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

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| In the Matter of:<br><br>COMMONWEALTH OF MASSACHUSETTS/ SECRETARY OF ADMINISTRATION AND FINANCE<br><br>and<br><br>NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES | Case Numbers: SUP-20-7856<br>SUP-20-7945<br><br>Date Issued: May 3, 2023 |

CERB Members Participating:

Marjorie F. Wittner, Chair
Kelly B. Strong, CERB Member
Victoria B. Caldwell, CERB Member

Appearances:

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| Emily Sabo, Esq. | - | Representing the Commonwealth of Massachusetts |
| Richard Waring, Esq. | - | Representing the National Association of Government Employees |

CERB DECISION ON REVIEW OF HEARING OFFICER'S DECISION

## SUMMARY

The National Association of Government Employees (NAGE or Union) and the Commonwealth of Massachusetts, acting through the Division of Banks (DOB or Employer), have each appealed aspects of the decision that a Department of Labor Relations (DLR) Hearing Officer issued on June 29, 2022. The Hearing Officer held that

the DOB did not commit a prohibited practice within the meaning of Section 10(a)(5) and, derivatively, Section 10(a)(1) of M.G.L. c. 150E (the Law) when it used the "lesser" rule to calculate mileage reimbursement for bank examiners without providing the Union with prior notice and an opportunity to bargain to resolution or impasse over that decision and its impacts on employees' terms and conditions of employment; nor did the Employer repudiate Article 11, Section 11.1(B) and Section 11.1(C) of the parties' collective bargaining agreement (CBA) as it pertained to the calculation of mileage reimbursement for bank examiners based on the lesser rule. The Hearing Officer further held that the Employer violated the Law when it changed the calculation of mileage reimbursement for bank examiners with certain travel routes based on the "shortest distance" rule without providing the Union with prior notice and an opportunity to bargain to resolution or impasse over that decision and its impacts on employees' terms and conditions of employment; and the Employer did repudiate Article 11, Section 11.1(A) of the parties' collective bargaining agreement (CBA) as it pertained to the calculation of mileage reimbursement for bank examiners with certain travel routes based on the shortest distance rule. After reviewing the hearing record, including the decision and the parties' supplementary statements, the Commonwealth Employee Relations Board (CERB) affirms in part and reverses in part the Hearing Officer's decision.

## FACTS

The parties entered into two stipulations regarding contract language and the Hearing Officer made additional findings. The Employer challenged certain parts of those

facts. We adopt the facts set forth in the Hearing Officer's decision[1] pursuant to 456 CMR 13.19(3)(b),[2] and summarize only those facts necessary to our decision, reserving some details for further discussion in the Opinion section.

**Pertinent CBA Language**

The Union and the DOB were parties to a collective bargaining agreement that was in effect from July 1, 2017 to June 30, 2020. Article 11, "Employee Expenses," contained three provisions that are pertinent here.

Article 11, Section 11.1(A) stated:

> When an employee is authorized to use his/her personal automobile for travel related to his/her employment he/she shall be reimbursed at the rate of forty (.40) cents per mile.
>
> Mileage shall be determined by the odometer reading of the motor vehicle but may be subject to review for reasonableness by the Appointing Authority who shall use a web-based service as a guide.

Article 11, Section 11.1(B) stated:

> 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.

Article 11, Section 11.1(C) stated:

> 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

[1] The full text of the Hearing Officer's decision is reported at Commonwealth of Massachusetts, Secretary of Administration and Finance, Division of Banks and National Association of Government Employees, Local 207, 48 MLC 348 (June 29, 2022).

[2] The Employer challenges certain findings, most of which are not pertinent to our decision here. We therefore do not address those challenges. See 456 CMR 13.19 (b) ("Only disputes as to material issues of fact need be resolved by the CERB on appeal.") We address the material disputes of fact below.

transportation expenses in cases where the employee has no regular office or other work location.

**The DOB and Bank Examiners**

The bank examiners at issue here are DOB employees and are members of statewide bargaining unit 6. The DOB employs approximately 100 persons in the positions of Examiner I, II, III and IV.[3]

The DOB's main office is located in Boston with specific cubicles assigned to licensing examiners and consumer examiners. In addition to its long-standing Boston office, field offices have been in existence since at least 1998. The DOB field offices are commonly referred to as the North, South, and West field offices.

All newly hired examiners are assigned to the Boston office for purposes of training and orientation. After the initial hiring period, the DOB assigns examiners to either its main Boston office, or to one of its field offices in Lakeville, Springfield, or Woburn, Massachusetts.[4] On rare occasions, the DOB may designate an examiner's home as their office for purposes of reimbursement for travel expenses.[5]

**The Lesser Rule**

[3] There are various types of bank examiners, including license examiners; consumer protection examiners or "non-depository" examiners; risk management examiners or "depository" examiners; and enforcement investigation and consumer assistance examiners.

[4] Prior to the opening of the Woburn office, the DOB had predecessor "North" field offices in Burlington and Lowell, Massachusetts.

[5] The DOB provides unassigned cubicle space for examiners at its field offices where examiners may perform certain duties in lieu of performing such duties on-site at a financial institution. Examiners are encouraged to perform work duties at their assigned offices, but the number of examiners working at their assigned field office varies week to week.

