COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of COMMONWEALTH OF MASSACHUSETTS, SECRETARY OF ADMINISTRATION AND FINANCE, DIVISION OF BANKS and NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, LOCAL 207	Case Nos. SUP-20-7856 and SUP-20-7945 Date Issued: June 29, 2022

Hearing Officer:

Kendrah Davis, Esq.

Appearances:

Emily Sabo, Esq.	-	Representing Commonwealth of Massachusetts, Secretary of Administration and Finance, Division of Banks
Richard Waring, Esq.	-	Representing National Association of Government Employees, Local 207

HEARING OFFICER'S DECISION

SUMMARY

The issues in this case are whether the Commonwealth of Massachusetts (Commonwealth), Secretary of Administration and Finance, Division of Banks (DOB or Employer) violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E (the Law) by failing to bargain in good faith with the National Association of Government Employees, Local 207 (NAGE or Union) by: (1) changing the calculation of mileage reimbursement for bank examiners not assigned to the DOB's Boston office based on the "lesser" 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; (2) repudiating 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 not assigned to the DOB's Boston office based on the lesser rule; (3) changing 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 (4) repudiating Article 11, Section 11.1 (A) and Section 11.1 (B) of the parties' CBA as it pertained to the calculation of mileage reimbursement for bank examiners with certain travel routes based on the shortest distance rule.

For the reasons explained below, I find that the Employer did not violate the Law as alleged by changing the calculation of mileage reimbursement for bank examiners not assigned to the DOB's Boston office based on the lesser 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. I also find that the Employer did not violate the Law as alleged by repudiating Article 11, Section 11.1 (B) and Section 11.1 (C) of the parties' CBA as it pertained to the calculation of mileage reimbursement for bank examiners not assigned to the DOB's Boston office based on the lesser rule. However, I find that the Employer did violate the Law, as alleged, by changing 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. I also find that the Employer violated the Law, as alleged, by repudiating Article 11, Section 11.1 (A) and Section 11.1 (B) of the parties' CBA as it pertained to the calculation of mileage reimbursement for bank examiners with certain travel routes based on the shortest distance rule.

STATEMENT OF THE CASE

On February 11, 2020, the Union filed a Charge of Prohibited Practice (Charge I) with the Department of Labor Relations (DLR), alleging that the Employer had engaged in prohibited practices within the meaning of Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by repudiating the parties' CBA which was effective from July 1, 2017 to June 30, 2020, and by unlawfully changing the way it calculated mileage reimbursement for bank examiners not assigned to the DOB's Boston office based on the lesser rule. On March 23, 2020, the Union filed another Charge of Prohibited Practice (Charge II) with the DLR, alleging that the Employer had engaged in prohibited practices within the meaning of Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by repudiating the CBA, and by unlawfully changing the way it calculated mileage reimbursement for bank examiners with certain travel routes based on the shortest distance rule.

Pursuant to Section 11 of the Law and Section 15.05 of the DLR's Rules, a DLR investigator investigated Charge I on April 21, 2020. That investigator issued a two-count Complaint of Prohibited Practice (Complaint I) on May 15, 2020, alleging that the

Employer had violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by failing to bargain in good faith with the Union when it: (1) changed the calculation of mileage reimbursement for bank examiners not assigned to the DOB's Boston office based on the lesser 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 (2) repudiated Article 11, Section 11.1 (B) and Section 11.1 (C) of the parties' CBA as it pertained to the calculation of mileage reimbursement for bank examiners not assigned to the DOB's Boston office based on the lesser rule. On July 10, 2020, the same investigator issued another two-count Complaint of Prohibited Practice (Complaint II), alleging that the Employer had violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by failing to bargain in good faith with the Union when it: (1) 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 (2) repudiated Article 11, Section 11.1 (A) and Section 11.1 (B) of the parties' CBA as it pertained to the calculation of mileage reimbursement for bank examiners with certain travel routes based on the shortest distance rule.

On May 19, 2020, and July 20, 2020, respectively, the Employer filed its Answers to Complaint I and Complaint II. On August 3 and 4, 2020, respectively, the Union requested, and the Employer assented to, consolidating Complaints I and II, which the DLR allowed on August 7, 2020. On October 22, 2020, December 1 and 8, 2020, and

January 7 and 26, 2021, I conducted five days of hearing via WebEx[1] at which both parties had a full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. Both parties filed their respective post-hearing briefs on March 26, 2021.

The Procedural Motions

By two separate emails on October 15, 2020, the Union filed two Motions in Limine seeking, first, to exclude nine exhibits offered by the Employer and, second, to preclude the testimony of witness Beverly Ashby (Ashby). By email on October 17, 2020, the Employer filed its response to the Motions in Limine; and by ruling issued on October 21, 2020, I denied both Motions.

On the record at the hearing on October 22, 2020, the Employer moved to impound certain evidence and filed a subsequent written Motion to Impound (Motion I) on November 6, 2020. The Charging Party did not object to Motion I. On March 12, 2021, the Employer filed an Amended Motion to Impound (Motion II), which included evidence from Motion I and additional evidence. By email on March 12, 2021, the Charging Party stated that it did not object to Motion II. On April 22, 2022, I issued a ruling that allowed Motion II in part, and denied it in part.

ADMISSIONS OF FACT

The Employer admitted to the following facts:

1. The Commonwealth of Massachusetts, acting through the Secretary of Administration and Finance, is a public employer within the meaning of Section 1 of the Law.

[1] I conducted the hearing remotely pursuant to the Governor Baker's teleworking directive to executive branch employees.

2. The Union is an employee organization within the meaning of Section 1 of the Law.

3. The Union is the exclusive collective bargaining representative for employees in statewide bargaining Unit 6, including Bank Examiners employed by the Division of Banks (Division [or DOB]).

4. The Union and the Employer [we]re parties to a collective bargaining agreement (CBA) that [was] in effect, by its terms, from July 1, 2017 to June 30, 2020.

5. [Article 11, Section 11.1] (B) of the parties' CBA state[d]: "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."

6. [Article 11, Section 11.1] (C) of the CBA state[d]: "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."

STIPULATIONS OF FACT

The parties stipulated to the following additional facts:

1. [Article 11, Section 11.1] (A) of the CBA state[d], in part, that "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."

2. In addition to the long-standing Boston office, field offices have been in existence since at least 1998. The three DOB field offices are commonly referred to as North, South, and West field offices.

FINDINGS OF FACT

Background

1. The DOB's Organizational Structure

The Executive Office for Administration and Finance oversees the Human Resources Division (HRD) which oversees the Office of Employee Relations (OER),

which oversees the Office of Consumer Affairs and Business Regulation (OCABR). OCABR is a consumer protection agency that oversees the DOB. At all relevant times, Joel Boone (Boone) was the OER Assistant Director and Dianne Handrahan (Handrahan) was the OCABR Chief Financial Officer. Also, at all relevant times, Christopher J. Groll (Groll) was the DOB Labor and Employee Relations Manager. In or around 2016, the DOB employed Mary Gallagher (Gallagher) as its Chief Operating Officer, and later promoted her to DOB Commissioner which is her current position. In 2015, the DOB hired Lia Fahey (Fahey) as a Project Coordinator and Site Commissioner. The DOB later promoted Fahey to Infrastructure Operations Manager, and promoted her again to Director of Operations where she has remained at all relevant times.

The DOB licenses and regulates certain financial services companies in Massachusetts, including approximately 170 state-chartered banks and credit unions (i.e., depository institutions), and over 10,000 mortgage brokers, mortgage lenders, check cashers, check sellers, consumer finance companies, debt collectors, pawn brokers, and foreign transmittal agencies (i.e., non-depository institutions).[2]

The DOB employs approximately 100 persons in the positions of Examiner I, II, III, and IV (examiners).[3] Certain examiners perform specific job duties, such as: licensing

[2] DOB retired examiner, Stephen O'Leary (O'Leary) gave unrebutted testimony on these figures. In its brief, the Union cited to the DOB's website, arguing that "the DOB website declares that it supervises nearly 170 state-chartered banks and credit unions over 10,000 non-depository licenses doing business in Massachusetts." Neither party offered the DOB website as evidence, and neither requested that I take administrative notice of that website. Thus, the DOB website is not in the record, and I do not consider it for purposes of this decision.

examiners who review applications for businesses seeking licensure as non-depository institutions; consumer protection examiners or "non-depository" examiners who investigate non-depository institutions; risk management examiners or "depository" examiners who investigate depository institutions for safety, soundness, and consumer protection; and enforcement investigation and consumer assistance examiners.

The DOB's main office is located in Boston where it receives and sends mail, permits in-person visits from the public, and designates specific cubicles to licensing examiners and consumer assistance examiners assigned to that office. Initially, the DOB assigns all newly-hired examiners to its Boston office for purposes of training and orientation. After the initial hiring period, the DOB assigns examiners to either its Boston office or to one of its three field offices located in Lakeville, Springfield, and Woburn,[4] Massachusetts. On rare occasions, the DOB may designate an examiner's home as their office for purposes of reimbursement for travel expenses. Regardless of assignment, the DOB provides all examiners with business cards that list the Boston office as their official business address.[5]

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[3] DOB Director of Administration and Training Jennifer DeWitt (DeWitt) testified that the DOB employs about 150 employees, approximately 100 of which are examiners with about 55 depository bank examiners and 45 non-depository bank examiners. NAGE State Director and Chief Negotiator Kevin Preston (Preston) also testified that at all relevant times, the DOB had over 100 bank examiners.

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

[5] DOB examiner Tayana Antin (Antin) testified that while she is not assigned to the Boston office, her business card lists the address "1000 Washington Street" 10th Floor, Boston, MA 02118-6400. Similarly, O'Leary testified that he had business cards with the

At its field offices, the DOB provides unassigned cubicle space for examiners where they may perform pre-examination and post-examination duties[6] in lieu of performing those duties on-site at financial institution.[7] While the DOB encourages examiners to perform work at their assigned offices, the number of examiners who actually perform their official duties at their respective field offices varies week to week.[8]

Washington Street address, as well as two earlier Boston office addresses at "100 Cambridge Street" and at "South Station." O'Leary also testified that at all times his business cards "reflected the [DOB's] main office" and that he "[n]ever had a business card with [his] home address."

[6] Antin gave unrebutted testimony that pre and post examination work includes writing examination reports.

[7] DOB Chief Risk Officer Paul Gibson (Gibson) gave unrebutted testimony that "on-site examination-related work [entails] things like reviewing board minutes that the institution would have for prior board meetings [and] reviewing loan files that are voluminous."

[8] Gibson testified that field examiners "spend more time working out of their respective field offices and shorter amounts of time on-site doing examination related work." He also testified that "[p]art of the reasoning is to reduce the burden on the institution that they're examining and to give the examination team their own work space to be able to complete pre-examination related work and also to have periodic meetings to discuss whatever needed to be discussed amongst the examination teams." Gibson testified further that while "[t]he entire examination process can be done on-site…most recently [in] the past ten months, a lot of it can be done off-site as well." While DeWitt testified that those "examiners are mostly working out of the field offices or telecommuting," she also testified that "about 60 to 85 percent of the time, [certain field examiners] would be expected to be on-site at a bank. And the remainder of the time they would be either telecommuting or attending trainings or meetings, maybe in the Boston office." Moreover, DOB Director of Operations Fahey testified generally that when field examiners are scheduled to work, they're scheduled to work where they need to be, whether that is at an institution or their field office or at a training or at another office." Fahey later conceded that the DOB does not require examiners "to be in their assigned field office every [day]."

