

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

In the Matter of

TOWN OF DEERFIELD

and

UNITED PUBLIC SERVICE EMPLOYEES
UNION, LOCAL 424

Case No. CAS-21-8441

Date Issued:

October 18, 2022

CERB Members Participating

Marjorie F. Wittner, Chair
Kelly Strong, CERB Member

Appearances:

Katherine Feodoroff, Esq. - Representing Town of Deerfield

John Connor, Esq. - Representing UPSEU, Local 424

CERB DECISION

Summary

1 On January 29, 2021, the United Public Service Employees Union, Local 424
2 (Union) filed a unit clarification petition with the Department of Labor Relations (DLR)
3 seeking to accrete the Assistant Highway/Public Works Superintendent (Assistant
4 Superintendent) to its bargaining unit of "All full-time and regular part-time employees
5 employed by the Town of Deerfield Highway Department in the positions of Heavy

1 Equipment Operator, Tree Warden, Heavy Equipment Operator Foreman, Mechanic and
2 Maintenance Foreman.”

3 On April 13, 2021, the Union and the Town of Deerfield (Town or Employer)
4 participated in an informal videoconference.¹ Through position statements and exhibits,
5 the Union argues that the Assistant Superintendent job title should be accreted into its
6 unit because it shares a community of interest with other bargaining unit positions.
7 Specifically, the Union contends that the Assistant Superintendent subsumed most of the
8 duties of the Foreman/Heavy Equipment Operator (HEO), which was a longstanding
9 bargaining unit position that the Town did not fill after the incumbent vacated the position
10 in 2020. The Town conversely argues that the Assistant Superintendent is a
11 managerial/supervisory employee and thus, not appropriately included in the existing
12 bargaining unit.

13 On August 22, 2022, the DLR sent the parties a letter summarizing the information
14 presented during the investigation and directing them to show cause why the unit
15 placement dispute should not be resolved based on that information.² After reviewing the
16 entire record, the Commonwealth Employment Relations Board (CERB) has determined
17 that there are no material disputes of fact. Based on the record, the CERB has determined
18 that the Assistant Superintendent is not a managerial employee, but that he is a

¹ Although the Assistant Superintendent position was not filled at the time that the Union filed this petition or at the time the DLR conducted the informal conference, the Union indicated that it wished to proceed with the petition based on the information available at the time of the investigation, including available job descriptions.

² The DLR also requested some additional information in the show cause letter, which the Town provided.

1 supervisor. We therefore decline to accrete him into the same unit with the employees
2 he supervises.

3 Background

4

5 Town Bargaining Units

6

7 Two groups of Town employees are represented for purposes of collective
8 bargaining – the Town’s police, and the Highway Department employees at issue in this
9 case.³ As discussed further below, the DLR certified the Highway Department bargaining
10 unit on June 3, 2022, in Case No. WMAM-20-7992.

11 Public Works Department, Generally

12

13 The Town’s Public Works Department (DPW) consists of the following
14 departments or divisions: Highway Department, Wastewater Treatment Plant
15 Department, and Transfer Station.⁴ The DPW Superintendent oversees all three

³ There are also several bargaining units of school employees.

⁴ In response to a request to provide an organization chart for the Deerfield Highway Department, the Town provided four separate organization charts labeled: “Highway Department,” “Wastewater Treatment Plant Department,” “Transfer Station” and “Building & Grounds Maintenance.” On the Buildings & Grounds Maintenance organization chart, three employees (one HEO, one Laborer/Equipment Operator and “Summer Help”) report to the Maintenance Foreman, who in turn reports to the DPW Superintendent. In an affidavit that the Union provided during this proceeding, Union President and Maintenance Foreman Charles Willor, III (Willor) disputes that there is a separate Buildings & Grounds Maintenance department within the DPW. He claims instead that the building and maintenance staff are part of the Highway Department. His claim is supported by the fact that the Town included Willor’s Maintenance Foreman job title on the list of Highway Department employees that it provided to the DLR in Case No. WMAM-22-7992 and the fact that the Town does not otherwise dispute that Willor is part of the Highway Department bargaining unit. We thus find that the Building and Grounds employees are part of the Highway Department. There is no dispute, however, that the Transfer Station and Wastewater Treatment Plant employees are not part of the Highway Department.

1 departments. The Town's Selectboard is the formal hiring authority for the DPW, but the
2 DPW Superintendent and Town Administrator typically participate in the hiring process.⁵

3 As of July 2020, the Highway Department consisted of eight employees in the
4 following job titles: Heavy Equipment Operator (5); Heavy Equipment Operator Tree
5 Warden (1); Maintenance Foreman, Mechanic HEO (1); and Foreman (HEO) (1). These
6 employees generally perform mechanical and non-mechanical maintenance, repair and
7 upkeep on Town roads, green spaces, properties, buildings and equipment. Their tasks
8 include landscaping, lawn maintenance, tree work, hauling brush and leaves, storm water
9 and sewer system maintenance (except for the maintenance associated with the
10 Wastewater Treatment Plant), pavement repair, hot patching and vehicle maintenance
11 for the highway and police departments. They also assist in Transfer Station operations
12 by loading and crushing boxes but do not otherwise perform any Transfer Station duties.