The first issue in this matter pertains to the application of the CBA's lesser rule, set forth in Article 11, Section 11.1(B). Prior to February 1, 2020, the DOB reimbursed field examiners for travel expenses, including mileage, when commuting to and from their homes between their regularly assigned field offices and temporary examination sites and approved the vast majority of payment voucher (PV) forms submitted by field examiners that sought reimbursement for commuting between their homes and field offices or examination sites.[6]

In or around October of 2019, Union Executive Vice President Bobbi Kaplan (Kaplan) had a meeting with DOB Labor and Employee Relations Manager Christopher J. Groll (Groll) during which Groll casually mentioned that DOB intended to change its practice of how it reimbursed examiners for travel expenses, including mileage, when commuting between their home and field offices. After the meeting, Kaplan emailed Groll to demand to bargain over the change and requested that DOB maintain the status quo until the parties had bargained to resolution or impasse. Kaplan also included in the email a request for certain information related to the change. On November 13, 2019, Kaplan emailed Groll for a status update on the Union's initial demand to bargain and request for information. On December 6, 2019, Groll emailed Kaplan the requested information and

[6] As the Employer notes in its appeal, DOB retired examiner Stephen O'Leary testified to one time when the DOB denied his submitted PV form because it deviated by more than five miles from distances stated in the "Milo Guide," which the Employer was using at that time to determine the reasonableness of mileage submitted for reimbursement. That is the only evidence the Employer relies on to challenge the Hearing Officer's finding that, "[a]t no point prior to February 5, 2020, did the DOB ever deny any PV forms submitted by field examiners who sought mileage reimbursement based on the actual route traveled."

asked that she contact him to schedule a time to meet and discuss the DOB's change to the "home office" rule.[7]

By letter dated January 24, 2020, Groll formally notified Kaplan about "Upcoming Changes to Mileage Reimbursements." Groll's letter stated that DOB viewed its practice of reimbursing examiners for mileage for commuting to and from their homes to their assigned offices as being in direct conflict with the "clear and unambiguous language of Article 11, Section 11.1(C) … of the collective bargaining agreement, which states unequivocally that "*[e]mployees shall not be reimbursed for commuting between their home and office or other regular work location."* [Emphasis in original.] Groll went on to state that although the CBA does allow for such "door-to-door" payments, the two prerequisites[8] for such payments had not been met. He stated, with respect to the first requirement, that the State's Chief Human Relations Officer (CHRO) has never approved "door-to-door" payments and second, that when the practice began, DOB only had Boston as a regular office location and now the DOB now had four locations, Boston, Lakeville, Springfield and Woburn, with all staff being assigned to one of those locations. In support of DOB's position that the current practice could no longer continue because of the clear and unambiguous contract language, Groll noted that the CERB had recently ruled in a

[7] The "home office" rule refers to examiners having their homes designated as their assigned office.

[8] Groll specified that prerequisite #1 is that the CHRO must approve door-to-door payments, and prerequisite #2 states that such approval only applies when the employee has no regular office or other work location.

case involving similar if not identical facts,[9] that the practice of reimbursing for door-to-door expenses must discontinue in light of the unambiguous language found in the CBA, and therefore, on February 1, 2020, DOB would begin to conform its mileage reimbursements to the express provisions of Article 11, Sections 11.1(B) and 11.1(C) of the CBA.

Groll's January 24, 2020 letter was followed by a January 27, 2020 email from Office of Consumer Affairs and Business Regulation (OCABR) Chief Operating Officer Dianne Handrahan (Handrahan) to all DOB staff regarding "Changes in DOB Travel Reimbursement Calculations." Handrahan reiterated that the practice at that time was in violation of the express language in the CBA and further explained that the manner in which staff had been calculating mileage was also inconsistent with the "lesser distance" calculation required by the CBA. Handrahan stated that effective February 1, 2020, the DOB would no longer reimburse examiners for mileage traveled between an examiner's home and assigned offices and any mileage reimbursements would be based on the "lesser distance" rule. Her email explained that when traveling to a temporary assignment, the employee would be reimbursed for the lesser of the distance between

[9] In Commonwealth of Massachusetts and Massachusetts Organization of State Engineers and Scientists, 46 MLC 134, SUP-16-5594 (January 16, 2020), which involved a dispute over the same contract language, the CERB, in finding for the Employer, stated the following:

> The Commonwealth Employment Relations Board… has stated a past practice cannot overcome explicit contract language. City of Somerville, 44 MLC 123, 125, MUP-16-5023 (January 30, 2018). Accordingly, MOSES' argument that the door-to-door formula is binding on the Commonwealth must fail in the face of clear, explicit provisions of Section 11.1 that provide to the contrary.

his/her home and the temporary assignment or between his/her regularly assigned office and his/her temporary assignment

Starting on February 1, 2020, the DOB began reimbursing bank examiners in accordance with the lesser rule. On February 6, 2020, DOB Director of Administration and Training Jennifer DeWitt (DeWitt) emailed DOB staff about the changes to mileage reimbursement and provided them with a copy of the January 24, 2020 notice sent from OCABR to NAGE concerning the changes to the mileage reimbursement calculation.

The Union and the Employer never met to bargain to resolution or impasse over the DOB's implementation of the lesser rule.