O'Leary testified that during his tenure as a field examiner, "[a]ll of [his] assignments were temporary," and that he "had no permanent assignment or permanent office." He also testified that on "occasion" he would perform "pre-exam work or post-exam work at a field

The DOB provides examiners assigned its field offices with laptop computers, "MyFi" devices, certain software, and telephone extensions for their email accounts. However, the DOB does not usually provide those examiners with designated desks,[9] desktop computers, telephones, fil/e cabinets, or other fixed personal belongings such as photographs or name plaques.[10] Instead, the DOB instructs these examiners to find an open space to sit/work when they are in their respective field office.

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office," but spent "90 to 95% of [his] career" on-site at financial institutions, while "[5] to 10% of the time [he went] to the field office or the Boston office," and that at "some institutions [he] was there for months and months and months and would not go to a field office or to the Boston office." Similarly, Antin testified that from 2013 through January 31, 2020, she left her home and travelled directly to an examination site "90 percent of the time," and that "five percent [of the time she] was probably in some kind of field office," while the remaining "five percent [she] would either be at training or…be in the Boston office."

Based on the totality of this evidence, I credit the corroborating testimonies of O'Leary and Antin, finding that field examiners perform most of their duties outside of their respectively assigned field offices, usually at examination sites.

[9] At some point between late August or early September of 2019 and February of 2020, the DOB provided Antin with a medical accommodation in the form of a sit/stand desk which it designated temporarily for her exclusive use during her pregnancy while assigned to the Lakeville field office.

[10] O'Leary testified that he "had no personal matters or materials" when he was assigned to his respective field offices, and that he "did not have a desk…did not have a desktop computer…did not have a telephone…[and] did not have any file cabinets." O'Leary also testified that "when [he] went to the field office, [he] didn't know which seat [he] would be sitting in or which workstation [because] [i]t was on a first-come-first-serve basis." Additionally, O'Leary testified that during his tenure, he "never had a permanent office," and "didn't even have a cardboard box….had no desk [and]…had no computer." Fahey testified that the DOB provides field examiners with "certain….standard equipment" including "a laptop and a MyFi device," certain software, and "a phone extension for [an] email account." She later conceded that the DOB does not issue name tags for specific cubicles in its field offices.

2. DOB Personnel

In 2008, the DOB hired Jennifer DeWitt (DeWitt) as an Examiner II where she worked out of the Lakeville field office. The DOB later promoted DeWitt to Examiner III, and promoted her again in 2015 as a "training and development manager." In mid-2019, the DOB promoted DeWitt to Director of Administration and Training where she has remained at all relevant times. On January 2, 1996, the DOB hired Paul Gibson (Gibson) as a "Field Based Bank Examiner" who had several promotions, including Assistant Chief Director, Chief Director, Deputy Commissioner, Senior Deputy Commissioner, and Chief Risk Officer. At all relevant times, Gibson has been DOB Chief Risk Officer.

On May 20, 1990, the DOB hired Stephen O'Leary (O'Leary) as an Examiner I. When O'Leary retired from the DOB on March 28, 2016, he was an Examiner IV. During his tenure, the DOB assigned O'Leary to the North field office, primarily.[11] In January of 2013, the DOB hired Tayana Antin (Antin) as an Examiner II, and later promoted her to Examiner IV where she has remained at all relevant times. Initially, the DOB assigned

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Based on the totality of this evidence, I credit O'Leary's testimony that during his tenure as a field examiner, he did not have any personal matters or materials when he was assigned to his respective field offices and, during that time, the DOB did not provide him with a designated desk, desktop computer, physical telephone, or file cabinets. I also credit O'Leary's testimony that his use of workstations at the field office was on a "first-come-first-serve basis." However, I credit Fahey's testimony that the DOB provided field examiners with certain standard equipment including laptops, MyFi devices, software, and telephone extensions for email accounts.

[11] O'Leary testified that when he was in a field office, the DOB directed him to "report to [the Northern Field Office] on a regular basis if needed rather than the Southern Field Office or the Western Field Office or the Boston Office." He also testified that when he "did have occasion to go to the Western Field Office and the Southern Field Office…[it was] rarely."

Antin to its Boston office, but "[o]nly for the first three days during an orientation period." At all relevant times after that, the DOB assigned Antin to its Lakeville field office. Prior to February of 2020, Antin would sometimes travel to other field offices when it was convenient.

3. NAGE Representatives

At all relevant times, Kevin Preston (Preston) was NAGE State Director and Chief Negotiator for Massachusetts Executive Branch employees. In 1999, NAGE appointed Bobbi Kaplan (Kaplan) as steward while she was employed in the Comptroller's Office. NAGE later appointed Kaplan to a vacant Executive Vice President position in 2001; and, in 2002, she was elected as Executive Vice President where she has remained at all relevant times. Also, at all relevant times, Theresa McGoldrick (McGoldrick) was NAGE National Executive Vice President, and Kelly Donohue (Donohue) was a NAGE Representative. During his tenure at the DOB, O'Leary served as Union Steward for 25 years, and also served for 12 years as Union Executive Board Member/Vice President between 2004 to 2016.

The Collective Bargaining Agreements

1. The 1981 – 1984 CBA

NAGE and the DOB were parties to a CBA that was effective from July 1, 1981 to June 30, 1984 (1981-1984 CBA). Article 11 of that CBA pertained to "Employee Expenses" and stated, in full:

> A. 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 twenty ($.20) cents per mile effective July 1, 1981. This rate of

> reimbursement is intended to cover the costs of garages, parking, tolls[,] and other charges.
>
> 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 home and his/her temporary assignment or between his/her regularly assigned office and his/her temporary assignment, whichever is less.
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> C. Employees shall not be reimbursed for commuting between their home and office or other regular work location. With the approval of the Personnel Administrator, an employee's home may be designated as his/her regular office by his/her appointing authority, for the purposes of allowed transportation expenses in cases where the employee has no regular office or other regular work location.

2. The Successor CBAs

The parties executed successor CBAs that were effective from July 1, 2000 to June 30, 2003 (2000-2003 CBA),[12] and from July 1, 2017 to June 30, 2020 (2017-2020 CBA).

[12] Although neither party offered a copy of the 2000-2003 CBA into evidence, O'Leary gave unrebutted testimony that the 2000-2003 CBA first referenced the "Milo Guide," which "was a booklet that had every city and town in the Commonwealth of Massachusetts." O'Leary also testified that during successor contract negotiations, in his capacity as Union steward and as an E-board member, he suggested that the DOB "do away with the Milo Guide and…go to [GPS,] web-based [mapping]," which the parties incorporated into subsequent CBAs. Similarly, Preston testified that "back before GPS, [the Milo Guide] showed the distance between the center of every town in Massachusetts," and that "[i]n the center of every town there was this grid that you'd look at….[to determine] how many miles it was from the center of town." Preston also testified that as "GPS [technology] started to evolve, [the DOB] just shifted over to it," and eventually the parties negotiated changes to their CBA where they eliminated use of the Milo Guide in favor of using "odometer…readings subject to a reasonableness test." Specifically, Preston testified that the parties changed the language of Article 11, Section 11.1 (A) to include "the rule to calculate mileage…based on odometer readings."

O'Leary also gave unrebutted testimony about the DOB practice of "wheeling" or "wheeled the route" which was "a very cumbersome process [that included] maps and a calibration wheel." Specifically, O'Leary testified that examiners "needed to [use the wheeled the route method for] each and every turn that we took and [the] street that we

Article 2, Section 2.1 of the 2017-2020 CBA pertained to "Managerial Rights/Productivity" and stated, in full:

> Except as otherwise limited by an express provision of this Agreement, the Employer shall have the right to exercise complete control and discretion over its organization and technology including but not limited to the determination of the standards of services to be provided and standards of productivity and performance of its employees; establish and/or revise personnel evaluation programs; the determination of the methods, means and personnel by which its operations are to be conducted; the determination of the content of job classifications; the appointment, promotion, assignment, direction and transfer of personnel; the suspension, demotion, discharge or any other appropriate action against its employees; the relief from duty of its employees because of lack of work or for other legitimate reasons; the establishment of reasonable work rules; and the taking of all necessary actions to carry out its mission in emergencies.

Article 11 of the 2017-2020 CBA pertained to "Employee Expenses" and stated, in full:

> A. 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.
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> 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.

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took to do it," and that the DOB would "actually follow the route [travelled by an examiner] on a map with a little wheel that was calibrated for mileage to see if it matched up with what [they] put down and it matched up with the odometer reading." He testified specifically that the DOB would "actually drive[ ] the road" to determine whether "the wheeling matched up within [the acceptable] tolerance level" which "was approximately five miles," which meant that if an examiner submitted a route that was "five miles under or five miles over what [the DOB] wheeled on the little map…that was acceptable and they would pay it." O'Leary testified that the DOB "would either prove [the route reported] or question it. And if [the DOB] questioned it they would call [the examiner] in [and] ask …why was there a deviation?" Additionally, O'Leary testified that the DOB instructed examiners to use the Milo Guide "if [they] didn't want to write the route down," but if the DOB checked "the exact route and it deviated from the Milo Guide [the DOB] would wheel it and then check [the route travelled] for reasonableness."

Effective July 10, 2005, employees shall be reimbursed for reasonable associated costs for parking and tolls for authorized travel.

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 home and his/her temporary assignment or between his/her regularly assigned office and his/her temporary assignment, whichever is less.

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

The Telecommuting Policy and Revised Policy

In or about 2013, the DOB implemented a Telecommuting Program Policy (Policy) that required employees to complete a checklist and sign an agreement, subject to management approval, prior to telecommuting. The Policy stated, in pertinent part:

> Purpose:
> To establish policy and issue guidance on the Division's Telecommuting Program. The term "telecommuting" means working at home or at other approved work sites. The Division's Telecommuting Program allows for participation based on specific nature and content of the work to be performed rather than on position or grade.
>
> Eligibility:
> The provisions of this Policy apply to all Division employees [with certain exceptions.]
> ….
>
> Note: Requests for permission to telecommute on a temporary basis may be considered for all Division staff when extenuating circumstances exist—provided that the employee has complied with all other aspects of the Division's Telecommuting Program. [Emphasis omitted.]
>
> Policy:
> It is the policy of the Division to allow its employees use of the Telecommuting Program for those projects/duties that are well-suited for

> completion at an alternative work site. The Division's Telecommuting Program is offered for the convenience of the employee, as well as a means of supporting enhanced employee flexibility and improved work/life balance, provided that the efficiency of the Division and its mission are not adversely impacted.
>
> Note: The employee's duty station will not change as a result of participation in the Division's Telecommuting Program.
>
> Program Guidelines:
> Telecommuting is subject to management approval and is not an employee entitlement. All requests for permission to telecommute from eligible employees will be reviewed and considered on a case-by-case basis. The employee's supervisor has the discretion to approve or deny requests for telecommuting. [Emphases omitted.]
> ….
> When approved by the DOB to telecommute, examiners do not submit travel

reimbursement forms because they perform work from their homes.[13] Pursuant to the Policy, the DOB began approving examiner requests to telecommute in 2014 (e.g., on March 3, 2014 and July 15, 2014).[14]

By email on January 11, 2016, Gallagher, acting in her capacity as then DOB Chief Operating Officer, notified all DOB staff that the Employer had issued a Revised Policy "to encourage broader/more uniform implementation of the telecommuting program."[15] [Emphasis omitted.] Gallagher's email stated, in pertinent part:

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[13] Gibson gave unrebutted testimony that when the Employer implemented the Policy in about 2013 or 2014, it did not reimburse examiners for mileage because while telecommuting, examiners do not submit mileage reimbursement forms. Gibson also testified that the DOB did not change this practice when it issued the Revised Policy "a few years later" in 2016, and that since issuing the initial Policy, examiners have not submitted mileage reimbursement forms when they are telecommuting.