13 Before 2020, there were two foremen in the Highway Department who were
14 responsible for overseeing the work of Highway crew members. Both foremen worked
15 alongside and performed the same work as their respective crews. As described further
16 below, since 2020, Willor has been the only foreman in the Highway Department.

17 Compensation and Hiring

18
19 The Town's employees are paid according to the Town of Deerfield Compensation
20 Classification Schedule (Classification Schedule). The Classification Schedule has six
21 grades (1-6) and ten steps per grade.

⁵ As described below, from time to time, the Highway Foreman/HEO also participated in hiring Highway Department employees.

1 Before beginning the hiring process for a new position, a job description must be
2 created and submitted for approval by the Town's Personnel Board and Selectboard. The
3 new job title must then be incorporated into the Compensation Schedule and submitted
4 to Town Meeting for approval. Once approved, the position is ready to be posted and
5 filled.

6 With respect to Highway Department employees, the FY21 Classification schedule
7 classified HEOs as Grade 2, with an hourly rate of \$16.47 - \$24.72. Other Grade 2 titles
8 include the Town Hall Program Coordinator and EMT-Basic.⁶

9 The "Foreman/HEO" was classified as Grade 3, with an hourly rate of ranging from
10 \$19.21 - \$28.84. As of March 2022, Willor earned \$28.60/hour. Other Grade 3 titles on
11 the Compensation Schedule include several administrative assistants, Advanced EMT,
12 Children's Librarian, Library Head of Circulation, and Recreation Director.

13 In a Special Town Meeting on October 22, 2020, the Town Meeting approved
14 classifying the Assistant Superintendent as a Grade 5 position, with a salary range of
15 \$24.72 – \$37.07/hour. Other Grade 5 positions include the Assistant EMS Director, the
16 Assistant Town Administrator/Planning Officer, the Library Director and the Chief
17 Wastewater Treatment Plant operator.

18 The Public Works Superintendent was classified as Grade 6, with an hourly rate
19 of \$27.46 to \$41.19. Other Grade 6 positions include the Police Chief, the EMS Chief,
20 and the Town Clerk/Treasurer/Collector.

21

⁶ Town Meeting approved the FY21 Compensation Schedule on June 1, 2020, two days before the DLR certified the Union in Case No. WMAM-20-7992. HEOs and HEO/Foremen were included in the FY21 schedule, but the Assistant Superintendent position was not.

1 Highway Department Foremen Job Descriptions

2

3 Foreman/Heavy Equipment Operator

4

5 Michael Phillips (Phillips) served as the Foreman/HEO (aka Highway Foreman)
6 from at least 2014 until his retirement in 2020. A 2015 job description provided by the
7 Town⁷ classified this position as a non-exempt Grade 3 position reporting to the
8 “Superintendent of Streets & Wastewater.” The job description’s General Statement of
9 Duties included performing “skilled and unskilled labor” and operating heavy and light
10 equipment that includes but is not limited to the sanitary sewer distribution system, solid
11 waste, cemetery, grounds and highway operations. Under Supervisory Responsibility,
12 the job description states in part:

13 Employee, as a regular part of the job, is required to lead other employees
14 to assist them in completing their assigned work. Employee also performs
15 non-supervisory work that is of the same kind and level as is done by the
16 employee(s) being supervised. The employee is not responsible for taking
17 any disciplinary action and participates in the hiring process for
18 department.⁸ The employee provides direct supervision of five (5) full-time
19 employees in accomplishing assigned work. The employee is required to
20 provide on-the-job training and direction to employees as required . . .

21

22 The Education and Experience required are an “Associates Degree or
23 journeyman’s level of trade knowledge and three to five years prior work experience, or
24 any equivalent combination of education, training and experience.” The Foreman/HEO
25 is required to possess a valid Commercial Class B Driver’s License and a hoisting
26 engineers license.

⁷ The Town also provided a 2012 job description. These findings are taken from the 2015 job description because it is more recent.

⁸ The Town confirmed that, on at least one occasion, the Foreman/HEO participated in the hiring process for DPW employees.

1 Under the heading Confidentiality, the job description states, “On a regular basis
2 the employee does not have access to confidential information in accordance with the
3 State Public Records law.”

4 Maintenance Foreman/HEO

5
6 The 2016 job description for the Maintenance/Foreman/HEO is very similar to the
7 Foreman/HEO job description except that the Foreman/HEO’s duties are geared mainly
8 towards the operation of equipment, while the Maintenance Foreman’s duties include
9 inspecting, maintaining and repairing that equipment and performing preventative
10 maintenance and repair for all Town-owned buildings, public facilities and grounds. The
11 salary grade, Supervisory Responsibility, Education and Experience, and Confidentiality
12 headings are otherwise the same on both foremen job descriptions.

13 On a chart of employees that the Town provided to the DLR as part of this
14 investigation (Employee Chart), the Town categorizes Willor as a non-exempt
15 “Workleader”⁹ who works “40+” hours. As foreman, Willor has resolved various employee
16 issues. On at least one occasion, he has given what he deemed a “verbal warning” to
17 employees for poor work performance, but he has not addressed any disciplinary issues
18 beyond that.¹⁰

⁹ The Town created this chart in response to a request for a list of all “non-school, non-police fire Town employees that included their name, title, department, salary, salary grade, and whether the Town considered them to be a supervisor, department head, exempt or non-exempt.” Willor is the only “Workleader” on the chart.