**The Shortest Distance Rule**

The second issue in the present matter is the "shortest distance rule." Under that rule, the DOB reimbursed employees for travel expenses under the lesser rule by multiplying the mileage rate by the number of miles of the shortest possible distance between his/her home and the temporary assignment or between his/her regularly assigned office and his/her temporary assignment.

The DOB did not apply that rule prior to February 5, 2020. Rather, it consistently reimbursed field examiners based on their odometer readings and/or maps of the actual route travelled that the examiners provided with their travel reimbursement request.[10]

[10] The Employer challenged the Hearing Officer's finding that "[e]ffective February 5, 2020, the DOB changed the way it reimbursed field examiners for mileage by making the odometer reading optional." Relying on transcript evidence and Employer Exhibit #50, the Employer claims that prior to February 5, 2020, field examiners had not submitted their car's actual odometer readings related to distance traveled but instead included the number of miles travelled and web directions with their payment vouchers. Employer Exhibit #50, however, includes several vouchers that show odometer readings. Further, Section 11.1(A) clearly states that reimbursements would be made pursuant to odometer

Although the reasonableness of the reported route was always subject to DOB review pursuant to Section 11.1(A), the DOB never required field examiners to report the shortest distance possible when they sought mileage reimbursement for travel either between their homes and an examination site or between their assigned field office and an examination site.

On February 5, 2020, DeWitt emailed all DOB staff "Guidance on DOB Travel Reimbursements" information, which contained material related to the DOB's use of the shortest distance rule for travel reimbursement calculations. In that guidance, the DOB stated that it "recognized the significant impact on mileage reimbursements for all DOB employees [and] we are working to implement the required changes and address any questions." The guidance provided notice that the DOB would apply the shortest distance rule to any PV submissions received after February 10, 2020 that sought reimbursement for travel on or before January 31, 2020. The guidance also contained information concerning office locations, odometer and/or map submissions, and multiple assignments in one day. Specifically, the guidance advised:

- If an employee has an assigned office and then voluntarily elects to report to another DOB office, the employee may not submit for travel reimbursement because that office is not a "temporary assignment" assigned by DOB.

- The use of odometer readings for mileage verification is optional and the submission of maps is preferred for routes used in the "lesser distance" calculation. However, "… if an employee opts to provide the odometer reading without submitting maps, you should anticipate that review and processing will take longer. The practice of referring back to previously submitted maps will take longer. Thus, OPS suggest you include all relevant maps (for both routes in the "lesser distance" calculation) with each weekly submission, so

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readings, subject to reasonableness checks using web-based services. We decline to modify the finding.

> your travel reimbursement can be processed more promptly. The route to your temporary assignment from your home or from your assigned office *will be* reviewed at the shortest distance." (Emphasis added).
>
> - Lesser rule is used to first assigned location on a day that an examiner travels to multiple assignments; actual mileage is used for additional assignments throughout the day; lesser rule used for travel from assigned location (if not assigned office) to home.

Beginning on February 5, 2020, the DOB implemented this guidance by changing the way it reimbursed field examiners for mileage by making the odometer reading optional, and by its application of the shortest distance rule to calculate the amount of the reimbursable mileage. The DOB's reasoning for the changes, as explained in a February 24, 2020 email from DeWitt to NAGE representative Kelly Donohue (Donohue) was as follows:

> … our understanding in consulting with the Secretariat, is the concept of the "the shortest distance" comes from the clear intent of the language in [S]ection 11.1(B) – 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 temporary assignment or between his/her regularly assigned office and his/her temporary assignment, *whichever is less.* [Emphasis in original.] Implicit in this language is the idea that the comparison of distances (from home to the temporary assignment or from the office to the temporary assignment) involves the shortest route for each. Otherwise, the language is essentially meaningless because, as you yourself note, there are a myriad of routes one could take to get from point A to point B. This idea of the "shortest distance" is also supported by the fact that [S]ec. 11.1(B) does not require that an employee be reimbursed for the *actual* route they take, but rather, clearly states that they will only be reimbursed for the lesser route. [Emphasis in original.]
>
> And you are correct that the current contractual language allows simply for the submission of odometer readings, and not actual map routes from an online source. But it has been our experience that most staff do, in fact, submit map routes, and we are fine with that continuing as it assists in the review. But no matter how the mileage

> is submitted, we are still obligated to review for the shortest route, and it will undoubtedly delay the processing of reimbursement forms if we are constantly required to do a comparative search. We have additional FAQs drafted which we hope to get out this week which would include that staff may print out the initial one pager from google maps which shows the route options rather than printing the turn-by-turn directions." [11]

On February 26, 2020, two days after DeWitt's email to Donohue, the DOB issued new frequently asked questions (FAQS) explaining how it would calculate mileage reimbursement under the shortest distance rule. The FAQs reiterated the information contained in DeWitt's February 24, 2020 email to Donohue.

On March 11, 2020, NAGE Executive Vice President Theresa McGoldrick (McGoldrick) sent Groll the following email:

> NAGE just became aware that DOB has unilaterally changed how members will be reimbursed for travel miles. The agency informed members it was using the shortest route possible generated by internet sources, whether or not the members used that route.
>
> > This is a violation of the CBA and past practice. If the agency is not changing its practice, please let me know by close of business tomorrow.

