

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

In the Matter of:

TOWN OF WEST NEWBURY

and

INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS, LOCAL
104

Case No. WMAM-24-10767

Date Issued: August 11, 2026

CERB Members Participating:

Lan T. Kantany, Chair
Kelly B. Strong, CERB Member
Victoria B. Caldwell, CERB Member

Appearances:

Timothy D. Zessin, Esq. - Representing the Town of West Newbury
Jennifer N. Smith, Esq. - Representing the International Brotherhood of
Daniel P. Fogarty, Esq. Electrical Workers, Local 104

1 CERB DECISION UPON REINVESTIGATION OF CERTIFICATION

2 Summary

3 The issue before the Commonwealth Employment Relations Board (CERB) is
4 whether the Water Manager/Superintendent is appropriately included in a certified
5 bargaining unit of West Newbury Water Department (Department) employees employed
6 in the positions of Water Operators and Superintendent. For the reasons stated below,
7 the CERB finds that the Water Manager/Superintendent is not a managerial employee

1 within the meaning of Section 1 of M.G.L. c. 150E (the Law) and should remain in the
2 certified unit.

3 Statement of the Case

4 On August 16, 2024, the International Brotherhood of Electrical Workers, Local
5 104 (Union) filed a petition for Certification by Written Majority Authorization (WMA) with
6 the Department of Labor Relations (DLR) seeking to represent a bargaining unit of full-
7 time employees employed by the Town of West Newbury (Town). The bargaining unit
8 includes three full-time employees: two Licensed Operators and one Water
9 Manager/Superintendent.

10 On September 6, 2024, the Town challenged the inclusion of Mark Marlowe
11 (Marlowe), the incumbent Water Manager/Superintendent, in the bargaining unit.
12 Alternatively, the Town requested that the Water Manager/Superintendent be removed
13 into his own bargaining unit as a supervisory employee. On September 16, 2024, the DLR
14 Neutral conducted a confidential inspection of the evidence of written majority
15 authorization and determined that a majority of the employees in the bargaining unit
16 supported the Union. Because the Town's challenge was non-outcome determinative, the
17 DLR Neutral did not resolve the challenge at that time.

18 Pursuant to the Neutral's report, the DLR certified the Union as the exclusive
19 bargaining representative on September 16, 2024, for the following unit:

20 All full-time and regular part-time non-professional employees of the West
21 Newbury Water Department in the positions of water operators and
22 superintendent, but excluding all managerial, confidential, casual, and all
23 other employees of the Town of West Newbury.
24

25 On September 20, 2024, the Town filed a motion to reinvestigate a Certification by
26 WMA pursuant to DLR Regulations, 456 CMR 14.15 and 14.19(15). The Town reiterated

1 its challenge to the inclusion of the Water Manager/Superintendent in the bargaining unit
2 and asserted that the position is a managerial position excluded from collective bargaining
3 under the Law or, in the alternative, a supervisory position that should be placed in a
4 separate bargaining unit.

5 On October 4, 2024, the CERB allowed the Town's motion to reinvestigate the
6 certification pursuant to 456 CMR 14.19(15).¹ By letter dated February 10, 2025, Chair
7 Lan Kantany informed the parties that she was appointed to investigate the certification,
8 requested positions and supporting information from the Union and the Town, and
9 requested that all facts should be either supported by documentary evidence or affidavits
10 from individuals with first-hand knowledge of the facts. The Union and the Town provided
11 positions and supporting information on March 17, March 18, August 18, and August 29,
12 2025.

13 On March 5, 2026, Chair Kantany issued a letter to the Union and the Town stating
14 that after reviewing all of the information provided there did not appear to be any facts in
15 dispute and directed them to show cause why the CERB should not resolve the issue
16 based on the information summarized in the letter (Show Cause letter). On March 18 and
17 19, 2026, the Town and the Union responded to the Show Cause letter.

18 Findings of Fact²

¹ 456 CMR 14.19(15) states that: "Within seven days after the [DLR] certifies the bargaining unit, the employer may seek review of any previous challenges the neutral had dismissed as non-outcome determinative. The employer may obtain such review by filing a request to reinvestigate the certification pursuant to the procedure outlined in 456 CMR. 14.15."