[14] All employees' names have been redacted pursuant to my Ruling on the Amended Motion to Impound.

> ….The attached [P]olicy has been updated with some minor revisions….Here are some key points:
>
> - If the scope of your tasks requires you to be in the office, then working remotely would not be possible. If you have a meeting (with a bank, licensee, colleagues, etc.), then telecommuting would not be possible….

Pursuant to the Revised Policy, the DOB approved additional examiner requests to telecommute in 2016, 2017, and 2018 (e.g., on January 12, 25 and 27, 2016, on May 31 and October 5, 2017, and on February 6, 2018).[16]

The 1982 Letter

By letter dated July 26, 1982, then Deputy Commissioner of Banks and General Counsel Edward F. Flynn, Jr. (Flynn) contacted the United States Department of the Treasury and the United States Internal Revenue Service concerning the DOB's home-office designation policy.[17] Flynn's letter stated, in full:

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[15] DeWitt gave unrebutted testimony that the Revised Policy "was in place up until this fall [of 2020] when HRD rolled out the telework policies from the Commonwealth" due to the COVID-19 pandemic. DeWitt also testified that prior to that roll out, she kept track of employees who participated in the telework program, and that prior to March of 2020, "[t]he vast majority of staff have completed [telework] agreements." She later conceded that "[v]ery rarely" does she review specific employee requests for telecommuting and/or do supervisors follow-up with her about employee issues in the telecommuting program.

[16] All employees' names have been redacted pursuant to my Ruling on the Amended Motion to Impound.

[17] O'Leary gave unrebutted testimony that when he was "[U]nion steward and…[E-board] vice president 25 out of the 26 years" during his DOB tenure, he relied on the 1982 letter; and that "on several occasions" he shared that letter with "Rita Colucci, Donna Lee…[and] Karen Brack [(née Malone)]" who were employed at OCABR and "were involved with the direct oversight of the [DOB]." O'Leary also testified that he provided copies of the 1982 letter to DOB "senior management" during contract negotiations "as a point of reference,"

> All examiners in this division, except those assigned to work in this office,[18] have their home designated as their office. Mr. [redacted] has his home designated as his office.
>
> This designation is made for two purposes: (1) Commonwealth regulations[19] call for the payment of travel expenses from office to destination. Without the designation, examiners would have to report to this office before commencing travel, and (2) Except for unusual circumstances[,] examiners never come to this office. They are expected to process their assignments at the bank or at their home or office location.
>
> Mr. [redacted] may be assigned to examinations anywhere within the Commonwealth. On occasion, such as schooling or seminars, Mr. [redacted] may be required to travel out of state.
>
> Except on rare occasions, all examiners use their personal cars for travel. Reimbursement is made for all air and rail travel. Auto expense is solely on a mileage basis of 20¢ per mile, office to job. Necessary telephone expense is reimbursed. Meals are reimbursed at a maximum of $2 for breakfast, $3 for lunch[,] and $6 for dinner when the examiner is on the road. Rooms are reimbursed at cost.
>
> Conventions, when permitted, are reimbursed in full. Reimbursement is not included on W-2 forms. Payment is made on a submission of vouchers

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explaining that if the DOB was going to require examiners to stop using their home addresses for travel reimbursement purposes, he "would [have] instruct[ed] [his] [U]nion members to report to either the Boston office or the field office every day and then report to the temporary location that they were assigned [b]ecause if they were going to sign payment vouchers under the pains and penalty of perjury…it needed to be accurate…."

DeWitt testified that at some point in the fall of 2019, Union representative Donahue sent her a copy of the 1982 letter which DeWitt "read…upon receipt." While DeWitt conceded that the practices described in that letter are "longstanding," she testified that any DOB practice "more than 20 years….would pre-date [her] career."

[18] Flynn's letter included the following DOB business address:

> Commonwealth of Massachusetts
> Office of the Commissioner of Banks
> State Office Building, Government Center
> 100 Cambridge Street, Boston 02102

[19] Flynn's letter did not reference any specific regulations.

> which are paid by check. Copies of the vouchers containing details of the reimbursements are on file. A blank copy of the standard voucher is enclosed.

The Arbitration Award

Pursuant to a grievance filed by the Union, Arbitrator John B. Cochran (Cochran) issued an award on January 3, 2004, denying the grievance and finding that the "Division of Banks did not violate Article 11, Section 11.1 of the CBA by not paying bank examiners for time spent travelling to and from the locations of bank examinations."[20] Specifically, Cochran found that Section 11.1 had more than one interpretation. First, he interpreted Section 11.1. to mean that "travel between a bank examiner's home and the site of an examination [wa]s not considered commuting because they are reimbursed for that travel" and, therefore, "the time spent traveling between home and the examination location must be considered work time for which examiners should be compensated, and not commuting time." In the alternative, he interpreted Section 11.1 to "mean that the parties made a conscious choice to limit the travel-related compensation employees would receive when traveling from their homes to a temporary assignment to the actual costs of transportation and not to compensate employees for that time." Based on these competing interpretations, Cochran concluded that the parties' contract language was

[20] O'Leary testified that "the substance of the issue and testimony [in the arbitration] was, first, that we were seeking to be…compensated from the time we left our home to the time we arrived [at the job site]," and that "during the course of that testimony we detailed at length how…there was designation from a letter in 1982 designating our home." O'Leary also gave unrebutted testimony that the Union "introduced and discussed [the 1982 letter] at length in the arbitration hearing in 2003," and that "the facts were clearly stipulated to what the practices were and that the employee's home was designated as the starting point for reimbursement purposes. So[,] it was clear to everybody."

"ambiguous," and that "the established practice…demonstrate[d] that the parties did not intend that Section 11.1 provide compensation for the time bank examiners spen[t] traveling between their homes and an examination, in addition to being reimbursed for their travel expenses."

Mileage Reimbursements – The Lesser Rule

1. The Prior Practice

When examiners commute to the Boston Office from their homes, the DOB does not reimburse those examiners for travel expenses, including mileage, if they are regularly assigned to that office. However, the DOB will reimburse field examiners for travel expenses, including mileage, if they are temporarily assigned to the Boston office (i.e., 11 months or less) and commute there for a specific purpose (e.g., special project assignments, covering for an examiner on extended leave, attending orientation, training, etc.).[21]

[21] Antin testified that on "occasion" the DOB would call field examiners "into the [Boston] office for a special project or to fill in if somebody's going to be on extended leave." She also testified that "it's rare, but it does happen," and that "if somebody's out on extended leave or if somebody leaves [employment] and [the DOB] do[es]n't yet have somebody to replace them" the DOB would temporarily assign a field examiner to the Boston office and reimburse them for travel expenses, including mileage, up to 11 months. Antin testified further that "on the 11th month, the assignment [to the Boston office] would be reviewed and depending on business needs if it needs to continue, that after the 12 months expenses would not continue."

Similarly, O'Leary testified that when the DOB called a field examiner into "the Boston office on a temporary assignment or a special project," that examiner would still be reimbursed for mileage and travel reimbursements from their home to the Boston office, [on a] temporary basis, up to 12 months." He also testified that after 12 months the DOB would review the assignment to determine "whether or not it would become a permanent assignment for that field examiner;" and that the DOB's "standard operating

Prior to February 1, 2020, the DOB reimbursed field examiners for travel expenses, including mileage, when they commuted to and from their homes between their regularly assigned field office and temporary examination sites.[22] At no point prior to February 1,

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procedures…call for that" as it "specifically spells out the whole process in relation to field examiner[s] being called into the office on a temporary basis [and] being reimbursed."

While Fahey testified that, sometimes, the DOB assigns field examiners to report to the Boston office for special projects, she admitted that she was "not aware of [a] specific rule" where the DOB would permanently assign a field examiner to the Boston office if that examiner traveled to Boston "for more than one year."

Based on the totality of this evidence, I credit the corroborating testimonies of Antin and O'Leary and find that the DOB reimburses field examiners for travel expenses, including mileage, while commuting between their homes and the Boston office while on temporary assignment. However, I also find that Antin's testimony about travel reimbursements applying to field examiners who work in Boston for up to 11 months is more credible than O'Leary's testimony that they apply for up to 12 months. This is because at the time of Antin's testimony, she possessed more current knowledge as a DOB employee, whereas at the time of O'Leary's testimony, his knowledge was less current as a DOB retiree.

[22] Antin gave unrebutted testimony that during her orientation in 2013, "the first thing that we were told was that our house counted as the starting point for all reimbursements." Specifically, Antin testified that when she submitted payment voucher forms for mileage reimbursement and traveled from her home to the field office, she would report the field office as her origin point and the banking institution as her destination point. Antin also testified that if she went back to the field office that same day, she would also submit for mileage reimbursement from the field office back to her home as the end point. She testified further that since 2013 through January 31, 2020, she left her home and travelled directly to a banking institution "90 percent of the time." Similarly, O'Leary testified that "there was no misunderstanding and [there was] a clear embracing by senior management from the day [he] was hired to the day [he] retired….there was no misunderstanding in relation to how reimbursement for mileage was to be handled. It was always from the employee's home to their temporary destination and return…every day." O'Leary also testified that examiners' "homes were designated…for travel reimbursement purposes because all of our assignments were temporary, and that the DOB "never challenged [him while]…seeking for mileage reimbursement on anything other than what [he] submitted, which was from [his] home to whatever the temporary location was in the 26 years [he] was there." Specifically, O'Leary testified that "in the 26 years [he] was [employed at the DOB]….[t]he lesser rule was never…inquired upon or implemented."

2020, did the DOB deny any payment voucher (PV) forms submitted by field examiners who sought mileage reimbursement for commuting between their homes and a field office or an examination site.[23]

2. The DOB's Notice and the Union's Initial Demands to Bargain

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Gibson conceded that prior to February 1, 2020, the DOB allowed payment voucher forms where examiners requested mileage reimbursements for travel between their homes and their respective field office. Gibson also admitted that when he was a field examiner, he submitted similar requests for mileage reimbursements, and that as a manager he also reviewed and approved such requests. DeWitt testified that she was aware "that [DOB] had a lot of challenges in figuring out how to consistently apply a lesser distance rule in terms of the routes being submitted by [DOB] employees and what work and be in line with the contract."