No one from the DOB, including Groll, responded to McGoldrick's March 11, 2020 email. There is no dispute that the parties never met to bargain over the Employer's implementation of the shortest distance rule.

## OPINION[12]

[11] The February 24, 2020 email also addressed the use of the "*new* reimbursement forms" and "anticipated there will be challenges as we implement the *changes* and begin reviewing and processing the *new* forms." (Emphasis added).

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

Section 6 of the Law provides in relevant part that "[t]he employer and the exclusive representative … shall negotiate in good faith with respect to wages, hours, standards or productivity and performance, and any other terms and conditions of employment…". The CERB has long maintained that Section 6's duty to bargain inherently places on the employer an obligation to refrain from changing established terms and conditions of employment without first bargaining with the employees' exclusive representative. When a public employer unilaterally changes a term and condition of employment without giving notice and an opportunity to bargain to resolution or impasse to the employees' exclusive bargaining representative, such an employer has failed to bargain in good faith in violation of Section 10(a)(5) of the Law. 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)). The CERB has long held that to establish a violation of Section 10(a)(5), the union must show that: (1) the employer changed an existing practice or instituted a new condition of employment; (2) the change affected a mandatory subject of bargaining; and (3) the change was implemented without giving prior notice and an opportunity to bargain to resolution or impasse to the employees' exclusive bargaining representative. Commonwealth of Massachusetts and MOSES, 20 MLC 1545, 1552, SUP-3460 (May 13, 1994) (citing Town of North Andover, 1 MLC 1103, 1106, MUP-529 (September 3,1974)). In determining terms 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).

An employer's obligation under the Law to bargain in good faith also includes the duty to refrain from repudiating an agreement reached as a result of collective bargaining. Commonwealth of Massachusetts/Commissioner of Administration and Finance and Alliance, AFSCME-SEIU, Local 509, 28 MLC 36, SUP-4345 (June 29, 2001). To establish that an employer's conduct constituted a repudiation of a contract provision, a union must demonstrate that the employer deliberatively refused to follow the agreement. Commonwealth of Massachusetts, 18 MLC 1161, 1163, SUP-3356, SUP-3439 (October 16, 1991)(additional citations omitted). If the evidence is insufficient to find an agreement underlying the matter in dispute, or if the parties hold differing good faith interpretations of the provisions at issue, the CERB will find no violation. Id.

The issues before the Hearing Officer were whether the Employer was required to give the Union notice and an opportunity to bargain prior to its implementation of the lesser rule and the shortest distance rule, both of which changed how employees would be reimbursed for travel expenses, and whether its implementation of the changes repudiated the parties' CBA. The Hearing Officer concluded that the Employer did not violate the Law when it unilaterally implemented the lesser rule. The Hearing Officer did find, however, that DOB unlawfully implemented the use of the shortest distance rule when it failed to provide the Union an opportunity to bargain to resolution or impasse prior to implementation of the rule and that its actions also constituted a deliberate repudiation of Article 11, Section 11.1(A) of the parties' CBA. Both parties have appealed the decision and have requested the CERB to review different aspects of that decision.

**The Lesser Rule**

The first issue on appeal is whether the DOB's reimbursement to examiners for the lesser of the distance between his/her home and the temporary assignment or between his/her regularly assigned office and his/her temporary assignment constituted a bargainable change. The Employer does not dispute that the criteria for employee travel reimbursements is a mandatory subject of bargaining, see Commonwealth of Massachusetts and MOSES, supra,) or that prior to February 2020, it was not enforcing the CBA's lesser rule provision. Relying on Commonwealth of Massachusetts and Massachusetts Organization of State Engineers and Scientists (MOSES), 46 MLC 134, SUP-16-5594 (H.O. decision January 16, 2020), ***aff'd*** 46 MLC 207 (May 1, 2020) (hereinafter referred to as the "MOSES decision" or "MOSES case"), the Employer argued to the Hearing Officer and on review that it was not required to bargain over its use of the lesser rule to reimburse examiners for travel expenses because the CERB had previously ruled that the CBA language was clear and unambiguous and could not be overridden by a contrary practice.

Conversely, the Union argued that the CERB's MOSES decision was "inapposite" because it involved different parties bound by a different CBA and did not involve a consistent past practice of employees receiving travel reimbursement from their homes. The Hearing Officer agreed with the Employer that the MOSES case was controlling and held that the DOB was not obligated to bargain with the Union prior to its implementation of the lesser rule.

In its supplemental statement to the CERB, the Union restates its position that the Hearing Officer incorrectly relied upon the MOSES decision because its facts and

circumstances are readily distinguishable from the present matter. The Union further contends that there is ample authority supporting its view that the CERB should abandon its position that a practice cannot overcome clear contractual language. Specifically, the Union cites an 11th Circuit Court of Appeals decision, an arbitration award, and a Rhode Island statute.

We disagree with the Union that the Hearing Officer improperly relied upon the CERB's prior decision. The Hearing Officer correctly found that the MOSES decision is controlling here. Both cases involve nearly identical contractual language and required the CERB to determine whether the employer's cessation of reimbursing employees for travel expenses from their home to either their assigned offices or their temporary assignment and the implementation of the lesser rule were bargainable changes. The Hearing Officer in the instant matter correctly concluded, based on the facts before her and relying on the CERB's prior decision, that the parties' clear and unambiguous contract language need not succumb to a practice contradicting its plain meaning.