¹⁰ Willor stated during the investigation that he gave verbal warnings to employees, and counsel indicated that what he did was consistent with the level of authority that foremen have to direct employee work. Willor described an incident in which he discovered that a costly piece of machinery had stopped working because it had no oil in it. The Town disputes that Willor ever gave any verbal warnings, noting that his job description indicates that the Maintenance Foreman does not issue discipline. We agree that the job

1 History of Assistant Superintendent Position

2

3 The Town first considered creating an Assistant Superintendent position in 2014.

4 During a June 19, 2014 Selectboard meeting, the Selectboard accepted the resignation

5 of then-Highway Department Superintendent Shawn Patterson. (Patterson). In the

6 discussion that followed, Patterson proposed moving Phillips from his Foreman/HEO

7 position to a position assisting then-interim Highway Department Superintendent Kevin

8 Scarborough (Scarborough).¹¹ The Selectboard moved and voted that Phillips' pay would

9 be classified at Grade 3, Level 10, a \$2.00/hour increase. Phillips served in this capacity

10 for approximately 90 days. He reverted to serving as Foreman/HEO when he did not

11 work out in the new role. Phillips remained the Foreman/HEO for the next six years until

12 his retirement sometime in the summer of 2020.

13 The Town did not seek to revive the Assistant Superintendent position or notify the

14 Union about any plans to do so until approximately May 2020, when the Union filed a

15 petition (WMAM-20-7992) seeking certification by written majority authorization (WMA) in

16 the following bargaining unit:

17 All full-time and regular part-time employees employed within the Town of
18 Deerfield Highway Department. Excluded: clerical, confidential and
19 managerial employees.

20

description does not give the Maintenance Foreman any disciplinary authority. Regardless of whether Willor gave a formal "verbal warning," it would not be inconsistent with Willor's supervisory responsibility to "lead other employees to assist them in completing their assigned work" to take steps to avoid costly mistakes, including speaking to employees who have made such mistakes and discussing the possible consequences of future ones.

¹¹ Scarborough subsequently became the DPW Superintendent.

1 On May 19, 2020, Union counsel sent a letter to Town counsel regarding the WMA
2 petition that asked whether the Town had any objection to the scope of the unit. The
3 Town replied in pertinent part, “[P]rior to this petition, the Town had been planning to add
4 an Assistant Superintendent position to the DPW” that they “would exclude as
5 managerial.”

6 On May 22, 2020, the parties selected the DLR as the neutral to verify the Union’s
7 majority support. On May 26, 2020, pursuant to 456 CMR 14.19(8), the Town filed
8 challenges with the DLR Neutral. The Town objected to including the Superintendent and
9 Assistant Superintendent in the unit. The Town described the Assistant Superintendent
10 position as “currently unfilled and unfunded,” further stating,

11 The positions of Superintendent and Assistant Superintendent are
12 managerial, possessing significant supervisory authority, owing their
13 allegiance to the Town, particularly in the areas of discipline and
14 productivity. These positions possess independent authority to make
15 personnel decisions including in discipline, they have the ability to
16 recommend such personnel decisions such as hiring, firing, and discharge;
17 and have independent authority to monitor attendance, to assign duties, to
18 direct work and to conduct performance evaluations.

19
20 The Union did not file a response to the challenge.¹²

21 On June 3, 2020, the DLR certified that the Union had majority support in a
22 bargaining unit comprised of:

23 All full-time and regular part-time employees employed by the Town of
24 Deerfield Highway Department in the positions of Heavy Equipment
25 Operator, Tree Warden, Heavy Equipment Operator Foreman, Mechanic,

¹² The Town also challenged the inclusion of currently “unfilled” clerical staff on community of interest grounds. This challenge, which the Union also did not contest, is not pertinent to this proceeding.

1 and Maintenance Foreman, but excluding all managerial, confidential,
2 casual and other employees.¹³

3 Reviving the Assistant Superintendent Job Title and Approval of Job Description

4 In July 2020, Phillips notified the Selectboard that he intended to retire. At a result,
5 the Selectboard began discussing reconstituting the Assistant Superintendent position to
6 assist the Superintendent with his administrative oversight responsibilities. The Town
7 wanted to revive the position because it believed that the Superintendent was working
8 too many hours and had inadequate coverage while he was on leave, particularly for
9 Wastewater Treatment Plant issues, which the Highway Foremen did not handle. The
10 Town was also undertaking several large public works projects at the time, including
11 sewer and wastewater treatment plant upgrades, a multi-million dollar streets project, and
12 planned renovations to its Senior Center and Town Hall.

13 After Phillips retired, the Superintendent asked Willor to assist temporarily with
14 many of Phillips' former duties. These included filling in for the Superintendent as needed,
15 taking daily work requests, assigning day-to-day tasks to Highway Department
16 employees, and supervising and actively participating in those tasks with a crew of five
17 full-time employees. In addition to supervising all the Highway Department employees,
18 Willor was in charge of Highway Department inventory, including ordering materials for
19 winter salting and sanding operations. Willor did not, however, assume Phillips' former
20 responsibility of being on call for salting or sanding events or having responsibility for
21 cemetery plots.