Based on the totality of this evidence, I find that prior to February 1, 2020, the DOB reimbursed field examiners for travel reimbursements, including mileage, regardless of whether they commuted from their homes to a field office prior to visiting an examination site, or commuted from a field office to their homes after visiting an examination site, without ever applying the lesser rule.

[23] O'Leary gave unrebutted testimony that no one from DOB ever challenged him for the mileage that he submitted on his PV forms, nor did the DOB "ever require [him] to calculate [mileage that was not the least possible distance], pursuant to Article 11.1(B), the lesser rule." Specifically, he testified that "[i]n [his] 26 years [at the DOB] as far as the routes that [he] took…the lesser rule was never applied," and that "[n]o one [from the DOB ever] told [him] to stop putting [his] home as the origin for [his] mileage" because "that was never questioned, never discussed within the [DOB]."

Similarly, Kaplan testified that she is "very familiar with the [CBA] language, [A]rticle 11" and that "frequently" during contract negotiations the issue of "travel reimbursement is raised." She also testified that "with approval of the Chief Human Resource Officer," Article 11.1 C permitted examiners to designate their home as their temporary office assignment "for purposes of travel reimbursement," which is also "called the lesser rule…meaning the lesser of the distance from your home to the…temporary assignment, or from your office to the temporary assignment….whichever is less." However, "[t]here was no lesser rule for DOB because they didn't have a lesser rule. [Instead, examiners] just submitted [PV forms showing that they travelled] from their home to the temporary assignment." Additionally, Preston testified that prior to the DOB's changes in February of 2020, the DOB had designated examiners' homes "as their office, so they were not subject to the lesser rule."

In or around October of 2019, the Union became aware that the DOB intended to change the practice of how it reimbursed examiners for travel expenses, including mileage, when commuting between their homes and field offices.[24] Accordingly, by email to Groll on October 30, 2019, Kaplan demanded to bargain with the DOB over the change, requested certain information related to the change, and requested that the DOB maintain the status quo until the parties had bargained to resolution or impasse. By follow-up email to Groll on November 13, 2019, Kaplan requested a status update on the Union's initial demand to bargain and request for information. By reply email on December 6, 2019, Groll provided Kaplan with the requested information and asked her to contact him to "schedule a time to meet and to discuss" the proposed change to eliminate the "home as office" rule.

By letter dated January 24, 2020, Groll notified Kaplan about "Upcoming Changes to Mileage Reimbursements" which stated, in full:

> As you are aware, an issue exists within the Division of Banks (DOB) with respect to how Bank Examiners are compensated for mileage reimbursement for commuting to and from their homes to their assigned offices. As has been previously communicated to you, it is the position of DOB that this practice is in direct conflict with the clear and unambiguous

[24] Kaplan gave unrebutted testimony that in October of 2019, she "had a meeting with Chris Groll" where "he sort of casually mentioned that there was going to be a change in [the DOB] regarding mileage" and that the DOB was "going to remove the designation of home as office from travel." Specifically, Kaplan testified that she could not "recall verbatim what [Groll] said, but [she] clearly remember[ed] [her] responses which [were], 'I'll have to file a demand to bargain…and [file] a request for that information." Kaplan also testified that she "know[s] it was October 30th" when she took that action and "followed up with an e-mail a couple of week later to [Groll], requesting the status of [her] demand and…the information [request]," and that Groll responded on December 6th. She testified further that she met with Groll in January of 2020 when he handed her "an arbitration decision that had just been awarded…[regarding] mileage reimbursement," to which she responded that the Union would "be filing an unfair labor charge." Groll did not testify.

language of Article 11, Section 11.1 (C) of the Unit 6 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.*" [Emphases in original.] Although [S]ection 11.1 (C) does contain language allowing for such "door-to-door" payments, it also contains two (2) specific prerequisite conditions which must be met: (1) the [S]tate's Chief Human Resources Officer (CHRO) must approve these "door to door" payments, and (2) such approval applies "only in cases where the employee has no regular office or other work location." With respect to the first prerequisite condition, it is my understanding that there has never been approval granted by the CHRO for these "door-to-door" payments, and as to the second, it is my further understanding that historically, when this practice began, DOB had only one location (Boston), and not sufficient space to accommodate all staff. However, that is no longer the case, as DOB now has four (4) locations – Boston and three (3) filed offices (Lakeville, Springfield[,] and Woburn), with all staff being assigned to one of these locations. As a result, DOB would not be eligible to even request such CHRO approval now, as all of your affected members do have a regular assigned work location/office. Therefore, it is management's position that this practice cannot be maintained, nor can it be deemed legally binding upon the parties.

As to this latter contention, that DOB's practice of compensating your members for "door-to-door" travel is not legally binding, the…[DLR] has recently issued a decision directly addressing this point. In Commonwealth of Massachusetts and Massachusetts Organization of State Engineers and Scientists, SUP-5594 (issued January 16, 2020) [sic], the DLR expressly held that:

> Article 11, Section 11.1 is clear and unambiguous. Section 11.1(B) clearly and unambiguously provides for the so-called lesser of rule: An employee who travels from his/her home to a temporary assignment rather than his/her regularly assigned office shall receive 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. Section 11.1 (C) clearly and unambiguously provides that employees shall not be reimbursed for commuting between their home and office or other regular work location….The door to door formula that some Inspectors have used to claim mileage directly conflicts with Sections 11.1(B) and 11.1 (C) because it ignores the lesser of formula and because it allows for the Inspectors to claim mileage to and from their home to their

> assigned office….The Commonwealth Employment Relations Board (CERB) has stated that 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.

> Based on the CERB's unequivocal holding in this case, please be advised that DOB intends to end its practice of providing mileage reimbursement for Bank Examiners commuting to and from their homes and their regular work offices, and instead will fully conform its mileage reimbursements with the express provisions of Article 11, [Section] 11.1, subparagraphs B and C of the Unit 6 contract.
>
> In light of the fact that NAGE has known of this proposed change for a while now, please be further advised that DOB will continue its current reimbursement practice only through the end of this month, and beginning February 1, 2020, will no longer reimburse Bank Examiners for travel to and from their homes and their assigned offices.
>
> If you have any questions concerning this matter, please let me know. But please also understand that the February 1, 2020 start date is not open for further discussion and/or consideration.

Additionally, by email on January 27, 2020, Handrahan notified all DOB staff about "Changes in DOB Travel Reimbursement Calculations," stating in full:

> A notice was sent to NAGE at the end of the day on Friday which has significant impact on mileage reimbursements for all DOB employees.
>
> The DOB practice of reimbursing field staff for commuting to and from their homes to field/assigned offices was called into question a couple months ago as the practice is in violation of the [U]nion contract and [S]tate travel policies. Further, the manner in which all staff have been calculating mileage to offsite locations is also inconsistent with the "lesser distance" calculation required.
>
> The specific language cited is Article 11, Section 11.1 (C) of the NAGE Unit 6 collective bargaining agreement [was] further addressed in a recent [DLR] decision SUP-16-5594 [sic] issued [on] January 16, 2020.

> Therefore, in order to bring DOB into alignment with prescribed policies and procedures regarding mileage reimbursement, effective February 1st the DOB will no longer reimburse employees from their homes to and from assigned offices. The mileage reimbursement allowance will now be based on the "lesser distance" rules. When traveling to a temporary assignment, the employee shall be reimbursed for the distance between his/her home and the temporary assignment OR between his/her regularly assigned office and his/her temporary assignment, whichever is less. [Emphasis in original.]
>
> The DOB leadership team has been involved in this change and is working to update travel reimbursement forms and processes. The updated travel reimbursement form (PV) will be circulated and posted to the intranet for use the first week in February.
>
> Thank you for your attention to this matter and for your cooperation and support with this change. If you have any questions, please feel free to reach out to me or to Jennifer DeWitt."

3. The Changed Practice

Effective February 1, 2020, the DOB reimbursed field examiners for mileage by applying the lesser rule. By email on February 6, 2020, DeWitt provided all DOB staff with the following update about the changes to mileage reimbursement, stating in full:

> Good morning,
>
> As we continue to address additional questions regarding mileage reimbursements, I wanted to circulate the official notice sent from OCABR to NAGE on Friday, January 24th. Mary and I were copied on this notice and received it at the same time as Bobbi Kaplan from NAGE.
>
> This notice may be helpful in providing some additional context. The author Chris Groll, Labor and Employee Relations Manager with OCABR/EOHED, indicated we could share this notice with all staff.
>
> Additional guidance to come as everyone begins to compete the new forms and we begin reviewing and processing.

The parties never met to bargain over the Employer's implementation of the lesser rule.[25]

Mileage Reimbursements – The Shortest Distance Rule

1. The Prior Practice

Prior to February 5, 2020, the DOB never required field examiners to report the shortest possible distances when seeking mileage reimbursement for travel either between their homes and examination site or between their respective field office and examination site.[26] Instead, prior to this time, the DOB reimbursed field examiners based

[25] Kaplan gave unrebutted testimony that the parties never met to bargain over the changes to travel reimbursements. Specifically, Kaplan testified that, "we never met with them. We never had one meeting."

[26] Antin testified that prior to February of 2020, the DOB did not ask her to produce alternate, shorter travel routes in lieu of the original routes that she had provided in her PV forms. Similarly, O'Leary testified that "no one ever told [him]" to compare the distance between a "field office or Boston and his home," and that the DOB's "review for reasonableness...was based upon the route that we submitted…and the routes that we took….based on the wheeling [or wheeled the route]." Instead, the DOB paid him for mileage on all of the vouchers that he submitted during his tenure at the DOB, "even the vouchers that were subject to the reasonableness test." O'Leary also testified that "the reasonableness rule" as referenced in Article 11, Section 11.1(A) "does not necessarily mean short[est distance] to my destination," but "means time, because time is money." For example, O'Leary testified that if he was "assigned 100 miles away, [he] needed to be there at 7:30 or 8:00 o'clock in the morning….so it's determined as to what time I had to leave my home and what the traffic conditions were, what the road conditions were at any given point in time or any given day." He testified further that "if there were questions on [the payment voucher]…there was a reasonable explanation for it whether it be…construction, or whether it would be you're driving…through the little one-horse town with these little traffic lights and all the rest as opposed to going up [interstate highways] 93, 95, or 128, something like that."

