

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

In the Matter of: *

TOWN OF ERVING *

and *

NEW ENGLAND POLICE BENEVOLENT ASSOCIATION *

Case Number: MCR-20-7978

Date Issued: September 15, 2020

CERB Members Participating:

Marjorie F. Wittner, Chair
Joan Ackerstein, CERB Member
Kelly Strong, CERB Member

Appearances:

Corey Higgins, Esq. -Representing Town of Erving

Thomas Horgan, Esq. -Representing New England Police Benevolent Association

AMENDED DECISION AND DIRECTION OF ELECTION

SUMMARY AND STATEMENT OF THE CASE

1 The issue in this case is whether the position of sergeant in the Town of Erving
2 (Town) Police Department should be excluded from the petitioned-for bargaining unit
3 because he is managerial within the meaning of Section 1 of M.G.L. c 150E (the Law),
4 because he is a supervisor, or because his inclusion would present a conflict of interest.

5 The Commonwealth Employment Relations Board (CERB) concludes that the
6 position of sergeant should be included in the petitioned-for bargaining unit.

1 On April 20, 2020, the New England Police Benevolent Association (Union) filed a
2 petition (Petition) with the Department of Labor Relations (DLR) seeking to represent a
3 unit of employees employed by the Town's Police Department.

4 On May 6, 2020, the DLR issued a Notice of Hearing for a June 3, 2020 hearing.
5 After the reassignment of the hearing officer, on June 3, 2020, the DLR issued a second
6 Notice of Hearing rescheduling the hearing on July 1, 2020.

7 On July 1, 2020, a DLR Hearing Officer conducted an evidentiary hearing during
8 which the parties were afforded a full opportunity to be heard, to examine and cross-
9 examine witnesses, and to present evidence.¹ The Town and the Union filed written briefs
10 on July 28, 2020. Based on the record of the hearing and the parties' briefs, the CERB
11 decides this matter in the first instance.

12 STIPULATIONS OF FACT

13 The parties agreed to the following eight stipulations of fact:

- 14
15 1. The Respondent, the Town of Erving (Town or Employer) is a public employer within
16 the meaning of Section 1 of M.G.L. c. 150E (hereinafter, "the Law").
17
18 2. The New England Police Benevolent Association (Union) is an employee organization
19 within the meaning of Section 1 of the Law.
20
21 3. By letter dated April 6, 2020, the Union filed a Representation Petition with the
22 Department of Labor Relations (DLR) seeking certification as the exclusive bargaining
23 representative of a bargaining unit comprised of all full-time and regularly scheduled part-
24 time patrol officers and the sergeant employed by the Town of Erving Police Department.
25
26 4. The Town has raised an objection to the inclusion of the sergeant position in the
27 petitioned-for unit on the grounds that the sergeant position is a managerial employee
28 under the Law, a supervisory employee within the meaning of the Law, and including the
29 sergeant position in the petitioned-for bargaining unit would create a conflict of interest
30 under M.G.L. c. 268A, §§ 6A, 20, 23(b)(3), and 23(c)(2). As well, supervisors and
31 managers, including superior officers, owe a common law duty of loyalty to their employer.

¹ The assigned Hearing Officer conducted the hearing remotely pursuant to Governor Baker's teleworking directive to executive branch employees.

1 5. The Town of Erving Police Department is a semi-military, law enforcement organization
2 that consists of a Chief of Police, who is the head of the Police Department and a
3 managerial employee, one (1) full-time sergeant, and four (4) full-time patrol officers.
4

5 6. There are currently no regularly scheduled part-time patrol officers employed by the
6 Town of Erving Police Department.
7

8 7. The Chief of Police of the Erving Police Department is a managerial employee under
9 the Law.
10

11 8. The Chief and the Sergeant each work four (4) ten- (10-) hour days per week. The
12 Sergeant's work schedule has historically been working the day shift on Tuesday from
13 6:00 a.m. to 4:00 p.m. Since or about April 13, 2020 to the present Sergeant Robert Holst
14 has worked the 3:00 p.m. to 1:00 a.m. shift, Tuesday, Wednesday, and Thursday, and
15 then on Fridays from 6:00 a.m. to 4:00 p.m. Beginning on or about July 13, 2020 Sergeant
16 Holst's work schedule will be Fridays and Saturdays from 6:00 a.m. to 4:00 p.m. and then
17 Sundays and Mondays from 3:00 p.m. to 1:00 a.m.
18

19 FINDINGS OF FACT

20 Background

21 The Town's Police Department includes four patrol officers, one sergeant, and the
22 Chief of Police. The Chief of Police reports to the Board of Selectmen. Christopher Blair
23 (the Chief or Chief Blair) has been employed at the Town's Police Department for twenty-
24 four years. He started as a patrol officer, was promoted to sergeant in 1999 and was
25 named the acting interim chief in February 2004. On July 1, 2004, Chief Blair was
26 promoted to the police chief position. Since then, there have been four different officers
27 occupying the one sergeant position in the Town's Police Department. As of the hearing,
28 Robert Holst (Sergeant Holst) filled the sergeant position. Holst has worked within the
29 Town's Police Department since 2011, becoming a sergeant in July 2014.