Furthermore, the principle enunciated in the MOSES decision is fully consistent with the well-established "waiver by contract" doctrine. Waiver by contract is an affirmative defense to unilateral change allegations. City of Newton v. Commonwealth Employment Relations Board, 100 Mass. App. Ct. 574, 584 (2021). Employers asserting this defense must "demonstrate that the parties consciously considered the situation that has arisen and that the union knowingly waived its bargaining rights." Commonwealth of Massachusetts, 19 MLC 1454, 1456, SUP-3528 (October 16, 1992) (additional citations omitted). The initial inquiry focuses upon the language of the contract and specifically whether the contract language "expressly or by necessary implication" confers upon the

employer the right to implement the change in the mandatory subject of bargaining without bargaining with the union. Id. If the contract language clearly demonstrates union waiver, then the employer's defense prevails. Id.

Before the Hearing Officer, the Employer argued that the clear and unambiguous language of Sections 11(1)(B) and (C) allowed it to implement those provisions without first giving the Union notice and an opportunity to bargain. This was in essence a waiver by contract argument.[13] Because, as explained in the MOSES decision, and above, Sections 11.1(B) and (C) clearly and unambiguously permit the Employer to impose the lesser rule and to cease reimbursing employees for travel from their homes under the circumstances set forth in 11.1 (C), we also find that the Union waived by contract any rights it had to bargain over this change. We thus affirm the Hearing Officer's conclusion that Employer was under no obligation to bargain with the Union prior to discontinuing the contradictory practice and implementing the lesser rule instead.[14]

We also decline to alter our case law on the basis of distinguishable court rulings, non-binding arbitration awards and statutory authority from jurisdictions beyond the Commonwealth. As a preliminary matter, these arguments are improperly raised for the first time on review. See Joseph R. Anderson v. Commonwealth Employment Relations Board, 73 Mass. App. Ct. 908, 909, n.7 (2009). Second, although the CERB is free to consider rulings from external jurisdictions as guidance and has often done so in matters

[13] Indeed, the Employer specifically references that doctrine on (unnumbered) page 9 of its post-hearing brief, but the Hearing Officer did not address it in this portion of her decision.

[14] Our determination here concerning waiver with regard to the "lesser rule" is separate from and is not intended to disturb the Hearing Officer's conclusion that the Union did not waive by contract its right to bargain over the shortest distance rule as discussed below.

of first impression, the CERB is not bound by such guidance. Board of Trustees, UMass, 8 MLC 1139, SUP-2306 (June 24, 1981). Here, as explained above, CERB precedent is well-established. We therefore decline to look beyond it to decide this issue. See OPEIU, Local 6 and Commonwealth Employment Relations Board, 96 Mass. App. Ct. 764, 771-772 (2019) (CERB did not err in applying long-standing precedent rather than federal rule where appellant union offered no reason why CERB was required as a matter of law to adopt it). In any event, the Union's reliance on these external precedents is misplaced as they are wholly distinguishable from the case at hand.

The Union relies upon Loveless v. Eastern Airlines, 681 F.2d 1272, 1280 (11th Cir. 1982), to support its view that a practice can override explicit contract language when the parties' intended meaning of the language is evinced by a long-standing practice. The Union, however, overstates the Court's ruling and understates the fact and circumstances surrounding the Court's review. The case involved the Court's review of whether an arbitration award drew its essence from the collective bargaining agreement. Id. at 1277. The Court was not presented with the question here of whether a past practice can overcome clear and explicit language as that question was left for the panel to decide based upon powers granted to it under the CBA. We are thus unpersuaded that Loveless v. Eastern Airlines provides us with a compelling basis to deviate from our precedent.

The Union also urges the CERB to consider the arbitration award in Evening News Association, 54 LA 716 (Mittenhall, Arb. 1970) to support its argument that the CERB should amend its holding that an employer's decision to abide by clear and unequivocal contract language is not a bargainable change. We decline to do so because the arbitration award involved neither party in the present matter. Moreover, the role of the

arbitrator was to rule on whether the parties' CBA had been violated, not to decide if a party had violated the Law, which is precisely what the CERB's mandate is with respect to M.G.L. c.150E. See City of Newton and Newton Police Superior Officers Association, MASSCOP, Local 401, 46 MLC 20, 22, MUP-16-5532 (August 20, 2019) (finding that the city's citation to an arbitration award to support its arguments was inapposite – just as an arbitrator is not bound by CERB decisions, the CERB is not bound by arbitration awards).