Similarly, Preston testified that "[t]he rule always was that so long as the route you took was reasonable, it didn't have to be the shortest route," and that Article 11.1(A) is based on "[w]hat your odometer reading is [and] the number of miles you actually drove." Preston

on the actual route travelled via odometer readings and/or maps, subject to the reasonableness of that route.[27] At 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 travelled.[28]

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also testified that "the test was reasonableness not shortest," but that the DOB "implemented a new rule [in February of 2020], which we call…the shortest possible route rule, which is what [the DOB] decided was the only thing they would reimburse for….[but it] is not what the contract says….and came out of the clear blue sky." Additionally, Preston testified that "this practice goes back 50 years," and that even "[t]he management admitted that it was a long standing practice...,as far back as 2003." Preston testified further that "as of January 1, 2020, four weeks or so before [the change]…our contract reopened. And we…began…meeting to discuss a new contract," but the DOB did not offer any proposals during negotiations, "[t]hey just decided to unilaterally do it over [the Union's] objections." Gibson conceded that prior to February of 2020, he did not require examiners to take the shortest possible distance to an examination site or to the field office.

Based on the totality of this evidence, I find that prior to February of 2020, the DOB never required examiners to report the shortest possible distance when submitting reimbursement forms for mileage.

[27] O'Leary testified that "somewhere around 2004 to 2005" the DOB permitted examiners to attach to their PV forms travel maps via web-based mapping, such as MapQuest "rather than putting down every single road that we took on every single day that we drove somewhere [via the wheeling method.]" Similarly, Antin testified that "the first thing that we were told [during orientation] was that our house counted as the starting point for all reimbursements," and that "if we went to the same location for a number of weeks[,] we only had to submit one map unless we changed our route, then we would submit a different map with the actual route that we took if we had changed it for any reason." Antin also testified that the standard practice was to submit traditional maps along with her PV forms to show the weekly routes that she travelled, and that when she travelled to the same location on multiple days/weeks, she continued "referencing that same map until [her] assignment ended, unless [she] drove a route that was different from what [she] normally took," at which point she would submit a new map.

[28] Antin gave unrebutted testimony that the DOB never denied any of her PV forms requesting mileage reimbursement prior to January 31, 2020, and that prior to February of 2020, the DOB had always reimbursed her for the full amount of mileage that she reported.

2. The Changed Practice

By email to all DOB staff on February 5, 2020, DeWitt provided "Guidance on DOB Travel Reimbursements" related to the shortest distance rule, which stated in full:

> In following up on the emails form Monday 1/27 on the announced "Changes in DOB Travel Reimbursement Calculations" effective February 1st, attached is FAQ guidance and the updated Travel Reimbursement Form.
>
> We recognize the significant impact on mileage reimbursements for all DOB employees, we are working to implement the required changes and address any questions. It is anticipated there will be challenges as we implement the changes and begin reviewing and processing the new forms. Please continue to send any additional questions.
>
> Any PVs for travel on or before January 31st, must be received in Boston by February 10th to be processed on the old form. Any PV submissions, for travel on or before January 31st, which are received after February 10th will be processed in compliance with the contract language and state travel policies.

The FAQ on Travel Reimbursement which DeWitt attached to her February 5, 2020 email stated in pertinent part:

> <u>Office Assignment</u>
> ….
>
> Office assignment is based on several factors including operational justification and need then employee proximity or preference. Some employee office assignments are based on the employee's role (such as Boston-based positions or RFMs[29] to particular field offices). Some office assignments are due to unit operational reasoning or need such as having a field examiner regularly report to an assigned office which may not be the closest to the employee's home. If an employee is assigned an office but chooses to report to another DOB office (due to traffic/distance/personal convenience), the employee may not submit for travel reimbursement as this location is not "a temporary assignment" assigned by DOB. [Emphases omitted.]
> ….

[29] Neither party offered evidence that defines this term.

> Telecommuting
> ….
>
> The DOB's Telecommuting Program is already in place and is designed to offer convenience and flexibility to employees within the context of the Commonwealth's broader guidelines on telecommuting. If an employee meets eligibility for participation in the telecommuting policy, and there is clear scope of work (measurable, quantifiable tasks) that can be done remotely, the telecommuting program is available as an option to provide workplace flexibility and save commuter expenses. Ultimately, the policy works best when employees and supervisors agree on a clearly defined scope of work that can be done remotely. The flexibility that telecommuting presents is meant to benefit the employee with no workflow interruption to the business of the Division.
>
> Employees should understand that telecommuting is a privilege that the Division extends for the benefit of improved time management, convenience, and employee morale. At the same time, it is important to be cognizant of the limitations and potential pitfalls that can result from telecommuting: scheduling and accessibility considerations, impact to on-site presence at regulated entities, difficulty for supervision, challenges in on-the-job training, reduced exposure/interaction with colleagues, etc.
>
> Employees need to consider what is reasonable and feasible in requesting telecommuting days. Telecommuting is subject to management approval and is not simply an employee entitlement….
>
> [Emphases omitted.]
>
> Odometer and/or Maps
> ….
>
> The new forms will assist employees in complying with the travel reimbursement requirements.
>
> The odometer reading is now optional, if you submit maps, the odometer reading is not required. As the vast majority of employees are already in the habit of providing maps, this option should be helpful to both employees and the reviewers/approvers. 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 also result in review delays. Thus, OPS[30]

[30] Neither party offered evidence that defines this term.

> 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. [Emphases omitted.]
>
> Multiple Assignments in One Day
> ….
>
> To first assigned location (if not assigned office) – lesser rule
> To additional assignments throughout the day – actual mileage (lesser rule does not apply)
> From assigned location (if not assigned office) return to home – lesser rule
>
> [Emphases omitted.]
> ….

Effective February 5, 2020, the DOB changed the way it reimbursed field examiners for mileage by making the odometer reading optional, and by applying the shortest distance rule to calculate the amount of reimbursable mileage.[31] At some point on or after February 5, 2020, Antin "provid[ed] training to newer examiners" at the Lakeville office, and later submitted a PV form for mileage reimbursement where she reported taking a longer route via I-495 without "provid[ing] an explanation" for taking that route.[32] Although the Employer requested that Antin resubmit that PV form with "the

[31] Kaplan testified that when the DOB "implemented the shortest distance rule," it was a rule that "they made up actually, because that violated the contract." Kaplan also testified that "[t]here's no…reference to the shortest distance in the contract or anywhere else….so [the DOB] implemented two changes [by, first] removing [examiners'] home as their office designation and…also changing from the lesser rule to the essentially shortest distance rule…without bargaining." She testified further that the DOB did not require examiners "to compare their mileage or the distance they traveled to anything," but changed this practice "in February…of 2020."

[32] Antin testified that she submitted "one voucher under this new system" and that the DOB "reimbursed [her for that voucher] but not for the amount that [she] submitted" but

absolute shortest route," she declined to submit additional information "under penalty of perjury."[33] Consequently, the DOB declined to reimburse Antin for the full amount of mileage that she had requested.

By email on February 24, 2020, DeWitt notified Union representative Donohue about "Mileage [A]djustments / Shortest Distance," stating in full:

> Thank you for your email and your patience as we continue to attempt the initial reviews of the new reimbursement forms. As mentioned in my prior all staff email, it is anticipated there will be challenges as we implement the changes and begin reviewing and processing the new forms. As you might imagine, how individuals can best complete the forms as well as how OPS can most efficiently review and process them are all things we are working out.

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for an amount less than "47 miles….because [she] took a different route than whoever was approving the voucher felt that [she] should have taken." She also testified that she submitted that particular voucher with traditional maps and although the DOB approved reimbursement for 47 miles at "$21.15," she only received "$15.40" which was approximately "$6 less." She testified further that when the DOB sent an email requesting that she resubmit the voucher with a shorter route, she declined, and that the DOB never informed her which route it wanted her to take. Instead, Antin testified to taking I-495 "because it [was] faster…it had snowed the day before and it was snowing that morning…and [b/ecause she] was also 40-weeks pregnant and…was more concerned about [her] safety and that of her unborn child more than saving the [DOB] $6."

[33] Antin testified that the DOB had "asked whether or not [she] would either resubmit [her] voucher or if [she] would just agree for them to change it," and that the DOB "didn't tell [her] a specific route, but they copied and pasted some language about using the absolute shortest route." Antin also testified that she "didn't resubmit [the voucher, but] told them that they could do whatever they wanted." Antin declined to submit a different route and testified that it was "under penalty of perjury [because] that's not the route that [she] took," and that the DOB should reimburse her "for the route that [she] actually drove." Similarly, O'Leary testified that the DOB's "standard operating procedures…indicated that we submitted our payment vouchers under the pains and penalty of perjury," and that "when we were signing our payment vouchers and seeking reimbursement, we were doing it under the pains and penalty of perjury….that we sign [the standard operating procedures] under pains of perjury." Specifically, O'Leary testified that the DOB told him "at orientation that if [we] lied on our payment vouchers [we] could be subject to disciplinary action up to and including dismissal."

> Please know it is most certainly our desire to continue being reasonable with respect to travel reimbursement. We are working to process the submissions in compliance with the contract language and [S]tate travel policies. To answer your initial question, our understanding in consulting within the Secretariat, is the concept of "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 hi/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.
>
> Further, to your emails[34] Friday, OPS has not yet processed any of the new reimbursement forms through SSTA. The initial forms submitted which cleared review (OPS review, unit review, supervisor approval, and fiscal approval) are to be processed this week. For the forms which were determined based on the initial OPS review that they required an adjustment (such as one route), we opted to have Bev [Ashby] send an email to the employee and get the "okay" before processing. These were the initial emails sent on Wednesday. Perhaps surprisingly, this was in attempt to lessen the burden of requiring a full resubmission. These forms were not submitted for any further review/approvals beyond OPS and have

[34] Neither party offered evidence that identifies these emails.

> not been processed. [Emphasis omitted.] In further reviewing these submissions today, we note that in at least a couple instances, the "miles office to/from assignment" is the lesser distance calculated into the mileage reimbursement amount, thus not the actual route traveled regardless of which route was submitted. For the remaining forms, the shortest distance (not actual route traveled) should be submitted for review. If you prefer[,] we request full resubmission rather than send adjustment emails we can make that change in our developing processes.
>
> I hope this clarifies things for you. If not, just let me know what additional questions you may have.

The Shortest Distance Rule FAQs

On February 26, 2020, the DOB issued new frequently asked questions (FAQs) pertaining to its earlier email on February 24, 2020, explaining how it would calculate mileage reimbursement under the shortest distance rule. Those FAQs stated in pertinent part:[35]

> Lesser Rule (Continued) & Shortest Distance
> ….
>
> As included in the prior FAQ on "Odometer and/or Maps," the route to your temporary assignment from home or from your assigned office will be reviewed at the shortest distance. Of note, in reviewing the new reimbursement forms from the first week in February, OPS could not complete review of some of the submissions as, when providing the routes to go into the lesser distance calculation, the actual or a longer route was submitted rather the shortest distance route.
>
> Please know that it is most certainly our desire to continue being reasonable with respect to travel reimbursement. We are working to process the submissions in compliance with the contract language and [S]tate travel policies. Our understanding in consulting within the Secretariat, is the concept of "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/her [sic] regularly assigned office, shall be allowed transportation expenses for the distance between his/her home and his/her temporary assignment or between his/her

[35] All emphases omitted.

regularly assigned office and his/her temporary assignment, whichever is less. 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 noted, 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.

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. Referring to the next question, staff may print out the initial one pager from google maps which shows the route options rather than printing the turn-by-turn directions.