30 Chief Blair's usual shift is Monday through Thursday, 6:00 a.m. to 4:00 p.m.
31 Historically, Sergeant Holst has worked Tuesday through Friday from 6:00 a.m. to 4:00
32 p.m. During the three weekly shifts that Chief Blair and Sergeant Holst worked together,
33 they were the only officers on duty. Commencing on April 13, 2020, Sergeant Holst's

1 work schedule changed to Tuesday through Thursday from 3:00 p.m.to 1:00 a.m. and
2 Fridays from 6:00 a.m. to 4:00 p.m.²

3 The Sergeant's Duties

4 Job Description

5 The parties jointly submitted a copy of a June 9, 2011 police sergeant job
6 description. The job description states generally that the police sergeant "performs
7 routine and specialized police law enforcement and supervisor work including field
8 operations, work schedules and support services to protect lives and property..." Under
9 the heading "Supervision Required," the job description states that the title reports to the
10 Chief of Police and that, under the general direction of the Chief, the sergeant

11 plans and carries out regular work assignments in accordance with standard
12 law enforcement practices and previous training, with substantial
13 responsibility for determining the sequence and timing of actions and
14 substantial independence in planning and organizing work activities
15 including determining the work methods.

16 The sergeant's job description specifies additional supervisory responsibilities as
17 follows:

18
19 Supervisory Responsibility: Employee, as a regular and continuing part of
20 the job, is accountable for the quality and quantity of work done by direct
21 subordinates and assures the accomplishment of the assigned work in the
22 prescribed manner. Supervisory functions typically consist of most of the
23 following: plans, schedules and coordinates work operations to meet
24 schedules, deadlines and priorities; revises work schedules to meet
25 changes in workload or availability of manpower; recommends and justifies
26 to higher levels of management changes in the organization of work, work
27 methods or assignment of functions to positions that may affect staffing
28 patterns, costs, work standards, etc.
29

² The parties stipulated that shortly after the hearing, beginning on or about July 13, 2020, Sergeant Holst's hours were scheduled to be changed again, to Fridays and Saturdays from 6:00 a.m. to 4:00 p.m. and Sundays and Mondays from 3:00 p.m. to 1:00 a.m.

1 The employee is responsible for the supervision of ten (10) staff members.³
2 Work operations are subject to frequent, abrupt, and unexpected changes
3 in deadlines, volume of work and sudden emergencies due to uncontrollable
4 or unpredictable circumstances. Substantial numbers of employees are
5 dispersed to many widely separate locations on a continuing basis.
6

7 Under "Essential Functions, the Job Description further provides the following:
8

- 9 1. Supervises staff including work assignments, reviews work activities
10 providing ongoing training and performance feedback; advises Officers
11 regarding unusual situations and/or questionable matters.
12
- 13 2. Investigates and processes crime scenes; detects, collects and
14 transports evidence and property to the Department; gathers
15 intelligence; conducts surveillance; interviews victims, witnesses and
16 suspects; writes affidavits, serves arrest warrants; makes arrests and
17 transports and processes suspects or prisoners.
18
- 19 3. Reviews, corrects and approves police reports, activity logs, citations,
20 and case assignment investigations; maintains a detailed database and
21 filing system.
22
- 23 4. Prepares for presentations in court proceedings; confers with court
24 prosecutors and testifies in court as required.
25
- 26 5. Manages relationships with outside law enforcement agencies and other
27 Town departments.
28
- 29 6. Participates in on-going training and instruction programs in order to
30 maintain required certifications and knowledge of current law
31 enforcement practices as well as related laws.
32
- 33 7. Serves as the Department's Breath Testing Officer.
34
- 35 8. Maintains assigned police cruisers and department equipment to ensure
36 safe and efficient operation.
37

38 In addition, the job description defines the patrol duties of the sergeant, as follows:
39

- 40 1. Monitors dispatch call loads and directs staff resources on a priority basis.
41
- 42 2. Patrols assigned areas of the community in uniform, on foot, or in a
43 marked police cruiser; conducts security checks of buildings, public
44 areas, residential and commercial neighborhoods; responds to

³ The parties agree that there are only four, not ten, patrol officers.

1 emergency calls and requests for assistance; enforces criminal and
2 motor vehicle laws and related codes; directs pedestrian and vehicular
3 traffic as necessary.
4

5 Around March 2019, all employees were asked to review their job descriptions. In
6 his response, Sergeant Holst indicated that he supervises all the officers below the rank
7 of sergeant. He also wrote that he does not hire but is part of the hiring process. Lastly,
8 he wrote "I don[']t do formal evaluations, but I do review and evaluate officers performance
9 and report to Chief." No changes were made to the job description as a result of Sergeant
10 Holst's comments.

11 Actual Duties

12 Sergeant Holst performs active patrol duties, as do the four patrol officers and
13 Chief Blair. Although officers often work alone on their shifts, Sergeant Holst oversees
14 their work and ensures that the officers are following Massachusetts General Laws and
15 the Police Department's policies and procedures. He reviews all arrest reports and
16 citations. Sergeant Holst also reviews all use of force reports to determine whether the
17 officer's actions complied with the policies and procedures. Both Sergeant Holst and
18 Chief Blair must sign off on the use of force forms, to concur with the officer's use of force.
19 If necessary, Sergeant Holst provides guidance and training to officers.

20 Sergeant Holst prepares the monthly scheduling of officers, assigning officers to
21 shifts by seniority. Pursuant to Chief Blair's request, the schedule is submitted by the 15th
22 of the previous month. Sergeant Holst shows the Chief the schedule and points out where
23 there are open shifts. The Chief determines whether the budget allows for overtime. If
24 not, they discuss other ways to fill the shift. If overtime is approved, Sergeant Holst asks
25 the officers who is interested. Once officers express an interest, Sergeant Holst fills the

1 overtime shift with the officer with the lowest number of overtime hours. The same formula
2 is used for scheduling details. Sergeant Holst has the authority to hold an officer on duty,
3 on overtime, without seeking approval from Chief Blair.