Finally, the Union points to a Rhode Island statute that sets forth a labor arbitrator's authority to consider past practices to support its view that the CERB should deviate from its prior rulings on the issue.[15] Other than stating that Massachusetts has never enacted a statute like Rhode Island's that addresses the interplay between past practice and explicit contact language, which notably only applies to arbitrators and not the CERB's counterpart, the Rhode Island State Labor Relations Board, the Union presents no valid reason why the CERB should restrict the authority vested to it by the Massachusetts legislature. Consequently, we shall continue to exercise our expertise and the longstanding discretion afforded to us by the judiciary to determine issues arising under

[15] The Rhode Island statute, R.I. General Laws c.9, § 28-9-27 provides:

> **(a)** An arbitrator shall have the authority to consider the existence of a past practice that may exist between the parties to a collective bargaining agreement only under the following circumstances:
> **(1)** The collective bargaining agreement does not contain an express provision that is the subject of the grievance; or
> **(2)** The collective bargaining agreement contains a provision that is unclear and ambiguous; or
> **(3)** The collective bargaining agreement contains a provision which has been mutually agreed upon by the parties that preserves existing past practices for the duration of the collective bargaining agreement.

Chapter 150E in a manner that is consistent with both the purpose and letter of the Law. See Everett v. Local 1656, Int'l Ass'n of Firefighters, 411 Mass. 361, 368 (1991) (deferring to CERB's "special expertise" when interpreting CBA language).

**The Shortest Distance Rule**

The first issue to address concerning the shortest distance rule is whether the DOB's implementation of the rule constituted a bargainable change that required the DOB to provide the Union with prior notice and an opportunity to bargain to resolution or impasse. The Hearing Officer found that the DOB's unilateral change of an established practice of reimbursing examiners for mileage based on their odometer readings and/or web-based maps and implementation of a reimbursement standard solely on the shortest distance rule was a bargainable change. She concluded that because the Employer failed to negotiate with the Union to resolution or impasse prior to implementation of the shortest distance rule, the Employer violated Section 10(a)(5) of the Law.

A corollary issue concerning the shortest distance rule is whether the DOB repudiated Sections 11.1(A) and (B) of the CBA by deliberately refusing to abide by or implement a provision contained in the CBA. The Union asserted that the DOB repudiated the agreement because the CBA provides that actual mileage driven will be reimbursed subject to one limitation – the reasonableness of the mileage being submitted, which management can check to determine if a basis exists to conclude that the miles submitted are unreasonable. The Employer conversely argued that it did not repudiate the CBA because the DOB's ability to compare routes to determine the shortest distances between an examiner's home/regularly assigned office and his/her temporary assignment is implicit in the CBA to ensure proper reimbursement to employees in accordance with

Section 11.1(B)'s lesser rule. The Hearing Officer concluded that based on the totality of the evidence before her, the DOB deliberately repudiated Article 11, Section 11.1(A) in that it refused to abide by the CBA's terms when it stopped reimbursing examiners in accordance with the reasonableness rule, made the odometer reading optional, and started reimbursing examiners based solely on the shortest distance rule.

On appeal, the DOB contends that the Hearing Officer relied on erroneous findings of fact and conclusions of law in reaching her decision. Based on the facts set out above, we find that the Hearing Officer did not err in determining that the DOB failed to negotiate with the Union to resolution or impasse prior to implementation of the shortest distance rule. We disagree, however, that the Employer unlawfully repudiated the CBA when it made this change. We therefore reverse the Hearing Officer's conclusion on this issue.

**Unilateral Change**

The Hearing Officer correctly concluded that the DOB violated Section 10(a)(5) of the Law by failing to bargain with the Union over the shortest distance rule prior to implementation. As described above, before February 5, 2020, the DOB reimbursed examiners based on the actual route that they traveled, as evidenced by odometer readings and/or web-based maps, subject only to the reasonableness of their route. After February 5, 2020, the DOB started reimbursing examiners for mileage expenses based on the lesser of the *shortest distance possible* from the employee's assigned office and a temporary assignment, or the *shortest distance possible* from the employee's home and a temporary assignment, regardless of the actual route the Examiner took. Because the Employer ceased reimbursing employees for actual mileage driven, subject only to the reasonableness rule, this was a change in the manner of how mileage reimbursements

were calculated. The DOB's contention that this does not constitute a bargainable change is not persuasive due not only to the fact that the DOB clearly changed its method of travel reimbursement calculations, but also from the fact that, in various communications from the DOB to the Union, the DOB clearly recognized and characterized it as a change.[16]

Finally, although not expressly contested by the Employer on appeal, we agree with the Hearing Officer that the Union did not waive by contract its right to bargain over

[16] Examples of communications from the DOB to examiners and/or Union representatives demonstrating a change in how mileage reimbursements would be processed include:

- In a February 5, 2020 Employer email to all DOB staff as a follow-up to its announced "*Changes* in DOB Travel Reimbursement Calculations," the DOB stated that it "… recognized the significant impact on mileage reimbursements for all DOB employees, we are working to implement the required *changes* and address any questions." (*Emphasis* added). The email further advised how future reimbursement requests should be submitted, "…if an employee opts to provide the odometer reading without submitting maps, you should anticipate that review and processing will take longer. The practice of referring back to previously submitted maps will take longer. Thus, OPS suggest you include all relevant maps (for both routes in the "lesser distance" calculation) with each weekly submission, so your travel reimbursement can be processed more promptly. The route to your temporary assignment from your home or from your assigned office *will be* reviewed at the shortest distance." (Emphasis added).