¹³ The DLR Neutral who conducted the verification process did not reference any of the Town's unit composition challenges in the inspection report that she issued on June 3, 2020.

1 Starting around June 2020, Superintendent Scarborough and the Town
2 Administrator began drafting an Assistant Superintendent job description. The Personnel
3 Board approved the final draft on September 21, 2020, and the Selectboard approved it
4 two days later.¹⁴

5 On October 5, 2020, the Town submitted a request to the Personnel Board for
6 approval to establish a pay range for the Assistant Superintendent position. On October
7 22, 2020, at a Special Town Meeting, the Town voted to amend its classification plan to
8 include a “Highway Department/Public Works Assistant Superintendent Position” at
9 Grade 5.

10 In April 2021, the Town posted the Assistant Superintendent position.¹⁵ The job
11 posting stated in pertinent part:

12 Under direction of Public Works Superintendent, position oversees daily
13 public works divisions operations (highway, transfer station, sewer and
14 wastewater treatment, cemeteries, grounds, buildings), coordinates
15 projects, supervises staff, assists with operational and capital budgets,
16 implements emergency response, department programs, practices,
17 policies, staff training, and customer service; acts as Superintendent in
18 Public Works Superintendent’s absence. Full-time, benefitted, exempt
19 position. Salary range \$63,000-74,000.

20 A search group comprised of Scarborough, the Town Administrator, the Police
21 Chief and the Town Accountant screened the applicants. The Town filled the position on
22 August 4, 2021. As of April 2022, Christopher Miller (Miller) held the title of Assistant

¹⁴ The Selectboard did not notify the Union of the vote, but the Union learned about it in October 2020.

¹⁵ The Town blames the COVID-19 pandemic, “critical service delivery” needs, union negotiations and this CAS petition for posting the Assistant Superintendent position six months after the job description was approved.

1 Public Works Superintendent. Miller's salary was classified as a Grade 5, Step 8, with an
2 hourly rate of \$35.35.

3 Superintendent and Assistant Superintendent Responsibilities and Job
4 Descriptions

5
6 Superintendent

7 The Statement of Duties on the 2015 Superintendent job description states that
8 the Superintendent "serves in a managerial and supervisory capacity overseeing six
9 divisions providing public works (highway, transfer station, wastewater treatment and
10 distribution system, cemeteries, grounds and facilities)."

11 Under Supervision Required, the job description states:

12
13 The employee works under the administrative direction of the Board of
14 Selectmen, working from municipal policies and objectives. Employee
15 establishes short- and long- range plans and objectives and assumes direct
16 accountability for department results; consults with the Board of Selectman
17 and the Town Administrator where clarification, iteration, or exception to
18 municipal policy may be required. The employee exercises responsibility for
19 the development and administration of departmental operating and capital
20 budgets. The employee is also expected to resolve all conflicts[] which arise
21 and coordinate with others as necessary.

22
23 Under Supervisory Responsibility, the job description states in part:

24
25 The employee is accountable for the direction and success of programs
26 accomplished through others, responsible for analyzing program objectives,
27 determining the various public works department work operations needed
28 to achieve them, estimating the financial end staff resources required,
29 allocating the available funds and staff, reporting periodically on the
30 achievement and status of the program objective, and recommending new
31 goals. The Superintendent formulates and recommends program goals and
32 develops plans for achieving short and long range objectives; determines
33 organizational structure, operating guidelines and work operations;
34 formulates, prepares and defends budget and operating guidelines and
35 work operations; formulates, prepares and defends budget and manpower
36 requests and accounts for effective use of funds and staff provided;
37 delegates authority to subordinate supervisors and holds them responsible
38 for the performance of their unit's work; reviews work in terms of
39 accomplishment of program objectives and progress reports, approves

1 standards establishing quality and quantity of work; and assists or oversees
2 the personnel function, including or effectively recommending hiring,
3 training and disciplining of employees.
4

5 The employee is responsible for the supervision of full-time employees,
6 part-time and seasonal employees . . .
7

8 During his tenure as superintendent, Scarborough has not conducted any performance
9 evaluations.

10 The preface to the Essential Functions heading states:
11

12 Note that the position is considered to be a 'working' superintendent which
13 requires, from time to time, active participation in completing highway
14 department and other tasks related to the position, including but not limited
15 to plowing, sanding, and functioning as a substitute for highway department
16 employees on various projects.
17

18 Under Confidentiality, the job description states, "Employee has regular access at
19 the departmental level to a wide variety of confidential information including official
20 personnel records, lawsuits and department and client records."