4 Patrol officers contact either Sergeant Holst or Chief Blair in emergency situations.
5 In three recent incidents, the arrest of an off-duty officer, an officer-involved shooting, and
6 an accident involving a cruiser, the Chief was alerted to these emergency situations by
7 people outside of the Town rather than the officer involved in the incident. Chief Blair
8 then informed Sergeant Holst.

9 Granting Time Off

10 Although Chief Blair and Sergeant Holst disagree, somewhat, on the procedures
11 for granting officers time off, they both play a role in the approval of requested time off.
12 Sergeant Holst ensures that there are no staffing issues associated with the granting of
13 the time-off while Chief Blair ensures that the officer seeking time-off has sufficient
14 vacation time available. Chief Blair makes the ultimate decision regarding whether to
15 approve any time-off request and can overturn Sergeant Holst's approval.

16 Discipline

17 Sergeant Holst has authority to issue verbal warnings to patrol officers. He has
18 only issued one written reprimand since being promoted to the rank of sergeant in 2014.
19 In January or February 2020, an officer did not respond to a specific call. After Sergeant
20 Holst discussed this matter with the officer, he consulted with Chief Blair. Sergeant Holst
21 maintains that he informed Chief Blair that he believed this issue warranted a written
22 reprimand and that Chief Blair agreed. Chief Blair maintains that he merely told Sergeant
23 Holst that if he felt strongly enough about this issue, he should put the discipline in writing.

1 Although Chief Blair asserts that the sergeant has authority to issue reprimands
2 independently, the Town's disciplinary procedures set forth in Policy and Procedure No.
3 4.13, which issued July 1, 2014, provides that sergeants "have the authority to orally
4 reprimand, issue letters of counsel, and recommend a formal written reprimand or more
5 serious punitive disciplinary action, as appropriate." Given this policy, which provides that
6 the sergeants only have authority to recommend, not issue, formal written reprimands
7 and the fact that Sergeant Holst has only issued one written reprimand during his tenure,
8 and that was only issued after he consulted with Chief Blair, the facts do not support a
9 finding that Sergeant Holst has any *independent* authority to issue written reprimands or
10 take any other punitive disciplinary actions beyond issuing verbal warnings.

11 There was one occasion when a previous sergeant, in the absence of the Chief,
12 recommended to the Board of Selectmen that an officer be disciplined. In 2005, Chief
13 Blair was out on medical leave for four months. The then-sergeant, acting as the officer
14 in charge, recommended to the Board of Selectmen that a disciplinary hearing for the
15 officer take place. The officer resigned prior to further action being taken.

16 Performance Reviews/Evaluations

17 Sergeant Holst does not formally evaluate any officers. In fact, the Police
18 Department has not formally evaluated the officers for the past several years. Sergeant
19 Holst does provide ongoing feedback to the officers regarding their work on a more
20 informal basis.

21 Hiring

22 Sergeant Holst has been involved in the hiring process of all new patrol officers
23 since he became the sergeant. For the last few years, the Town has utilized a review

1 board comprised of five individuals appointed by the Select Board to interview qualified
2 applicants for hire in the Police Department. The review board is generally comprised
3 of one member of the Board of Selectmen, the sergeant, the Chief, and two citizens.

4 Sergeant Holst and the Chief together determine whether each candidate meets
5 the necessary qualifications to be interviewed. The five members of the hiring review
6 board then write prospective questions. Sergeant Holst sends his proposed interview
7 questions to Chief Blair. Chief Blair and the others on the hiring review board send their
8 questions to the Town Administrator who prepares the finalized list of questions. Not all
9 proposed questions make the final list. All five participate in the interview of the
10 applicants, asking some of the preselected questions. All five grade/rank the candidates
11 and vote on who should be offered employment. Chief Blair votes if the other four are
12 tied.

13 The most recent hiring review board that Sergeant Holst participated in was
14 convened to fill two vacancies. All the participants agreed on the top applicant who was
15 selected for the first opening. They disagreed regarding who should fill the second
16 opening. Sergeant Holst and two other members agreed on a particular candidate to fill
17 the second opening, while the Chief favored a different candidate to fill the second slot.
18 The candidate who had been supported by Sergeant Holst and two other members of the
19 hiring review board was offered the second slot, however that applicant did not ultimately
20 make it through the academy. Therefore, another applicant was hired. This applicant had
21 been Chief Blair's, but not Sergeant Holst's, first choice

22 In addition to Sergeant Holst's role in the hiring process, the Chief and Sergeant
23 Holst have conversations about probationary employees and their performance. Chief

1 Blair indicates that he gives weight to Sergeant Holst's thoughts about whether a
2 probationary employee should be made a permanent employee in the Police Department.
3 Chief Blair also speaks with patrol officers regarding probationary employees but notes
4 that he gives more weight to the sergeant's input.

5 Budget

6 The Chief puts the budget together and presents his recommendation to the Select
7 Board. Chief Blair does ask Sergeant Holst for input about whether there is anything
8 specific that the Chief should include in the budget.

9 Chief Blair and Sergeant Holst disagree about the process used when Sergeant
10 Holst's cruiser was recently replaced. Chief Blair recalls that Sergeant Holst got quotes
11 and provided the requested budgetary amount that he needed for his cruiser and the
12 Chief then advocated for that money with the Select Board. Sergeant Holst recalls that
13 he was given a specific budget which he then used to build the package for his new
14 cruiser. However, there is no dispute that Sergeant Holst does not have any independent
15 responsibility with respect to the Police Department Budget, regarding his cruiser or any
16 other budgetary item.

