AN AGENCY OF THE COMMONWEALTH OF MASSACHUSETTS

The Commonwealth Employment Relations Board (CERB) has held that the Commonwealth of Massachusetts (Commonwealth) violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E (the Law) by unilaterally changing the method of calculating mileage reimbursement contained in the 2014-2017 collective bargaining agreement (CBA) between the Massachusetts Organization of State Engineers and Scientists and the former Department of Public Safety.

Section 2 of the Law gives public employees the right to engage in self-organization; to form, join or assist any union; to bargain collectively through representatives of their choosing; to act together for the purpose of collective bargaining or other mutual aid or protection; and to refrain from all the above.

WE WILL NOT unilaterally implement a mileage reimbursement policy that deviates from and conflicts with the mileage reimbursement policy contained in the 2014- 2017 CBA.

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

WE WILL rescind the unilateral implementation of a mileage reimbursement policy that deviates from and conflicts with the formula contained in Article 11, Section 11.1 of the 2014-2017 CBA.

WE WILL make all State Building Inspectors and District Engineering Inspectors whole for any loss of appropriate mileage reimbursement they suffered on or after May 9, 2016, as a result of the Commonwealth's unlawful implementation of a reimbursement policy that deviates from and conflicts with the 2014-2017 CBA.

_____ _____

Commonwealth of Massachusetts Date