21 Under Judgment, the job description states in part:
22

23 Guidelines only provide limited guidance for performing the
24 work...Extensive judgment and ingenuity are required to develop new or
25 adapt existing methods and approaches for accomplishing objectives or to
26 deal with new or unusual requirements within the limits of the guidelines or
27 policies. The employee is recognized as the department or functional area's
28 authority in interpreting the guidelines, in determining how they should be
29 applied, and in developing operating policies.
30

31 Under Education and Experience, the job description states in part:
32

33 A college degree including courses in civil engineering is desired but not
34 required with more than ten years of construction work related experience
35 with at least five in a supervisory capacity in construction, public or private
36 treated ground water supply and/or sanitary sewer system, pumps,
37 hydraulics, building preventative maintenance or any equivalent
38 combination. . .
39

1 The Town listed Superintendent Scarborough as a “Department Head” on the
2 Employee Chart. The other Department Heads on the chart include the Senior Center
3 Director (Grade 4); Building Commissioner/Zoning Officer (Grade 6); Town Administrator
4 (contract employee); Library Director (Grade 5); and EMS Chief (Grade 6).

5 Assistant Highway/Public Works Superintendent

6 The Statement of Duties on the 2020 Assistant Superintendent job description
7 states:

8 Under the general supervision of the Superintendent, the Assistant
9 Superintendent performs a variety of broad-based management issues;
10 assists in analysis, planning, and implementation of “public works” projects
11 including, highway, sewer, building maintenance, cemetery,
12 groundskeeping, tree-work. [G]enerates tasks for the day-to-day operation
13 of the department and assists with administrative duties such as billing,
14 budgets, payroll, and overall staff accountability. Additional responsibilities
15 include operation of heavy trucks and equipment related to public works
16 projects. . . .The employee is expected to recognize instances which are out
17 of the ordinary and which do not fall within existing instructions; the
18 employee is then expected to seek advice and further instructions. The
19 employee also views and checks the work out in the field regarding
20 productivity and efficiency and keeps the Superintendent aware of
21 progress, accuracy and completion.

22
23 Under Supervision Required, the job description states:

24
25 Under the administrative supervision of the Superintendent, the employee
26 is familiar with the work routine and uses initiative in carrying out recurring
27 assignments independently with specific instruction.

28
29 Under Supervisory Responsibility, the job description states:

30
31 The Assistant Superintendent, as a regular part of the job, is required to
32 lead other employees to assist them in completing their assigned work. The
33 Assistant Superintendent provides additional, specific instruction for new,
34 difficult or unusual assignments, including suggested work methods. The
35 employee also performs non-supervisory work that is of the same kind and
36 level as is done by the employees(s) being supervised. The Assistant
37 Superintendent is also responsible for assisting the Superintendent with
38 disciplinary action, including recommendations relative thereto and
39 collaborates in the hiring process. The employee provides direct

1 supervision of assigned tasks, and work flow for other department
2 employees. The employee is required to provide on-the-job training and
3 direction to employees as required. . .
4

5 Under Confidentiality, the job description states:
6

7 The employee does not have access to confidential information in
8 accordance with the State Public Records law on a regular basis. However,
9 in connection with certain disciplinary matters, he/she may review
10 confidential information with the Superintendent; said information shall
11 remain confidential and not be disclosed except as required by disciplinary
12 proceedings or law.
13

14 Under Judgment, the job description states:
15

16 Considerable independent judgment and initiative in providing technical
17 guidance and advice to other employees and Superintendent. Numerous
18 standardized practices, procedures or general instructions govern the work
19 and may require additional interpretation.
20

21 Essential functions include: "Acts on behalf of the Superintendent in his/her
22 absence, serves as Acting Superintendent when so designated by the Superintendent
23 and/or Selectboard and represents the Town at regional, state and federal planning
24 meetings as needed."
25

26 Under Education and Experience, the job description requires an associate's
27 degree or journeyman's level of trade knowledge and three to five years prior work
28 experience with at least two years in a supervisory capacity.

29 The Town categorized the Assistant Superintendent as a "Supervisor" on the
30 Employee Chart. The Assistant Superintendent is the only Highway Department
31 employee with the "Supervisor" classification. There were other "supervisors" on the chart
32 from other departments, including the Assistant Town Administrator (Grade 5); Town
Accountant (Grade 5); Assistant Treasurer/Collector (Grade 4); Board of Health Agent

1 (unclassified); Library Children's Circulation (Grade 1); and Library Adult Head of
2 Circulation (Grade 3).

3 Filling in for Superintendent
4

5 As of March 18, 2022, the Superintendent had been out for eight weeks on a
6 medical leave. The Assistant Superintendent has been serving as Acting Superintendent.

7 His tasks have included:

- 8 1) Budget administration, including implementing planned activities and development
9 of FY 2023 capital and omnibus budget.
- 10 2) Responding to calls for non-highway related service by the public and staff.
11
- 12 3) Coordinating with the Town Administrator and engineering consultants to manage
13 staffing issues at the Wastewater Treatment Facilities. These duties included
14 completing contract negotiations with a neighboring town and participating in the
15 hiring processes for departmental staff.
16
- 17 4) Placing a Wastewater Treatment plant employee on paid administrative leave.¹⁶
18 This process required the Human Resources Coordinator/Town Administrator's
19 approval. Town Counsel and the Human Resources Coordinator/Town
20 Administrator assisted the Assistant Superintendent with the paperwork
21 associated with this task. Similar decisions by Department Heads, including the
22 Superintendent, require the Human Resources Coordinator/Town Administrator's
23 approval.