17 Administrative Duties

18 Sergeant Holst performed certain administrative duties until the early Spring of
19 2020. These administrative duties included sending reports to the Registry of Motor
20 Vehicles, maintaining the sex offender registry, issuing licenses to carry firearm permits,
21 and preparing certain documents that must be filed in court. However, earlier this year,
22 Chief Blair removed the administrative duties from Sergeant Holst, so Sergeant Holst now

1 only performs these administrative duties when serving as officer in charge in Chief Blair's
2 absence.⁴

3 All Police Department payroll and personnel documents, including formal
4 evaluations and disciplinary records, are stored in the Board of Selectmen's office and in
5 Chief Blair's office. If Sergeant Holst has need to access a personnel document, he asks
6 for Chief Blair's permission to retrieve the necessary document from the Chief's files.

7 Officer in Charge Responsibilities

8 The sergeant serves as the officer in charge when Chief Blair is out of the office
9 on leave. Until recently, Chief Blair has taken four weeks of vacation a year.
10 Commencing in 2020, Chief Blair is entitled to five weeks of vacation. In the past few
11 years, the Chief has taken most of his vacation time, three to four weeks, during
12 November and December. Additionally, in 2005, early in Chief Blair's tenure, he was out
13 on medical leave for about four months. The then-sergeant acted as officer in charge
14 during those four months.

15 In the Chief's absence, Sergeant Holst performs all of Chief Blair's usual duties.
16 He keeps track of the budget, processes the payroll, and handles billing for details.
17 Among other things, he also prepares court-related documents, maintains the sex
18 offender registry, issues license to carry firearms permits, ensures the criminal justice

⁴ Sergeant Holst was issued a written reprimand for not communicating with the patrol officers he supervises or with the Chief, and for not performing his supervisory responsibilities, such as reviewing officers' reports, and providing ongoing training and performance feedback. When Chief Blair discussed these matters with Sergeant Holst, Sergeant Holst mentioned that he was performing certain extra administrative duties that were outside of his job description. Chief Blair understood that Sergeant Holst was requesting to be given additional compensation for doing these extra duties and as a result, the Chief decided to take those duties back and perform them himself.

1 information system is operating properly and ensures the body cameras are backed up.
2 Additionally, in the Chief's absence, the sergeant has access to the officer's personnel
3 files which contain information about their wages, benefits and disciplinary records.

4 As the officer in charge, the sergeant has the authority to recommend to the Select
5 Board that an officer receive discipline, although Sergeant Holst has not done so. The
6 sergeant also has authority to formulate policies in an emergency situation for the Board
7 of Selectmen to consider. As described below, however, no sergeant, including Sergeant
8 Holst, has actually formulated any policies, even when acting as the officer in charge.

9 Policy Creation

10 There is no evidence that Sergeant Holst has independently prepared or
11 formulated policies. Chief Blair prepares and modifies the Police Department's policies.
12 At times, after drafting a policy, Chief Blair asks Sergeant Holst to review it. As an
13 example, the Chief requested that Sergeant Holst review the body camera policy before
14 the Chief submitted it to the Board of Selectmen for final approval. Chief Blair indicates
15 he gives the Sergeant Holst's input into these policies a lot of weight because of Sergeant
16 Holst's knowledge of the law and police procedure. Sergeant Holst recalls his role was
17 limited to proof-reading certain proposed policies for misspellings or grammatical errors.
18 Chief Blair has also sought input from patrol officers on certain policies. One patrol officer,
19 who had certain expertise in the area, successfully recommended changes in the wording
20 to a policy regarding field sobriety tests.

21 At one point, Sergeant Holst advocated that the detail rate be increased to \$50 per
22 hour. Chief Blair determined that this was too high, so he went to the Board of Selectmen
23 and advocated for an increase in the detail rate to \$47 per hour.

1 Appellate Process Relating to a Personnel Matter

2 The Town's Personnel Policies and Procedures include a dispute resolution
3 procedure. This procedure encourages employees to resolve any work-related concerns
4 by raising the concern with his or her direct supervisor. The policy provides as follows:

5 Matters appropriate for consideration are applications of employment
6 policies or procedures that are perceived as unfair, including those related
7 to promotion or non-reappointment. Matters excluded from consideration
8 include grievances related to discrimination and sexual harassment or
9 sexual misconduct; such matters place specific obligations on the
10 Appointing Authority or its designee based on federal and state laws.

11
12 The policy explains the process as follows:

- 13 1. Employees will bring any work-related concerns to the attention of their
14 supervisor within five (5) days of the concern arising. If the issue is not
15 resolved through discussion with the employee's supervisor, or not
16 appropriate to raise with the supervisor, it may be brought to the
17 attention of the PRRB (Personnel Relations Review Board) within five
18 (5) days.
- 19 2. If the issue is not resolved to the satisfaction of the employee by utilizing
20 the process in Step 1, the employee shall bring the matter to the
21 attention of the next level within five days of the decision of the
22 supervisor.
- 23 3. If the issue is not resolved to the satisfaction of the employee by the
24 Supervisor or Board, the employee shall have seven days after the
25 decision of the Supervisor or Board, to ask for review by the Board of
26 Selectmen or its designee. The Board of Selectmen's decision will be
27 final.