Odometer and/or Maps (Continued)

Recognizing it can be a lot of maps/paper, you may print out the initial one pager from google maps (example below) which shows the route options rather than printing the actual route turn-by-turn directions. This will also expedite the review in verifying the shortest route used in the lesser distance calculation (further clarified below). The FAQ response on "Odometer and/or Maps" includes additional information on providing all relevant maps and no longer referring back to previously submitted maps which causes review challenges.
….

Public Transportation
….

The "lesser rule" is specific to mileage; there is no comparison of mileage vs. public transportation. Employees should be considering the most reasonable method of commuting.
….

[Field examiners who are assigned to Woburn, Lakeville, or Springfield but need to report to Boston] will get paid for mileage (lesser rule) and parking….

….

The Union's Subsequent Demands to Bargain and Information Requests

By email to Groll on February 4, 2020, McGoldrick "reiterate[d] NAGE's demand to bargain" over the changes and demanded that the DOB "maintain the status quo until such time as bargaining has been completed…." By reply email that same day, Groll stated in full:

> I believe the Agency's response is already contained in my letter last week to Bobbi Kaplan (a copy of which is attached hereto for your convenience.) The Division of Banks (DOB) readily admits that there has been a longstanding practice of providing mileage reimbursements to Bank Examiners for travel between their homes and their assigned work offices. NAGE was put on notice a while ago that this practice is in direct conflict with the clear and unambiguous language contained in Article 11 – Employee Expenses, [S]ec. 11.1, subparagraphs B and C of the Unit 6 collective bargaining agreement. 11.1(C) expressly precludes reimbursing employees "for commuting between their home and office, or other regular work location", and 11.1(B) mandates the "lesser than" rule when travelling to a temporary assignment (i.e., the contract only provides mileage reimbursement for the lesser distance from the employee's home to the temporary assignment, or distance from the employee's regularly assigned office to the temporary assignment). It is the Agency's position that the change recently implemented simply aligns with this clear and unambiguous language, and as such, the Agency has no bargaining obligation here, as the prior practice, no matter how longstanding it may be, cannot be legally binding on DOB. The [DLR] recently stated the same in SUP-16-5594 (decided January 16, 2020) [sic], in a case directly on point, with identical contract language contained in the MOSES collective bargaining agreement. (A copy of SUP-16-5594 is also attached hereto for your convenience.) As such, it is DOB's position that the Commonwealth satisfied any bargaining obligation in this matter when the parties negotiated these unassailably clear and unambiguous provisions.
>
> You are certainly free (and encouraged) to pursue whatever legal recourse you believe is necessary to protect your members' rights and benefits, as that is your role as the exclusive bargaining representative, and the Agency is prepared to defend its actions in whatever forum is necessary. That being said, I am certainly willing to discuss any concerns you may have about DOB's decision to bring its operations into full compliance with the NAGE

> agreement, but I make such an offer in the spirit of maintaining harmonious labor-management relations, and not as an acknowledgement of any bargaining obligation on DOB's part. As such, I must unfortunately decline your request to maintain the prior, contractually-prohibited practice.

By email on February 10, 2020, Preston requested the following information from OER Assistant Director Boone:

> 1) A copy of all memos, executive orders, advisory opinions or documents of any kind, whether physical or electronic, that were issued by the Human Resources Division or any of its sub-units or predecessors, on or after January 1, 1990, that deal with the subject of the delegation of any of the authority of HRD (or its sub-units and predecessors) to Departments and Agencies within the executive branch.
>
> 2) A copy of any documents of any kind that were sent or received by persons within HRD (including, but not limited to OER), that include any direct or indirect refence to the designation of one or more Division of Banks employee's home as their office for purposes of calculation of travel.
>
> 3) The names and titles of all current or former employees of HRD, or any of its sub-units, that were aware prior to January 1, 2016 that NAGE represented employees of the Division of Banks had had their homes designated as their office for purposes of travel reimbursement.
>
> 4) In 2003, HRD formally conceded that employees of the Division of Banks were entitled to have their home considered their office for purposes of travel calculation (see Class Action Arb 4143), Arbitrator Marc Greenbaum, position of the Commonwealth, page 8). On what date did the Commonwealth repudiate this position. Please specify the name and title of the employee who did so.
>
> These requests relate to a charge of prohibited practice which NAGE is filling regarding the Division of Banks' unilateral change of a more than 40 years past practice regarding the designation of certain DOB employees' homes as their office for the purpose of calculating travel. The change also represents a repudiation of the CBA.
> ….

By reply email to Preston on April 21, 2020, Boone stated in full:[36]

> 1. DOB (or EOHED) would not be the primary source for any type of documents issued by HRD (or any of its sub-units or predecessors) that pertain to the delegation of authority by HRD to Departments and Agencies within the Executive branch. And in more direct relation to this case, DOB (and EOHED) are not aware of any document (either physical or electronic) in which the Chief Human Resources Officer granted DOB the right to reimburse staff for mileage traveling to and from their homes and assigned offices, notwithstanding the specific contractual prohibition against such reimbursements contained in Article 11.
>
> 2. DOB is not (and was not) aware of any obligation to notify HRD of the office assignments of its staff for the purposes of calculating mileage reimbursement, and therefore, no such documentation exists (as far as I can tell). Nor does DOB have any documentation that was (or might have been) sent to HRD indicating that staff were assigned their homes as their primary work location.
>
> 3. Similar to the response in #2, DOB does not have any information as to the identity of anyone at HRD (or any of its sub units) who may have been aware that NAGE bargaining unit members within DOB had their homes designated as their primary work location.
>
> The arbitrator for the case referenced here was John Cochran, and not Marc Greenbaum. And that particular case focused on NAGE's claim that DOB violated the contract by not reimbursing staff for travel time when traveling to job sites. The specific reference cited in the info request pertains to John Cochran's recitation/summary of the Commonwealth's argument that Article

[36] Boone testified that his response to Preston "includes information that [Boone] received from DOB" and from Michelle Heffernan (Heffernan) in HRD who provided Boone with her knowledge about payment to examiners. Specifically, Boone testified that Heffernan had no information about when that practice changed of paying field examiners for mileage travelling to and from their homes, and that her exact words were "[t]hat there was no information available," and that she had no knowledge of that." Boone also testified that he shared Preston's information request with Marianne Dill and John Langan who also worked in HRD, and that they "had no information about when the Commonwealth changed or repudiated the position that bank examiners could receive travel calculations based on their home."

> 11 is inapplicable to the issue at hand. The exact line is, "Further, the language of [A]rticle 11 only entitles them to reimbursement for the mileage between their homes and job sites, and does not provide compensation [for] travel time." It is beyond the pale to suggest that this single sentence somehow stands for the proposition that the Commonwealth agrees with NAGE's claim now that DOB staff are to be reimbursed for travel to and from the homes to their assigned offices, notwithstanding the specific contractual prohibition against such reimbursements contained in Article 11.

By final email to Groll on March 11, 2020, McGoldrick stated, in full:

> 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.

Neither Groll, nor anyone else from the Employer responded to McGoldrick's March 11, 2020 email. The parties never met to bargain over the Employer's implementation of the shortest distance rule.[37]

DECISION

Section 6 of the Law requires public employers to negotiate in good faith with respect to wages, hours, standards of productivity and performance, and any other terms and conditions of employment. The statutory obligation to bargain in good faith includes the duty to give the exclusive collective bargaining representative notice and an opportunity to bargain to resolution or impasse before changing an existing condition of employment or implementing a new condition of employment involving a mandatory

[37] Kaplan gave unrebutted testimony that the parties never met to bargain over the changes to travel reimbursements. Specifically, she testified that, "we never met with them. We never had one meeting."

subject of bargaining. Commonwealth of Massachusetts v. Labor Relations Commission, 404 Mass. 124, 127 (1989); School Committee of Newton v. Labor Relations Commission, 388 Mass. 557 (1983). The duty to bargain also extends to both conditions of employment that are established through a past practice as well as conditions of employment that are established through a collective bargaining agreement. Spencer-East Brookfield Regional School District, 44 MLC 96, 97, MUP-15-4847 (Dec. 5, 2017) (citing Town of Wilmington, 9 MLC 1694, 1699, MUP-4688 (March 18, 1983)).

A public employer's unilateral change of a condition of employment involving a mandatory subject of bargaining without first negotiating with the union to resolution or impasse before implementing the change constitutes a prohibited practice under Section 10(a)(5) of the Law. School Committee of Newton, 388 Mass. at 574. To establish a unilateral change violation, the charging party must show that: (1) the employer changed an existing practice or instituted a new one; (2) the change affected a mandatory subject of bargaining; and, (3) the change was implemented without prior notice and an opportunity to bargain. City of Boston, 20 MLC 1545, 1552, SUP-3460 (May 13, 1994); Boston School Committee, 3 MLC 1603, 1605, MUP-2503, MUP-2528 and MUP-2541 (April 15, 1977).

I. The Unilateral Changes

Here, there is no dispute that prior to February 1, 2020, the Employer reimbursed field examiners for mileage when travelling between their homes to their field offices and/or examination sites. Nor is there any dispute that on or about February 1, 2020, the Employer changed this practice when it implemented the lesser rule, which calculated

mileage reimbursement for an examiner based on "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." In fact, the Employer admitted to this change in its February 4, 2020 email, which stated specifically, that "[t]he Division of Banks (DOB) readily admits that there has been a longstanding practice of providing mileage reimbursements to Bank Examiners for travel between their homes and their assigned work offices." Moreover, there is no dispute that the method for calculating mileage reimbursement is a mandatory subject of bargaining. Nor is there any dispute that the Employer did not bargain with the Union when it changed this practice on or about February 1, 2020.

Similarly, there is no dispute that prior to February 5, 2020, the Employer reimbursed field examiners for actual mileage travelled pursuant to their odometer readings and or web-based maps, subject to the reasonableness rule. Nor is there any dispute that on or about February 5, 2020, the Employer changed this practice when it implemented the shortest distance rule, which calculated mileage reimbursement for examiners based on the shortest route that could be traveled rather than the actual route travelled. Again, the Employer admitted to this change in its February 4, 2020 email, which stated specifically, that "[t]he Division of Banks (DOB) readily admits that there has been a longstanding practice of providing mileage reimbursements to Bank Examiners for travel between their homes and their assigned work offices." The Employer also admitted to this change per its February 5, 2020 email, which stated that "[t]he odometer reading is now optional" and "[t]he route to your temporary assignment from your home to your

assigned office will be reviewed at the shortest distance." Moreover, there is no dispute that this method for calculating mileage reimbursement is a mandatory subject of bargaining, or that the Employer did not bargain with the Union prior to implementing this change.

The Employer argues that it was not obligated to bargain with the Union prior to making these changes based on precedent established by the Commonwealth Employment Relations Board (CERB) in Commonwealth of Massachusetts, 46 MLC 134, 138, SUP-16-5594 (H.O. Jan. 16, 2020), aff'd 46 MLC 207, 208 (May 1, 2020).[38] In that case, the employer Department of Public Safety (DPS)[39] and the union Massachusetts Organization of State Engineers and Scientists (MOSES) entered into a collective bargaining agreement with contract language that mirrored the lesser rule language at issue here. Specifically, the relevant provisions of that contract stated, in full:

> 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.