24 Opinion¹⁷

25 A unit clarification is the appropriate procedural vehicle to determine whether
26 newly-created positions should be included in or excluded from a given bargaining unit or
27 to determine whether substantial changes in the job duties of an existing position warrant
28 inclusion or exclusion from a bargaining unit. Town of Athol, 32 MLC 50, 52, CAS-04-

¹⁶ In response to a question in the show cause letter, the Town stated that this process was repeated with another employee at the Transfer Station.

¹⁷ The CERB's jurisdiction is not contested.

1 3567 (June 29, 2005). In deciding whether an employee should be accreted into an
2 existing bargaining unit, the CERB applies a three-step analysis. First, the CERB
3 determines whether the position existed when the DLR originally certified the unit. City
4 of Boston, 35 MLC 137, 140, CAS-07-3669 (December 31, 2008). If the position existed
5 at the time of the original certification but was not included in the unit and has not since
6 changed, the CERB will not accrete it to the unit using the CAS process. University of
7 Massachusetts, 41 MLC 205, CAS-14-3424 (April 10, 2015). Here, the unit was certified
8 on June 3, 2020, but the Town Meeting and the Selectboard did not approve the job
9 description for the new Assistant Superintendent position until September 2020, and
10 Town Meeting did not approve incorporating the position into the Town's Compensation
11 Schedule until October 5, 2020. Accordingly, even though the Town challenged the
12 Assistant Superintendent position in the petitioned-for unit during the WMA process, the
13 record indicates that, pursuant to the Town's hiring policies, the position was neither
14 formally created nor approved at that point, and the Town could not hire anyone to fill it.
15 Indeed, the Town acknowledged as much in its WMA challenge, when it described the
16 position as "currently unfilled and unfunded." The first prong of the accretion analysis is
17 therefore inconclusive.

18 Regarding the second prong, the CERB examines the parties' subsequent
19 bargaining history to determine whether the parties considered the disputed title to be
20 included in the unit. City of Boston, 35 MLC at 140. Absent bargaining history to support
21 a finding that the parties addressed and resolved the unit placement of the contested
22 position, the CERB will find that it is unable to determine whether the parties explicitly
23 agreed to exclude the contested position from the bargaining unit. Town of Somerset, 25

1 MLC 98, 100, CAS-3145 (January 6, 1999). Here, there is no evidence that the Union
2 and the Town have reached agreement on the Assistant Superintendent's unit placement.
3 Rather, the Town filled the Assistant Superintendent position in August 2021, and the
4 Union filed this petition four months later. The second prong is therefore inconclusive.

5 Under the third and final step, the CERB examines whether the disputed position
6 shares a community of interest with others in the bargaining unit. City of Boston, 35 MLC
7 at 140. The Town argues that the Assistant Superintendent is a managerial and/or
8 confidential employee who is excluded from the Law's coverage. It also contends that
9 the Assistant Superintendent is a supervisory employee who does not share a community
10 of interest with the other Highway Department employees. We first consider whether the
11 Assistant Superintendent is a managerial employee as defined in Section 1 of M.G.L. c.
12 150E (the Law) and thus excluded from eligibility in a bargaining unit.

13 Section 1 of the Law excludes managerial employees from the definition of
14 employees who are entitled to collective bargaining rights under the Law. Section 1
15 designates employees as managerial only if they: (a) participate to a substantial degree
16 in formulating or determining policy; or (b) assist to a substantial degree in the preparation
17 for or the conduct of collective bargaining on behalf of a public employer; or (c) have a
18 substantial responsibility involving the exercise of independent judgment of an appellate
19 responsibility not initially in effect in the administration of a collective bargaining
20 agreement or in personnel administration. An individual need satisfy only one of the
21 disjunctive requirements to be excluded from the Law's coverage. Methuen School
22 Committee, 47 MLC 271, 275, CAS-18-7037 (May 26, 2021) (citing Brockton School
23 Committee, 11 MLC 1375, 1377, MUP-5050 (January 29, 1985)). Here, the Town

1 contends that the Assistant Superintendent is a managerial employee under the first and
2 third parts of the statutory test.¹⁸ We disagree.

3 To be considered a managerial employee under the first part of the test, an
4 employee must make policy decisions and determine the employer's objectives.
5 Wellesley School Committee, 1 MLC 1389, 1401, MUP-2009, CAS-2005 (April 25, 1975),
6 *aff'd sub nom.*, School Committee of Wellesley v. Labor Relations Commission, 376
7 Mass. 112 (1978). The policy decisions must be of major importance to the mission and
8 objectives of the public employer, Wellesley School Committee, 1 MLC at 1403, and the
9 employee must participate in the policy decision-making process on a regular basis.
10 Town of Plainville, 18 MLC 1001, 1009, MCR-4019 (June 12, 1991). The employee's
11 duties must not merely include having input into the decision-making process. *Id.* This
12 part of the analysis also focuses on whether an employee possesses independent
13 decision-making authority or whether the employee's decisions are screened by another
14 layer of administration. Worcester School Committee, 3 MLC 1653, 1672, MUP-2044
15 (April 29, 1977). Unlike supervisory personnel who "transmit policy directives to lower
16 level staff and, within certain areas of discretion, implement the policies, managerial
17 employees 'make the policy decisions and determine the objectives.'" Town of Holden,
18 25 MLC 175, 177, MCR-4655 (May 18, 1999) (quoting Town of Bolton, 25 MLC 62, 66,
19 MCR-4562 (September 10, 1998) (additional quotations omitted)).