28 When officers have workplace concerns, they usually bring the matter up to
29 Sergeant Holst informally, either verbally or via text or email, rather than filing a written
30 grievance. For instance, officers may raise concerns when they are held over on shift
31 due to the late arrival of the officer on the next shift or when their cruiser is not left in the
32 proper condition with a full gas tank. A recent wage study also led to a number of
33 concerns amongst the officers. Sergeant Holst attempts to address such concerns. If he
34 is not able to successfully resolve the issue, the officer may advance his or her concerns

1 to Chief Blair. If the matter is still not resolved, the officer can advance the matter to the
2 Board of Selectmen for a final decision.

3 POSITION OF THE PARTIES

4 The Union

5 The Union maintains that Sergeant Holst is not a managerial or supervisory
6 employee under the Law, and that the placement of a sergeant in the proposed unit of
7 patrol officers would not pose a conflict of interest under the state's Conflict of Interest
8 law, M.G.L c. 268A. In support of its position, the Union maintains that Sergeant Holst
9 does not exercise independent discretion when performing his work duties, rather he
10 refers to, and relies upon, the Town's personnel policies and internal Police Department
11 policies and procedures when making work related decisions. The Union contends that
12 the sergeant does not have independent authority to hire or fill overtime vacancies during
13 non-emergency situations, his role in the grievance process is limited to the first step and
14 he does not participate in the formation of any policies or procedures. The sergeant's
15 disciplinary authority allows only for verbal counseling. Any other discipline imposed on
16 patrol officers is imposed by the Chief and must be adopted by the Board of Selectmen.
17 Although Sergeant Holst previously performed some administrative duties, he no longer
18 does so. Lastly, the Union asserts that the Town failed to support its argument that
19 including the sergeant in the proposed unit would somehow violate the terms of M.G.L. c.
20 268A. Accordingly, the Union maintains that the sergeant position should be included in
21 the proposed unit.

22

23

1 The Town

2 The Town argues that the position of sergeant should be excluded from the unit.
 3 The sergeant functions as the second-in-command of the Police Department and is the
 4 acting chief in the absence of the Chief of Police. The Town argues that, in these roles,
 5 the sergeant could have a significant role in the formulation of policy. The Town further
 6 contends that the sergeant exercises independent judgment of an appellate responsibility
 7 and in personnel administration pursuant to the Town's dispute resolution process.
 8 Additionally, he schedules patrol officers, supervises their work and provides ongoing
 9 performance feedback. Along with the Chief, the sergeant approves time off requests
 10 from patrol officers and also has authority to issue and make recommendations
 11 concerning discipline of patrol officers, including verbal and written reprimands. The
 12 sergeant also has input in the hiring process for patrol officers. The Town further argues
 13 that if the sergeant is included in the petitioned-for unit, it would create a conflict of interest
 14 in violation of M.G.L. c. 268A, particularly when the sergeant is in command of the
 15 Department in the Chief's absence.

16 OPINION⁵17 Managerial Status

18 Section 1 of the Law contains the following three-part test to determine whether a
 19 person is a "managerial" employee:

20 Employees shall be designated as managerial employees only if they (a)
 21 participate to a substantial degree in formulating or determining policy, or
 22 (b) assist to a substantial degree in the preparation for or the conduct of
 23 collective bargaining on behalf of a public employer, or (c) have a
 24 substantial responsibility involving the exercise of independent judgment of
 25 an appellate responsibility not initially in effect, in the administration of a
 26 collective bargaining agreement or in personnel administration.

⁵ The CERB's jurisdiction is not contested.

1 An employee is excluded from an appropriate bargaining unit as a managerial
2 employee under Section 3 of the Law only if the employee's actual duties and
3 responsibilities satisfy any one of the three criteria set out above. Town of Manchester-
4 by-the-Sea, 24 MLC 76, 81, MCR-4511 (March 6, 1998) (Manchester-by-the-Sea). The
5 CERB traditionally applies all statutory exclusions from collective bargaining narrowly, so
6 as not to deprive employees not otherwise managerial of the right to bargain collectively
7 through representatives of their own choosing. Commonwealth of Massachusetts, 6 MLC
8 1026, 1028, CAS-2291 (May 7, 1979). The exercise of supervisory authority, without
9 more, does not make an individual a manager within the meaning of the Law. Worcester
10 School Committee, 3 MLC 1653, 1672, MUP-2055 (April 29, 1977).

11 We conclude that the sergeant does not perform duties that meet the first prong of
12 the managerial test. The Town argues that the sergeant could have a significant role in
13 the formulation of Police Department policy, especially when acting as the officer in
14 charge in the absence of the Chief. However, as noted above, our decision must be
15 based on the sergeant's actual duties and there is no evidence that Sergeant Holst or any
16 of the previous sergeants ever formulated any policies, when serving in their role as
17 sergeant or while serving as the officer in charge in the absence of the Chief. The Chief
18 prepares the policies and has the sergeant review them to proof-read them and to provide
19 feedback. Limited participation in the decision-making process or attending and
20 participating in policy-making discussions is insufficient to render an employee
21 managerial, if the person's input is merely informational or advisory in
22 nature. Manchester-by-the-Sea (citing Wellesley School Committee, 1 MLC 1299, 1403,
23 MUP-2013 (February 27, 1975) (Wellesley School)). Here, the sergeant's role in policy

1 formulation is consultative at best and does not constitute participation to a substantial
2 degree in formulating or determining policy.⁶

3 To be considered a managerial employee under the second prong, a person must
4 participate to a substantial degree in preparing for or conducting collective bargaining.
5 Wellesley School, at 1407. The Town does not argue, and there is no evidence to
6 suggest, that the sergeant assists in the preparation for, or conduct of, any collective
7 bargaining. Accordingly, we also conclude that the sergeant does not perform duties that
8 meet the second prong of the managerial test.