[38] In its brief, the Respondent also relies on Article 2, Section 2.1 of the CBA to argue that it had the managerial right to lease office space and assign employees to offices. Because the Complaint does not allege that the Respondent violated the Law as it relates to these issues, I decline to address it. Further, the Respondent argues in its brief that since implementing the telework Policy in 2013, it has never designated an examiner's home as their office for purposes of travel reimbursement. However, there is no dispute that an examiner does not incur travel expenses when telecommuting because that examiner performs works from home, not at a field office or examination site; nor does the Union allege that the Employer violated the Law concerning the Policy. For both of these reasons, I decline to consider the Employer's argument on this issue.

[39] The DPS ceased to exist on March 25, 2017. Commonwealth of Massachusetts, 46 at 135, n. 2.

> ….
>
> 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 purposes of allowed transportation expenses in cases where the employee has no regular office or other regular work location.

Id. at 207.

There, the hearing officer concluded that the employer was not obligated to bargain over its decision to change how it calculated mileage reimbursement from the "door-to-door" rule (i.e., mileage travelled between leaving home and returning home) to the lesser rule (i.e., mileage travelled between home and work location or between assigned office and work location, whichever is lesser). Id. at 207. Affirming the hearing officer, the CERB reasoned that while an employer is generally obligated to bargain before changing a past practice, it will not find a "binding past practice [where] it conflicts with the clear and unambiguous language of [the parties' contract]." Thus, the CERB held that "[i]n determining terms and conditions of employment, a past practice cannot overcome explicit contract language." Id. at 208.

1. Article 11, Sections 11.1(B) and (C) – The Lesser Rule

Here, the Employer points to the clear and unambiguous terms of Article 11, Section 11.1(B) of the parties' CBA, which stated expressly that the reimbursement of transportation expenses "shall be allowed…for the distance between [an examiner's] home and his/her temporary assignment or between his/her regularly assigned office and his/her temporary assignment, whichever is less." It also points to the clear and unambiguous terms of Article 11, Section 11.1(C) which stated expressly that

"[e]mployees shall not be reimbursed for commuting between their home and office or other regular work location" unless "the Chief Human Resources Officer [(CHRO)] [approved designating] an employee's home…as his/her regular office…where th[at] employee has no regular office or other work location." Read together, the Employer argues that this contract language "clearly, unequivocally, and specifically" permitted it to reimburse examiners based on the lesser distance rule in February of 2020. It also argues that except for one instance in 1982, there is no evidence that the CHRO ever approved designation of an examiner's home as their office for the purpose of mileage reimbursement. Thus, because the parties' contractual language is explicit as it pertains to the lesser rule, there is no binding past practice obligating it to bargain with the Union.

Conversely, the Union argues that the Employer's reliance on Commonwealth of Massachusetts is "inapposite" because in that case "the parties were different (different agency and union), as were the collective bargaining agreement and…the fact pattern" which did "not hinge on this case's Article 11.1(C)," which did not involve a "consistent past practice by [members of that bargaining unit] receiving travel reimbursements from their homes," and which was void of "proof of the agency's consent to the practice, unlike the present case."

Despite the Union's arguments, I find that the CERB's decision in Commonwealth of Massachusetts applies directly to the Employer's implementation of the lesser rule on February 1, 2020. First, both cases address the legal issue of whether the employer unilaterally changed the parties' prior practice of calculating mileage reimbursements for unit members who traveled to and from their homes to either their assigned offices or

work sites. Second, both cases also involve identical "lesser rule" contract language contained in Article 11, Sections 11.1 (B) and (C), which calculated mileage based on travel to and from employees' homes to either their assigned office or work site. Last, the Law does not restrict the CERB from relying on legal precedent when deciding cases that differ factually; and the Union presented no evidence to the contrary. See, generally, Cambridge Health Alliance, 37 MLC 168, 169-170, MUP-08-5162 (March 24, 2011) (union claimed that CERB's decisions were based on flawed precedent but presented no persuasive arguments to depart from the CERB's longstanding precedent).

Based on the totality of this evidence, I find that the Employer did not act unlawfully when it decided on February 1, 2020, to stop reimbursing examiners for mileage based on travel between their homes and their assigned field office and/ or examination site, and to start reimbursing them based only on the lesser rule. This is because the Employer was not obligated to bargain with the Union prior to implementing this decision due to the explicit language of Article 11, Sections 11.1 (B) and (C), which was clear and unambiguous, and because the prior practice conflicted with those contractual terms. Commonwealth of Massachusetts, 46 MLC at 208. Based on this evidence, I also find that the Employer did not repudiate Article 11, Sections 11.1 (B) and (C) as it related to the implementation of the lesser rule because these contractual terms were clear and unambiguous. See, e.g., Commonwealth of Massachusetts, 28 MLC 339, 347, SUP-4333 (May 17, 2002) (citing Boston School Committee, 22 MLC 1365, 1376, MUP-8125 (Jan. 9, 1996)); City of Worcester School Committee, 2 MLC 1283, 1285, MUP-2260 (Jan. 8, 1976) (CERB found no repudiation after giving effect to the clear meaning of the parties'

bargained-for language, and did not inquire further into the parties' intent where the words of the agreement were unambiguous).

2. Article 11, Section 11.1(A) – The Shortest Distance Rule

Concerning Article 11, Section 11.1(A), I agree with the Union that the CERB's decision in Commonwealth of Massachusetts, is distinguished because that case did not involve any contract language similar to that contained in Section 11.1 (A). Nor is there is any evidence that case addressed mileage reimbursements in the context of odometer readings, the reasonableness rule, or the shortest distance rule.

Instead, based on the undisputed evidence established above, I find that on or about February 5, 2020, the Employer unilaterally changed its established practice of reimbursing examiners for mileage because on their odometer readings and/or web-based maps, subject to the reasonableness rule, and calculated those mileage reimbursements based solely on the shortest distance rule. Because this change involved a mandatory subject of bargaining (i.e., calculation of mileage reimbursement), and because the Employer implemented the change without first negotiating with the Union to resolution or impasse, I find that the Employer's action constitutes a prohibited practice under Section 10(a)(5) of the Law. School Committee of Newton, 388 Mass. at 574.

II. Repudiation

The statutory obligation to bargain in good faith includes the duty to comply with the terms of a collectively bargained agreement. Commonwealth of Massachusetts, 26 MLC 165, 168, SUP-3972 (March 13, 2000) (citing, City of Quincy, 17 MLC 1603, MUP-

6710 (March 20, 1991); Massachusetts Board of Regents of Higher Education, 10 MLC 1196, SUP-2673 (Sept. 8, 1983)). Repudiating a collectively bargained agreement by deliberately refusing to abide by or to implement an agreement's unambiguous terms violates the duty to bargain in good faith and constitutes a prohibited practice under Section 10(a)(5) of the Law. Town of Falmouth, 20 MLC 1555, MUP-8114 (May 16, 1994), aff'd sub nom., Town of Falmouth v. Labor Relations Commission, 42 Mass. App. Ct. 1113 (1997); Commonwealth of Massachusetts, 36 MLC 65, 68, SUP-05-5191 (Oct. 23, 2009).

To show that an employer has repudiated an agreement, the charging party must prove that the employer deliberately refused to abide by the agreement. Worcester County Sheriff's Department, 28 MLC 1, 6, SUP-4531 (June 13, 2001); City of Quincy, 17 MLC 1603, 1608 (1991); Massachusetts Board of Regents of Higher Education, 10 MLC 1196, SUP-2673 (Sept. 8, 1983). If the language of the agreement is ambiguous, the CERB looks to the parties' bargaining history to determine whether there was an agreement between the parties. City of Waltham, 25 MLC 59, 60, MUP-1427 (Sept. 8, 1998). The CERB gives effect to the clear meaning of the bargained-for language and does not inquire into the parties' intent where the words of the agreement are unambiguous. Boston School Committee, 22 MLC 1365, 1376, MUP-8125 (Jan. 9, 1996) (citing City of Worcester, 2 MLC 1281, 1285, MUP-2260 (Jan. 8, 1976)).

Here, the Union argues that the Employer repudiated Article 11, Section 11.1(A) on or about February 5, 2020, when it stopped reimbursing examiners for mileage based on the reasonableness rule, and started reimbursing them for mileage based only on the

shortest distance rule. Specifically, the Union contends that Article 11.1(A) "specifically provides that the actual mileage driven will be reimbursed with only one limitation, and that is…the mileage cannot be unreasonable using GPS as a measure," which "is exactly how it was done for more than four decades." Thus, the Employer's implementation of the shortest distance rule contradicts the clear language of the contract, which provides that "mileage is based on actual odometer readings" that "management may check if there is a basis to conclude the miles submitted are unreasonable." The Union asserts that the Employer had been contemplating this change since the Fall of 2019, that the parties had a meeting of the minds on the actual terms of the mileage rule, and that the parties had manifested assent to those terms based on the plain language of the CBA, and based also on the 1982 letter, the 2003 arbitration award, the longstanding past practice, and the testimonial record, but implemented the change without bargaining.

Conversely, the Employer argues that it did not repudiate the CBA because "[t]o evaluate whether the distance from an employee's home to a temporary assignment or an employee's regularly assigned office to a temporary assignment is the lesser distance, for the purpose of reimbursing the employee, the Respondent needs to be able to measure those distances," and "[u]sing web-based maps to do so, is a necessary part of complying with the already-bargained-for contract language." Next, the Employer contends that "Section 11.1(B) anticipates that employees will be reimbursed for a potentially hypothetical route—'whichever is less'—as opposed to the exact route that an employee took as measured by an odometer," and that "to compare distances, [it] must compare the shortest distance between each location…[o]therwise, the comparison to

determine 'whichever is less' would be meaningless as it would not actually determine which was the lesser distance."

1. The Contractual Ambiguities

The record shows that the language of Article 11, Section 11.1(A) is ambiguous concerning whether it permitted the Employer to apply the shortest distance rule on or about February 5, 2020. Specifically, this provision was silent concerning the phrase "shortest distance," stating, in full, that: "[m]ileage shall be determined by the odometer 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." Similarly, the record shows that Article 11, Section 11.1(B) is also ambiguous and silent concerning the shortest distance rule, because that provision stated, in full that: "[a]n 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 assigned office and his/her temporary assignment, whichever is less." Moreover, DeWitt's February 24, 2020 email stated that the Employer's application of the shortest distance rule was not based on explicit language contained in the parties' CBA, but was "[i]mplicit" as it related to Article 11, Section 11.1(B) because "the idea that the comparison of distances…involves the shortest route for each."

Thus, based on the ambiguities of Article 11, Sections 11.1(A) and (B) of the parties' CBA, I must look to the parties' bargaining history to determine whether there was an agreement. See, e.g., City of Waltham, 25 MLC at 60 (if the language of an agreement

is ambiguous, the CERB looks to the parties' bargaining history that culminated in the contractual provision at issue to determine whether there was an agreement between the parties).