¹⁸ As discussed in the next section regarding confidential status, the Town contends that the Assistant Superintendent will be expected to settle grievances and directly assist and collaborate in collective bargaining strategy. The Town does not contend. And there is no evidence that, under the second part of the managerial analysis, the Assistant Superintendent "assist[s] to a substantial degree in the preparation for or the conduct of collective bargaining" on the Town's behalf.

1 Referencing the job description, the Town argues that the Assistant
2 Superintendent is a policy making position because it actively participates in the planning
3 and execution of a myriad of public works projects, fills in for the Superintendent and the
4 duties involve a “variety of managerial functions including planning, organizing,
5 coordinating, evaluating, integrating activities and training where duties generally follow
6 standardized practices, procedures, regulations or guidelines.” The Town also relies on
7 that portion of the job description stating that the position “[e]xercises significant
8 responsibility and accountability in the effective recommendation of plans and
9 procedures, effective deployment of personnel in varied situations.” However, the
10 Assistant Superintendent’s job description also states that the position works “[u]nder the
11 general supervision of the Superintendent and in situations, where the employee may
12 “recognize instances which are out of the ordinary and which do not fall within existing
13 instructions,” the employee is “expected to seek advice and further instructions.” Thus,
14 even assuming that the managerial decisions referenced in the job description are policy
15 decisions that are of “major importance to the mission and objectives of the public
16 employer,” the record does not show that the Assistant Superintendent is a managerial
17 employee because he does not have independent decision-making authority or
18 participate to a substantial degree in formulating policy. Rather, the job description
19 reflects that anything other than routine decisions must be screened through another layer
20 of administration. This alone demonstrates that the Assistant Superintendent does not
21 meet the statutory criteria. See Town of Dartmouth, 29 MLC 204, MCR-02-4985 (May 7,
22 2003) (finding that DPW Assistant Superintendent was not a managerial employee
23 because he did not participate to a substantial degree in formulating policy or exercise

1 the level of responsibility and independent judgment that the superintendent did on a daily
2 basis).

3 The fact that the Assistant Superintendent may temporarily assume the
4 Superintendent's duties while the Superintendent is on vacation or leave does not compel
5 a different conclusion. In order to substantially exercise independent judgment, "an
6 employee must do more than temporarily fill in for a superintendent or other manager."
7 Town of Hudson, 40 MLC 42, 47, WMAM-12-2446 (August 7, 2013); Town of Plymouth,
8 1 MLC 1482, MCR-2142 (June 27, 1975). In this case, although the Assistant
9 Superintendent filled in for eight weeks while the Superintendent was on leave, there is
10 no evidence that such lengthy leaves occurred on a routine basis. We therefore decline
11 to forever deprive this title of collective bargaining rights based on this one instance.
12 Furthermore, although, as discussed below, the Assistant Superintendent exercises
13 supervisory authority over other Highway Department employees, supervisory authority
14 alone does not make an employee managerial. Worcester School Committee, 3 MLC at
15 1672.

16 Confidential Status

17 Section 1 of Chapter 150E designates employees as confidential "only if they
18 directly assist and act in a confidential capacity to a person or persons otherwise excluded
19 from coverage under this chapter." The CERB has construed this statutory language to
20 exclude those persons who have a direct and substantial relationship with an excluded
21 employee that creates a legitimate expectation of confidentiality in their routine and
22 recurrent dealings. Framingham Public Schools, 17 MLC 1233, 1236, CAS-2838
23 (September 4, 1990). Employees who have "significant access or exposure to

1 confidential information concerning labor relations matters, management's position on
2 personnel matters, or advance knowledge of the employer's collective bargaining
3 proposals are excluded as confidential." City of Everett, 27 MLC 147, 150, MCR-4824
4 (May 23, 2001). The CERB has construed exceptions to the definition of employee
5 narrowly to preclude as few employees as possible from collective bargaining while not
6 unduly hampering an employer's ability to manage the operation of the enterprise.
7 Framingham Public Schools, 17 MLC at 1236.

8 The Town contends that the Assistant Superintendent is a confidential employee
9 for several reasons. It first argues that it will expect the Superintendent to settle
10 grievances and to directly assist and collaborate in collective bargaining strategy.
11 However, these duties are not reflected on the Assistant Superintendent's job description,
12 which was finalized after the DLR certified the Highway Department unit.¹⁹ Accordingly,
13 in the absence of evidence that the Assistant Superintendent has actually performed
14 these duties, the mere potential for the Assistant Superintendent to do so does not render
15 him a confidential employee. See Town of Chelmsford, 27 MLC 41, 43, CAS-3394
16 (November 6, 2000) (CERB decides appropriate unit placement based on actual, not
17 potential job duties).