9 Our focus, therefore, is on whether the sergeant's duties meet the third criterion of
10 the test, i.e., whether the sergeant has substantial responsibility involving the exercise of
11 independent judgment of an appellate responsibility not initially in effect, in the
12 administration of a collective bargaining agreement or in personnel administration. We
13 find that the sergeant does not.

14 When considering the third statutory test of a managerial employee, the CERB has
15 determined that the words "independent judgment" require that an employee exercise
16 discretion without consultation or approval. The fact that an employee may recommend
17 an action, and that recommendation is accepted by a higher authority, is insufficient to
18 determine that the employee is a managerial employee. Manchester-by-the-Sea at 81
19 (1998) (citing Wellesley School at 1408). To be "substantial," the responsibility must not
20 be perfunctory or routine; it must have some impact and significance. Id. Finally, the
21 appellate authority must be exercised beyond the first step in a grievance-arbitration

⁶ The evidence also revealed that the Chief sought the input from a patrol officer on a policy, but the Town makes no argument that the patrol officer, who successfully recommended certain policy language, should be excluded from the unit.

1 procedure. Id. The exercise of supervisory authority to comply with the provisions of a
2 collective bargaining agreement is insufficient, standing alone, to satisfy this third
3 criterion. Id. (citing Town of Agawam, 13 MLC 1364, 1369, MCR-3511 (December 24,
4 1986).

5 The Town does not specifically suggest that the sergeant's involvement in
6 scheduling, hiring or disciplining patrol officers is evidence that the sergeant is a
7 managerial employee. We, too, do not believe any of the duties the sergeant performs in
8 these areas demonstrate the high level of discretion and independent authority
9 associated with managerial status. While there is no dispute that the sergeant plays a
10 substantial role in scheduling the patrol officers, these duties, while important, are more
11 administrative or clerical than managerial in nature and do not denote the type of
12 significant judgment necessary to meet the third criterion. The sergeant may access
13 certain personnel records, with the Chief's agreement, however, such access has never
14 formed the basis of a determination that an employee is managerial.⁷ Although Sergeant
15 Holst exercises some independent judgment in issuing verbal warnings, he is guided by
16 the Police Department's policies and procedures. Sergeant Holst has only issued one
17 written reprimand during his tenure, and that was only issued after consultation with the
18 Chief. As to his involvement in the hiring process, the "authority to select an applicant to
19 fill a vacancy is not 'independent judgment of an appellate responsibility' when the

⁷Nor does it warrant the sergeant's exclusion as confidential because mere access to sensitive financial data, personnel records or similar non-labor relations material does not make an individual a confidential employee. Town of Wareham, 36 MLC 76, 79, WMAM-18-1017 (October 28, 2009).

1 authority to determine whether or not to fill the vacancy resides within higher authority.”
2 City of Quincy, 13 MLC 1436, 1441, MUP-5786 (February 3, 1987). Here, there is no
3 evidence that the sergeant played any role in determining the need to hire additional
4 personnel. Nor does Sergeant Holst possess independent authority to make hiring
5 decisions. He is one of five members of a hiring review board who conduct interviews
6 and votes on which candidate should be offered a position. He alone cannot select any
7 candidate to fill a vacancy.

8 The Town’s argument that the sergeant is a manager centers mostly on the
9 sergeant’s role pursuant to the dispute resolution procedure set forth in the Town’s
10 Personnel Policies and Procedures, and the sergeant’s role as officer in charge when the
11 Chief is on leave.

12 Pursuant to the dispute resolution procedure set forth in the Town’s Personnel
13 Policies and Procedures, patrol officers are encouraged to raise work-related concerns
14 to the sergeant in an attempt to resolve the issues. Given this responsibility, the Town
15 asserts that the sergeant has responsibility of an appellate nature under Step 1 of the
16 Town’s dispute resolution process and is thus a manager. The Town ignores the fact,
17 though, that the appellate authority must be exercised beyond the first level of a
18 grievance process in order for exclusion as a managerial employee to be appropriate.
19 Manchester-by-the-Sea, at 81. Here, the sergeant’s role is limited to the first level of
20 the process. If the sergeant is unable to resolve the issue at the first step, the
21 employee can move the issue to the Chief, and ultimately the Board of Selectmen, if
22 necessary.

1 We find that the sergeant is not a managerial employee. The fact that the sergeant
2 temporarily assumes the Chief's duties when the Chief is on vacation or is out on medical
3 leave does not compel a different conclusion. In order to "substantially" exercise
4 independent judgment an employee must do more than temporarily fill-in for a
5 superintendent or other manager. Town of Hudson, 40 MLC 42,47, WMAM-12-2446
6 (August 7, 2013) (Hudson). Although we indicated in Hudson, that "there may be a point
7 at which the frequency or length of time with which an employee fills in for a manager
8 could result in excluding that person from the unit as managerial, at least on a temporary
9 basis," that point has not been reached here. Id. The Chief takes up to five weeks of
10 vacation a year. During that time, the sergeant acts as the officer in charge. Serving in
11 that role for the five weeks that the Chief is absent a year does not constitute "substantial"
12 authority or responsibility under any of the managerial test's three prongs. We therefore
13 conclude that the sergeant is not a managerial employee within the meaning of Section
14 1 of the Law.