- In a February 24, 2020 email to a NAGE Union representative, the Employer addressed the use of the "*new* reimbursement forms" and "… anticipated there will be challenges as we implement the *changes* and begin reviewing and processing the *new* forms." (*Emphasis* added) The Employer acknowledged in this email that the concept of "shortest distance" was not expressly written in the CBA but was what it determined to be the implicit intent of Section 11.1(B).

this change. We find that the plain language of Article 11.1(A), either read alone or in conjunction with Section 11.1 (B), does not expressly or by necessary implication permit the Employer to apply the shortest distance rule. Commonwealth of Massachusetts, 19 MLC at 1456.

Given this change, where it is undisputed that travel reimbursements are a mandatory subject of bargaining and the Employer failed to provide the Union with an opportunity to bargain to resolution or impasse over the use of the shortest distance rule, we affirm the Hearing Officer's ruling that the DOB violated Section 10(a)(5) of the Law by failing to provide the Union with notice and an opportunity to bargain to resolution or impasse over the shortest distance rule.

**Repudiation**

We reach a different conclusion with respect to the question of whether the DOB's implementation of the shortest distance rule constituted a repudiation of Section 11.1(A) of the CBA. To establish a repudiation, a union must show that an employer deliberately engaged in a pattern of conduct designed to ignore the parties' collective bargaining agreement. Board of Higher Education and Massachusetts State College Association/MTA/NEA, 41 MLC 217, 223, SUP-08-5396 (February 6, 2015) ***aff'd sub nom.*** Board of Higher Education v. Commonwealth Employment Relations Board 483 Mass. 310 (2019). If the language of the agreement is unambiguous, the CERB gives effect to the clear meaning of the bargained-for language and does not inquire into the parties' intent. Boston School Committee, 22 MLC 1365, 1376, MUP-8125 (January 9, 1996). If the language is ambiguous, the CERB looks to the bargaining history to determine whether there was an agreement between the parties. Id. at 1375. If the

evidence is insufficient to find an agreement underlying the matter in dispute, or if the parties hold differing good faith interpretations of the terms of the agreement, the CERB will not find a repudiation because the parties did not achieve a meeting of the minds. City of Everett, 26 MLC 25, 27, MUP-1542 (July 22, 1999).

Here, although the first clause of the second paragraph of Section 11.1(A) states that "[m]ileage *shall* be determined by the odometer reading of the motor vehicle," this mandatory language is modified by the second clause, which states that such determination "may be subject to review for reasonableness by the Appointing Authority who shall use a web-based service as a guide." We find that the second clause modifies the first clause by granting the Employer the discretion to review the odometer reading for "reasonableness" using web-based map services. The CBA does not contain a definition of the term "reasonableness," specify a standard by which the reasonableness of the reading would be measured, or define or describe the circumstances that could trigger the Employer's discretion to decline to reimburse employees based on the mileage they have submitted. For this reason, we agree with the Hearing Officer that, read as a whole, Section 11.1(A) is ambiguous.

Section 11.1(A)'s ambiguity is exacerbated by the fact that the CBA provides no guidance as to how or whether Section 11.1(B)'s lesser rule relates to Section 11.1(A)'s reasonableness clause, i.e., whether, as the Employer argues, the route used to determine which is the lesser of the two distances is the sole standard by which reasonableness is to be determined or whether it will be based on different considerations pertaining to the actual route the employee traveled.

Prior to February 2020, this second layer of ambiguity was not an issue for the Employer as it was not the lesser rule. After February 2020, however, it was, resulting in the Employer's unilateral implementation of the "shortest distance" rule to determine mileage reimbursements in circumstances when the lesser rule applied. We have affirmed the Hearing Officer's conclusion that the Employer violated Section 10(a)(5) of the Law by implementing the shortest distance rule without first giving the Union notice and an opportunity to bargain. Here, however, given the ambiguity of the Section 11.1(A) reasonableness provision, when read alone and in conjunction with Section 11.1(B), and given our finding that the parties never bargained to clarify those ambiguities after the Employer began enforcing the "lesser rule," we disagree with the Hearing Officer that the parties achieved a meeting of the minds on how to reimburse employees for travel expenses in situations where the lesser rule applied to an employee's travel voucher. See Commonwealth of Massachusetts, 28 MLC 351, SUP-4487 (May 17, 2002) (finding no repudiation where, among other things, the language of the agreement was ambiguous as to the length of time the agreement would remain in effect and there was no bargaining history that shed light on its meaning).

Because the parties never had a meeting of the minds on how to reimburse employees for travel expenses when the lesser rule applied after February 5, 2020, it cannot be said that the DOB deliberately attempted to ignore what is required under Article 11, Sections 11.1(A) and 11.1(B). To the contrary, the DOB continued to abide by the overall purpose of Article 11, Section 11.1 to reimburse examiners for certain mileage expenses. The DOB's post February 2020 reevaluation of how it was administering Section 11.1(A) and its subsequent attempt to apply the entirety of Article 11, Section

11.1 in a manner that it believed fulfilled its CBA obligations cannot be characterized as a purposeful effort to avoid reimbursing examiners for employment-related travel expenses. Compare Town of Wellesley, 23 MLC 86, MUP-9909 (September 13, 1996) (where parties agreed that town would provide sufficient training for EMTs to maintain their certification and off-site training would be subject to chief's approval, but such agreement did not require town to provide a specific number of off-duty training hours, union failed to show that town deliberately repudiated agreement by not providing a specific number of hours of training or by withholding approval for certain off-duty requests) to Board of Higher Education, 41 MLC 217, SUP-08-5396 (February 6, 2015) (colleges that repeatedly and admittedly failed to comply with unambiguous contractual cap on the number of courses that part-time faculty could teach in a given department repudiated CBA by deliberately engaging in a pattern of conduct designed to ignore the parties' collective bargaining agreement).