18 The Town next contends that the Assistant Superintendent will have access to
19 sensitive information. It relies on the "Confidential" section of the job description, which
20 states, "in connection with certain disciplinary matters, he/she may review confidential
21 information with the Superintendent; said information shall remain confidential and not be

¹⁹ As noted above, even though the position was unfilled at the time of the investigation, the Union agreed to go forward based on the information available at the time of the investigation, including job descriptions.

1 disclosed except as required by disciplinary proceedings or law.” This argument,
2 however, overlooks the first sentence of the Confidentiality section, which states, “On a
3 *regular* basis the employee does not have access to confidential information in
4 accordance with the State Public Records Law.” (Emphasis added).

5 As stated above, to be a confidential employee, employees must have a
6 “continuing and substantial relationship with a managerial employee of such a nature that
7 there is a legitimate expectation of confidential in their routine and recurrent dealings.”
8 Framingham Public Schools, 17 MLC at 1236. Moreover, employees may directly assist
9 excluded employees without assisting them in a confidential capacity. Nauset Regional
10 School District Committee, 6 MLC 1293, 1294, MCR-2702(July 13, 1979). Here, the
11 Assistant Superintendent’s primary responsibilities appear to be supervision of the
12 Highway Department employees, including making sure that their work is performed
13 properly. The record before us is devoid of evidence that the interactions between the
14 Assistant Superintendent and the Superintendent relative to the Assistant
15 Superintendent’s supervisory duties involve the routine and recurrent or significant
16 exchange of confidential information. See Commonwealth of Massachusetts, 6 MLC
17 2110, CAS-2102, CAS-2354 (May 2, 1980) (declining to exclude Assistant Bureau Chiefs
18 as confidential employees where record was devoid of any evidence that their interaction
19 with the Bureau Chiefs involved a significant exchange of confidential information). For
20 this reason, we find that the Assistant Superintendent is not a confidential employee
21 within the meaning of the Law.

22 Supervisory Status

1 The CERB generally establishes separate bargaining units for supervisory and
2 non-supervisory employees because of the inherent conflict between such employees.
3 City of Pittsfield, 15 MLC 1723, MCR-2842 (May 17,1989). This policy is rooted in the
4 belief that individuals who possess significant supervisory authority owe their allegiance
5 to their employer, particularly in the areas of employee discipline and productivity. Town
6 of Bolton, 25 MLC at 67, (citing City of Westfield, 7 MLC 1245, 1250, MCR-2912 (August
7 28, 1980)). Therefore, rather than place supervisors in the untenable position of
8 disciplining employees on whom they rely to secure improved terms and conditions of
9 employment through the collective bargaining process, the CERB places supervisors in
10 separate bargaining units. Id.

11 In determining whether employees are supervisors who should be placed in a
12 separate unit, the CERB examines both supervisory authority and the total relationship
13 among employees. University of Massachusetts, 3 MLC 1179, SCR-2079 (October 15,
14 1976). Supervisors are employees with independent authority or effective
15 recommendatory powers in major personnel decisions such as hiring, transfer,
16 suspension, promotion and discharge. They also have authority to direct employees and
17 resolve grievances. Id.

18 Tested against these principles, we find that the Assistant Superintendent is a
19 supervisory employee. Unlike the Foreman/HEO, the Assistant Superintendent is
20 “responsible for assisting the Superintendent with disciplinary action, including
21 recommendations relative thereto.” When this authority is coupled with his ability to
22 directly oversee the work of all Highway employees, we decline to place the Assistant
23 Superintendent in the same unit as the employees he supervises. See City of Westfield,

1 7 MLC at 1252 (holding that deputy fire chiefs are supervisors due to the independent
2 judgment they exercise in assigning and directing the work of unit members, initiating
3 discipline, and filling in for the fire chief as the administrator of the fire department).

4 We recognize that there are some exceptions to the general rule of not placing
5 supervisors in the same unit as the employees they supervise, including where there is
6 only one person in the title and there is no other bargaining unit into which the supervisor
7 can be placed. See, e.g., Town of Hudson, 40 MLC at 48. Here, although the Town may
8 not currently have a supervisory or department head unit, the Employee Chart reveals
9 that the Town has other non-union positions whose incumbents could potentially form
10 such a unit, provided that they are eligible to do so.²⁰ Thus, excluding the Assistant
11 Supervisor from the Highway Department unit will not prompt the creation of a one-person
12 unit or prevent the incumbent in the position from exercising bargaining rights in the future.
13 See, e.g., Town of Pepperell, 33 MLC 72, 75, CAS-05-3616 (October 18, 2006) (citing
14 Woburn Housing Authority, 27 MLC 109, 111, MCR-4765 (January 12, 2002); Town of
15 Somerset, 25 MLC 98, 100, CAS-3145 (January 6, 1999).

16 Conclusion

17 For the foregoing reasons, we conclude that the Assistant Superintendent is not a
18 managerial or a confidential employee within the meaning of Section 1 of the Law. We

²⁰ We do not comment here on what the composition or contours of such a unit would be.

- 1 nevertheless find that he is a supervisory employee and thus decline to place him in the
- 2 same unit with employees he supervises.

SO ORDERED.

COMMONWEALTH EMPLOYMENT RELATIONS BOARD

Marjorie F Wittner

MARJORIE F. WITTNER, CHAIR

Kelly Strong

KELLY STRONG, CERB MEMBER