15 Supervisory Status

16 The Town's argument that the sergeant should be excluded from the unit because
17 of his supervisory status also lacks merit.

18 The CERB generally establishes separate bargaining units for supervisory
19 employees and the employees that they supervise. City of Chicopee, 1 MLC 1195, 1196,
20 MCR-1228 (November 18, 1974); Town of Easton, 31 MLC 132, 146, MCR-03-5064
21 (March 10, 2005). This well-established policy is rooted in the belief that individuals who
22 possess significant supervisory authority owe their allegiance to their employer,
23 particularly in areas of discipline and productivity. City of Westfield, 7 MLC 1245, 1250,
24 MCR-2912 (August 28, 1980).

1 To determine whether an employee is a supervisor, the CERB distinguishes
2 between a true supervisor and an employee who possesses more limited supervisory
3 authority. In determining whether an employee is a true supervisor, and thus should be
4 excluded from a unit including subordinate employees, the CERB considers factors such
5 as whether the employee has the independent authority to:

- 6 • assign and to direct the work of employees, see Worcester School
7 Committee, 22 MLC 1762, 1766, MCR-4429 (May 28, 1996); City of
8 Westfield, 7 MLC 1245, 1252; MCR-2912 (August 28, 1980);
9
- 10 • initiate and to recommend discipline, Id.;
- 11
- 12 • adjust grievances, Id.; and
- 13
- 14 • the independent authority to make, or the power to recommend effectively,
15 personnel decisions about whether to hire, to transfer, to suspend, to
16 promote or to discharge employees. Greater New Bedford Regional
17 Vocational School Committee, 15 MLC 1040, 1045, MCR-3769 (July 13,
18 1980).

19 We conclude that although the sergeant exercises some supervisory authority over
20 the patrol officers, the sergeant does not exercise sufficient supervisory authority to
21 warrant his exclusion from the petitioned-for unit. Pursuant to Chief Blair's preference,
22 Sergeant Holst prepares a work schedule for the Police Department on a monthly basis.
23 He fills shifts by seniority and confers with Chief Blair to determine how to fill any
24 remaining open shifts. Sergeant Holst consults with the Chief regarding whether overtime
25 is authorized, except in those cases when it is necessary to hold over an on-duty officer.
26 Sergeant Holst works in conjunction with the Chief to approve time off. Although the
27 sergeant has some input into this matter, the Chief has ultimately authority to grant time
28 off. In an emergency situation, the patrol officers can contact either the sergeant or the
29 Chief.

1 The sergeant also reviews the patrol officers' work to ensure that they are following
2 the Police Department's established policies and procedures. Although the sergeant
3 signs off on any officer's use of force, he does not do so in isolation; The Chief also must
4 sign off on the officer's use of force. The sergeant does not formally evaluate any officer
5 and there is no evidence that the sergeant's review of the patrol officers' work has any
6 impact over their wages. Compare Town of Seekonk, 30 MLC 121, 125, MCR-03-3053
7 (March 12, 2004) (senior librarians and customer service/inventory supervisory are
8 supervisory employees where they evaluate employees and their evaluations determine
9 whether subordinate employees advance to the next step on salary scale) to City of
10 Springfield, 34 MLC 46, 50, CAS-06-3644 (October 18, 2007) (Evaluations performed by
11 Assistant Assessor I's do not establish supervisory status where evaluations did not
12 directly impact wages).

13 The sergeant can, and has, given oral warnings. However, the sergeant's ability
14 to issue this type of low-level of discipline does not compel a finding that it would be
15 inappropriate for him to be included in a unit with the patrol officers. See Town of Bourne,
16 38 MLC 25, CAS-10-3756 (July 22, 2011) (Although officers had issued verbal and written
17 warnings to subordinates, that was not sufficient to remove the officers from the unit
18 including their subordinates). Sergeant Holst has only issued a written reprimand once,
19 and that was issued only after consultation with the Chief. The Town's disciplinary policy,
20 which grants sergeants the authority to orally reprimand and counsel officers, only grants
21 the sergeants the authority to recommend written reprimands and other disciplinary
22 actions. The ability to issue certain discipline is indicative of supervisory status, but it is
23 not dispositive where the purported managerial employee does not have independent

1 authority to make, or effectively recommend, personnel decisions such as whether to hire,
2 transfer, suspend, evaluate, promote or discharge employees. Town of Boxford, 35 MLC
3 113, MCR-06-5239 (December 23, 2008) (citing Greater New Bedford Regional
4 Vocational School Committee, 15 MLC 1040, 1045, MCR-3769 (July 3, 1988)). The
5 sergeant does not have the requisite authority in any of these areas.

6 Although Sergeant Holst is part of the hiring review board, he does not have
7 independent authority to hire. He is merely one of five who interview and vote on the
8 applicants. Sometimes his desired candidate is offered the position, if at least two others
9 agree with the selection, and sometimes his desired candidate is not offered the position.
10 The Chief does consult with the sergeant regarding the status of probationary employees,
11 but he also consults with the patrol officers and ultimately makes his own determination
12 about whether a probationary should be made a permanent employee.

13 The evidence does not show, and we do not find, that the sergeant has
14 independent authority to make, or effectively recommend, other personnel decisions to
15 transfer, suspend, promote or discharge employees. As to whether the sergeant can
16 adjust grievances, there is no evidence that Sergeant Holst, or any other sergeant, ever
17 heard or adjudicated any grievances. When officers have workplace concerns, they
18 usually bring the matter up to Sergeant Holst informally, either verbally or via text or email,
19 rather than filing a written grievance. Sergeant Holst attempts to address such concerns.
20 If Sergeant Holst is not able to successfully resolve the matter at this first step, the officer
21 may advance his or her concerns to Chief Blair, and if still unresolved, to the Board of
22 Selectmen.