2. The Parties' Bargaining History

Here, the record shows that the Union provided unrebutted evidence of the parties' bargaining history concerning Article 11, Section 11.1 (A). First, O'Leary gave unrebutted testimony that beginning with the 2000-2003 CBA, the parties had negotiated and agreed to incorporate changes to Article 11, Section 11.1 (A) by adding language about the Milo Guide as it related to the Employer's use of "wheeling" or the "wheeled the route" method to determine the reasonableness of the mileage reported by examiners on their PV forms. Preston also gave unrebutted testimony that the parties negotiated and agreed to incorporate new language in the 2017-2020 CBA by eliminating use of the Milo Guide in Article 11, Section 11.1(A) in favor of using "odometer…readings subject to a reasonableness test." In fact, the record shows that at no time during the parties' contractual negotiations beginning with the 1981-1984 CBA, and continuing with their successor negotiations for the 2017-2020 CBA, did either party ever raise or consider the issue of calculating mileage reimbursement based on the shortest distance rule.

In addition to considering the parties' bargaining history, I must also look to whether the parties hold differing good faith interpretations of the disputed terms contained in Article 11, Sections 11.1(A) and (B) of their CBA, and whether they reached a meeting of the minds on the matter of the shortest distance rule.

3. Meeting of the Minds

The CERB will not find repudiation where the parties hold differing good faith interpretations of the terms of an agreement and did not achieve a meeting of the minds. City of Boston, 26 MLC 215, 216, MUP-2081 (May 31, 2000); Town of Ipswich, 11 MLC 1403, 1410, MUP-5248 (Feb. 7, 1985), aff'd sub nom., Town of Ipswich v. Labor Relations Commission, 21 Mass. App. Ct. 1113 (1986). To achieve a meeting of the minds, the parties must manifest an assent to the terms of an agreement. Suffolk County Sheriff's Department, 30 MLC 1, MUP-2630, MUP-2747 (Aug. 19, 2003); City of Boston, 26 MLC at 217.

The Employer argues that the "parties' contract specifically require[d] [it] to reimburse [b]ank [e]xaminers for the lesser distance when traveling to a temporary assignment, such that the employee shall be reimbursed for the distance between his/her home and the temporary assignment, as explained in the FAQs." The Employer also argues that because Article 11, Section 11.1(A) "refers to odometer readings being reviewed for reasonableness with a web-based guide," it "cannot be found to have repudiated an agreement in such circumstances."

I am unpersuaded by the Employer's arguments and find, instead, that both parties assented to the plain language of Article 11, Sections 11.1(A) and (B), beginning with their negotiations in 1981-1984 CBA, and continuing with the successor negotiations in the 2000-2003 CBA and the 2017-2020 CBA. These provisions have existed for over 40 years. While the parties negotiated changes to Article 11, Section 11.1(A) beginning with the 2000-2003 CBA and again with the 2017-2020 CBA, Article 11, Section 11.1(B) has

remained unchanged despite over 40 years of bargaining. There is no dispute that the parties negotiated in good faith over the terms of these contractual provisions, and there is no dispute that they agreed to calculate mileage reimbursement based on odometer readings, "subject to review for reasonableness" which could include a "Web-based service as a guide." Finally, there is no dispute that the parties never proposed, considered, or bargained over the term "shortest distance" as it related to either Article 11, Section 11.1(A) or (B) during their negotiations.

Additionally, the record shows that the parties negotiated the terms of Article 11 and agreed to calculate mileage reimbursement for examiners based on their odometer readings, "subject to review for reasonableness" which could include a "Web-based service as a guide" pursuant to the terms of Section 11.1(A). The record also shows that the Employer's conduct over the past 40 years demonstrates assent to these contractual terms because it consistently reimbursed examiners for mileage travelled either between their homes and examination sites, or between their respective field office and examination sites. Specifically, prior to the 2017-2020 CBA, the Employer calculated mileage reimbursements based on the Milo Guide and/or the wheeling method, subject to a reasonableness review. And, pursuant to the 2017-2020 CBA, when the parties agreed to change the terms of Article 11, Section 11.1(A) by calculating reimbursements on odometer readings and/or web-based guides (e.g., MapQuest), they continued to apply the reasonableness rule without issue. Moreover, prior to February 5, 2020, the Employer never required examiners to compare the shortest possible distances of the actual routes travelled, and never denied a PV form from an examiner who failed to

include any "shortest distance" information. Instead, by email on February 4, 2020, the DOB "readily admit[ted] that there has been a longstanding practice of providing mileage reimbursements to" examiners, and by email on February 5, 2020, announced that "[t]he odometer meeting is now optional" and that "the route to [examiners'] temporary assignment from [their] home or from [their] assigned office will be reviewed at the shortest distance," without prior bargaining with the Union.

The totality of this evidence shows that the parties reached a meeting of the minds on the issue of the reasonableness rule contained in Article 11, Section 11.1(A), and agreed to calculate mileage reimbursements pursuant to that rule. See, e.g., Suffolk County Sheriff's Department, 30 MLC 1, 6-7, MUP-2630 and MUP-2747 (Aug. 19, 2003) (parties' statements and conduct demonstrated requisite assent and meeting of the minds on terms of the agreement); see, generally, Worcester County Sheriff's Department, 28 MLC 1, 7, SUP-4531 (June 13, 2001) (using a "totality of circumstances" test, CERB found employer repudiated agreement to continue weekly payments although agreement did not explicitly require weekly payment until implementation of the bi-weekly payroll system); compare Town of Ipswich, 11 MLC 1403, 1411, MUP-5248 (Feb. 7, 1985), aff'd sub nom., Town of Ipswich v. Labor Relations Commission, 21 Mass. App. Ct. 1113 (1986) (in finding a repudiation, CERB rejected town's reliance on Acushnet Permanent Firefighters Association, 7 MLC 1265, MUPL-2295 (H.O. Aug. 3, 1980) in which "hearing officer found no 'meeting of the minds' where one party presented language that had previously been proposed by the other party but the parties could not agree on the meaning of the language"). The totality of this evidence also shows that the Employer

deliberately refused to abide by the terms of Article 11, section 11.1(A) on February 5, 2020, when it stopped reimbursing examiners pursuant to the reasonableness rule, made the odometer reading "optional," and decided to reimburse examiners for mileage based solely on the shortest distance rule. Worcester County Sheriff's Department, 28 MLC at 6.

For all these reasons, I find that the Employer repudiated Article 11, Section 11.1(A) of the parties' CBA when on or about February 5, 2020, it stopped reimbursing examiners pursuant to the reasonableness rule, made the odometer reading "optional," and started reimbursing those examiners based solely on the shortest distance rule.

III. Waiver By Contract

Finally, the Employer argues that the Union waived by contract its rights to bargain over the shortest distance rule. Assuming arguendo, that the Employer did not repudiate Article 11, Section 11.1(A) of the parties' CBA, I find no evidence that the Union waived its rights to bargain over this part of the contract. Where an employer raises the affirmative defense of waiver by contract, it bears the burden of demonstrating that the parties consciously considered the situation that has arisen, and that the union knowingly waived its bargaining rights. City of Newton, 29 MLC 186, 190, MUP-2709 (April 2, 2003) (citing Massachusetts Board of Regents, 15 MLC 1265, 1269, SUP-2959 (Nov. 18, 1988)). The initial inquiry focuses upon the language of the contract. Town of Mansfield, 25 MLC 14, 15, MUP-1567 (Aug. 4, 1998)). If the language clearly, unequivocally, and specifically permits the public employer to make the change, no further inquiry is necessary. City of Worcester, 16 MLC 1327, 1333, MUP-6810 (Oct. 19, 1989).

Here, the plain language of Article 11.1(A) did not expressly permit the Employer to apply the shortest distance rule in February of 2020. In fact, as established above, that contractual provision has remained silent concerning the "shortest distance" for over 40 years. Consequently, the Employer's affirmative defense of waiver by contract must fail because it is unable to show that the parties had consciously considered the "shortest distance" rule during their contract negotiations, and there is no evidence in the record that the Union knowingly waived its rights to bargain over this issue.

CONCLUSION

In conclusion, the Employer did not violate Section 10(a)(5) of the Law as alleged by changing its calculation of mileage reimbursement for examiners based on the lesser rule. Nor did the Employer violate Section 10(a)(5) of the Law by repudiating Article 11, Sections 11.1 (B) and (C) of the parties' CBA as it pertained to the calculation of mileage reimbursement for those examiners based on the lesser rule. However, the Employer did violate Section 10(a)(5) of the Law when it changed its calculation of mileage reimbursement 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. The Employer also violated Section 10(a)(5) of the Law when it repudiated Article 11, Section 11.1 (A) of the parties' CBA as it pertained to the calculation of mileage reimbursement for those examiners based on the shortest distance rule.

ORDER

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

1. Cease and desist from:

    a) Unilaterally implementing a mileage reimbursement policy pursuant to the shortest distance rule which deviates from and conflicts with the odometer readings and/or web-based maps used by examiners, subject to the reasonableness of the actual routes travelled by those examiners pursuant to Article 11, Section 11.1(A) of the parties' 2017-2020 CBA;

    b) Repudiating Article 11, Section 11.1(A) of the parties' 2017-2020 CBA, which calculates mileage reimbursement for examiners based on odometer readings and/or web-based maps used by examiners, subject to the reasonableness of the actual routes travelled by those examiners.

    c) Failing and refusing to bargain collectively in good faith with the Union over the decision to implement a mileage reimbursement policy pursuant to the shortest distance rule which deviates from and conflicts with odometer readings and/or web-based maps used by examiners, subject to the reasonableness of the actual routes travelled by those examiners, and the impacts of that decision; and,

    d) In any like or related manner interfering with, restraining or coercing employees in the exercise of their rights guaranteed under the Law.

2. Take the following affirmative action:

    a) Rescind the unilateral imposition of a mileage reimbursement policy pursuant to the shortest distance rule which deviates from and conflicts with the odometer readings and/or web-based maps used by examiners, subject to the reasonableness of the actual routes travelled by those examiners per Article 11, Section 11.1(A) of the parties' 2017-2020 CBA;

    b) Adhere to Article 11, Section 11.1(A) of the parties' 2017-2020 CBA, which requires the calculation of mileage reimbursement for examiners based on the odometer readings and/or web-based maps used by examiners, subject to the reasonableness of the actual routes travelled by those examiners.

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 at stated in Article 11, Section 11.1(A) of the parties' 2017-2020 CBA, with interest compounded quarterly at the rate specified in G.L. c. 231, Sec. 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 where notices are usually posted, including electronically if the Employer customarily communicates with these unit members via intranet or email, and display for a period of thirty (30) days thereafter; and

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

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

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KENDRAH DAVIS, ESQ.
HEARING OFFICER

APPEAL RIGHTS

The parties are advised of their right, pursuant to M.G.L. Chapter 150E, Section 11 and 456 CMR 13.19, to request a review of this decision by the Commonwealth Employment Relations Board by filing a Request for Review with the Department of Labor Relations within ten days after receiving notice of this decision. If a Request for Review is not filed within ten days, this decision shall become final and binding on the parties.