We therefore find that the DOB's good faith application of Section 11.1(A) post February 1, 2020, to achieve contractual consistency with its Section 11.1(B) obligations did not constitute a deliberate repudiation in violation of Section 10(a)(5) and, derivatively Section 10(a)(1) of the Law.

## CONCLUSION

For the foregoing reasons, and those stated in the Hearing Officer's decision, we affirm the Hearing Officer's decision that Employer did not violate the Law when it failed to provide the Union with an opportunity to bargain to resolution or impasse prior to its compliance with the CBA's lesser rule, but that the Employer did unlawfully fail to provide the Union with an opportunity to bargain to resolution or impasse prior to its

implementation of the shortest distance rule. We reverse the Hearing Officer's ruling that the Employer unlawfully repudiated the CBA. Thus, we issue the following Order.

## ORDER

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

1. Cease and desist from:

   a. Failing to bargain collectively in good faith with the Union by unilaterally implementing the shortest distance rule as a means of reimbursing field examiners for travel expenses under Article 11, Section 11.1(A) when the "lesser rule" set forth in Article11, Section 11.1(B) of the parties' 2017-2020 CBA applies.

   b. In any similar manner, interfering with, restraining or coercing employees in the exercise of their rights guaranteed under the Law.

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

   a. Immediately rescind the shortest distance rule as a means of reimbursing field examiners for travel expenses under Article 11, Section 11.1(A) of the parties' CBA when the "lesser rule" set forth in Article11, Section 11.1(B) applies.

   b. Upon request by the Union, bargain in good faith to resolution or impasse over the method of calculating mileage reimbursement to field examiners for travel expenses under Article 11, Section 11.1(A) when the "lesser rule" set forth in Article 11, Section 11.1(B) applies.

   c. Make whole every examiner who was entitled to, but did not receive, after February 5, 2020, mileage reimbursement in accordance with the odometer readings and/or web-based maps used by those examiners, subject to the reasonableness of the actual routes travelled by those examiners as stated in Article 11, Section 11.1(A), with interest compounded quarterly at the rate specified in G.L. c. 231, §6I.

   d. Post immediately, signed copies of the attached Notice to Employees in all conspicuous places where members of the Union's bargaining unit usually congregate or notices are usually posted, including electronically if the Employer customarily communicates with these unit members by email or intranet, and display for a period of thirty days thereafter; and,

e. Notify the DLR in writing of the steps taken to comply with this Order within thirty (30) days of its receipt.

**SO ORDERED.**

COMMONWEALTH OF MASSACHUSETTS
COMMONWEALTH EMPLOYMENT RELATIONS BOARD

Marjorie F Wittner

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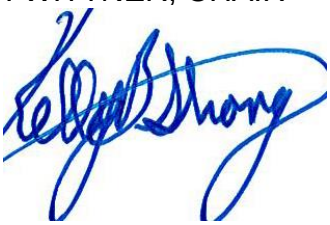
MARJORIE F. WITTNER, CHAIR



_____
KELLY B. STRONG, CERB MEMBER

Victoria B. Caldwell

_____
VICTORIA B. CALDWELL, 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 obtain 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

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Section 2 of M.G.L. Chapter 150E gives public employees the following rights: to engage in self-organization; to form, join or assist any union; to bargain collectively through representatives of their own choosing; to act together for the purpose of collective bargaining or other mutual aid or protection; and to refrain from all of the above.

WE WILL NOT fail to bargain collectively in good faith with the Union by unilaterally implementing the shortest distance rule as a means of reimbursing field examiners for travel expenses under Article 11, Section 11.1(A) when the "lesser rule" set forth in Article11, Section 11.1(B) applies.

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

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

- Immediately rescind the shortest distance rule as a means of reimbursing field examiners for travel expenses under Article 11, Section 11.1(A) of the parties' CBA when the "lesser rule" set forth in Article11, Section 11.1(B) applies.

- Upon request by the Union, bargain in good faith to resolution or impasse over the method of calculating mileage reimbursement to field examiners for travel expenses under Article 11, Section 11.1(A) when the lesser rule set forth in Article 11, Section 11.1(B) applies.

- Make whole every examiner who was entitled to, but did not receive, after February 5, 2020, mileage reimbursement in accordance with the odometer readings and/or web-based maps used by those examiners, subject to the reasonableness of the actual routes travelled by those examiners as stated in Article 11, Section 11.1(A), with interest compounded quarterly at the rate specified in G.L. c. 231, §6I.
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_____ _____
For the Commonwealth of Massachusetts Date

**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED OR REMOVED**

This notice must remain posted for 30 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Department of Labor Relations, Charles F. Hurley Building, 1st Floor, 19 Staniford Street, Boston, MA 02114 (Telephone: (617) 626-7132).