1 For all these reasons, we determine that although the sergeant exercises some
2 supervisory authority over the patrol officers, the sergeant's level of supervisory authority
3 is insufficient to warrant excluding him from the unit.

4 Moreover, even if we had determined that the sergeant was a true supervisor, we
5 would have to consider other factors to determine whether, under the circumstances
6 presented here, the position of sergeant should be excluded from the petitioned-for unit.
7 The Town only has one Sergeant. However, the CERB disfavors one-person units as
8 contrary to its policy of creating broad comprehensive units to better facilitate stable and
9 contain labor relations. Town of Bolton, 25 MLC 62, 68, MCR-4562 (September 10, 1998)
10 (quoting Chatham School Committee, 6 MLC 1042, 1043 (1979)). The CERB had held
11 that its policy rejecting one-person units outweighs its concern about placing an individual
12 with supervisory authority in a unit with the employees they supervise. Town of Berkley
13 35 MLC 266, MCR-09-5361 (May 7, 2009) (Berkley). In Berkley, we determined that even
14 if the sergeant in that case were a supervisory employee, creating a separate one-person
15 supervisory unit for the one sergeant would not safeguard the rights of the sergeant to
16 effective representation when there existed a larger bargaining unit in which the sergeant
17 could be placed. The Town urges us not to rely on Berkley, arguing that the facts are
18 different here because Sergeant Holst is both a managerial and a supervisory employee
19 and he serves as the Acting Chief in the Chief's absence and therefore should not be
20 included in the bargaining unit. However, we have already determined that the sergeant
21 is not a managerial employee. Thus, even if we had concluded that the sergeant was a
22 supervisor, which we did not, given the fact that there is only one sergeant in the Town's

1 Police Department, we would decline to exclude the sergeant from the proposed
2 bargaining unit.

3 Conflict of Interest

4 Lastly, the Town claims that including the position of sergeant in the petitioned-
5 for unit would create a conflict of interest, particularly when the sergeant is in command
6 of the Police Department in the Chief's absence. In this regard, the Town speculates
7 that the sergeant could end up participating in a matter affecting his/her own personal
8 financial interest, which would violate M.G.L. c. 268A, the Commonwealth's Conflict of
9 Interest Law. This argument is totally unsupported. The Town cited no case law arising
10 under Chapter 150E or the conflict of interest law for this proposition. The Town's
11 conjecture that a reasonable person could conclude that the sergeant might be
12 improperly influenced in regard to matters relating to collective bargaining as a result
13 of his membership in the bargaining unit is unpersuasive. We find no conflict that
14 would prevent the sergeant's inclusion in the unit.⁸

15 Conclusion

16 Based on the above, we find that the sergeant is not a managerial employee within
17 the meaning of the Law, the sergeant is not a supervisory employee, and that the inclusion
18 of the sergeant position in the proposed bargaining unit would not pose a conflict of
19 interest. Consequently, we issue the following Direction of Election.

20

21 DIRECTION OF ELECTION

⁸ We note that should circumstances change such that an actual conflict arises, there are ways the sergeant could address the matter, such as recusing himself from the decision-making process.

1 Based on the record and for the reasons stated above, we conclude that a question
2 of representation has arisen among personnel employed by the Town and that the
3 following unit constitutes an appropriate bargaining unit within the meaning of Section 3
4 of the Law:

5 All full-time and regular part-time patrol officers and sergeants employed by
6 the Town of Erving Police Department but excluding the Chief of Police and
7 all other managerial, confidential, casual, and other employees.
8

9 IT IS HEREBY DIRECTED that an election by secret ballot shall be conducted to
10 determine whether a majority of employees in the above-described bargaining unit desire
11 to be represented by the New England Police Benevolent Association.

12 The eligible voters shall include all those persons within the above-described
13 bargaining unit whose names appear on the Town's payroll for the payroll period for the
14 week ending the Saturday preceding the date of this decision and who have not since
15 quit or been discharged for cause.

16 To ensure that all eligible voters shall have the opportunity to be informed of the
17 issues and their statutory right to vote, all parties to this election shall have access to a
18 list of voters in the unit and their addresses which may be used to communicate with
19 them.

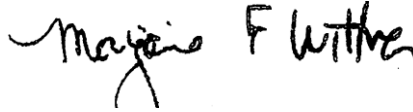
20 Accordingly, IT IS HEREBY FURTHER DIRECTED that an eligibility list be filed
21 with the DLR no later than fourteen (14) days from the date of this decision.⁹

22 The DLR shall make the list available to all parties to the election. Failure to submit
23 the list in a timely manner may result in substantial prejudice to the rights of employees
24 and the parties; therefore, no extension of time for filing the lists will be granted except

⁹ The list may be electronically mailed to *EfileDLR@mass.gov*.

- 1 under extraordinary circumstances. Failure to comply with this direction may be grounds
- 2 for setting aside the election, should proper and timely objections be filed.
- 3 **SO ORDERED.**

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS
COMMONWEALTH EMPLOYMENT RELATIONS BOARD



MARJORIE F. WITTNER, CHAIR



JOAN ACKERSTEIN, CERB MEMBER



KELLY STRONG, CERB MEMBER