² The following facts are derived from the Show Cause letter and the parties' responses to the Show Cause letter. We have clarified or added facts based on the responses and removed disputed facts that are not material to our determination.

1 The Town is a party to three collective bargaining agreements with Teamsters
2 Union Local 170. Teamsters Union Local 170 represents three bargaining units
3 comprised of the following: 1) patrol officers and sergeants; 2) dispatchers; 3) lead man,
4 equipment operators, truck drivers and laborers in the highway department.

5 West Newbury Water Department
6

7 The Department employs one Water Manager/Superintendent, two Licensed
8 Operators, and one part-time Administrative Assistant.

9 Pursuant to Chapter 38 of the Acts of 1936, the Board of Water Commissioners
10 (BOWC) is a three-member body responsible for the daily operation of the Department,
11 providing potable water for public consumption, and ensuring water availability for fire-
12 fighting requirements. The BOWC has no authority to appoint or remove Department
13 personnel, set terms or conditions of employment, or authorize overtime. The BOWC also
14 cannot discipline or discharge employees. The BOWC meets approximately monthly and
15 as needed.

16 The Town bylaws vest in the BOWC the authority to declare a State of Water
17 Supply Conservation. This declaration is intended to protect, preserve and maintain public
18 safety and welfare by providing for enforcement of restrictions, requirements, provisions
19 or conditions imposed on municipal water users by the Town or by the Massachusetts
20 Department of Environmental Protection.

21 Pursuant to Section 8(b) of the Town Manager Act, “[t]he town manager shall
22 supervise all town departments and direct the day-to-day affairs of the town.” The Town
23 Manager is the appointing and hiring authority for “all department heads”, including the
24 Water Manager/Superintendent, as well as the Licensed Operator and Administrative

Assistant positions. The Town Manager is authorized to approve overtime requests for all Department employees. The Town Manager has the authority to conduct performance evaluations on and discipline the Water Manager/Superintendent, as well as the authority to terminate the Water Manager/Superintendent and Licensed Operators. The Town Manager is in contact with the Water Manager/Superintendent on an almost daily basis, “particularly regarding out-of-the-ordinary departmental operations and challenges”, as well as with the Administrative Assistant.

Licensed Operators’ Duties and Requirements

The Department’s Licensed Operators work Monday through Friday, from 6:30 a.m. to 2:30 p.m. or 7:00 a.m. to 3:00 p.m.³ They are paid between \$27.65 per hour to \$39.50 per hour. The operators primarily work at the Department garage and in the field. At least one operator must be on call at all times to address situations that arise off-hours. All operators, including the Water Manager/Superintendent, participate in an on-call rotation, one week at a time. They may be required to be on call for 24 hours or be available for a long period of time during emergency situations.

The Department’s Licensed Operators perform “manual work of a skilled nature on construction, water service maintenance and repair projects”, and are eligible for overtime compensation. Licensed Operators perform work outside “regardless of weather conditions” and may be exposed to the “continuous presence of unpleasant or irritating elements, such as considerable noise, odors, chemical fumes, dust, smoke, heat, cold,

³ We note the Town’s response to the Show Cause letter stating that the regular hours are only 7:00 a.m. to 3:00 p.m., and not 6:30 a.m. to 2:30 p.m. Because it is not material to our determination, we do not need to resolve this discrepancy.

oil, dirt, or grease.” Licensed Operator positions require “a great deal of physical effort” and “lifting and carrying heavy objects.”

The Licensed Operators are required to have a high school degree or equivalent, a MA Drinking Water Supply Operators Grade I Distribution and Grade I Treatment license, and a valid driver’s license. Additionally, the Licensed Operators must have two years of related experience, or any equivalent combination of education, training, certification, and experience.

Water Manager/Superintendent

The Water Manager/Superintendent regularly works Monday through Friday, from 7:00 a.m. to 3:00 p.m. The position is paid between \$74,180 per year to \$105,977 per year. The designated work location is the Department’s office. The Water Manager/Superintendent may also work at the Department garage and in the field.

Marlowe received an offer of employment for the position of Water Manager/Superintendent for the Town on September 20, 2022, and has held the position since approximately that time. Prior to that, Michael Gootée (Gootée) held the position until his retirement. Therefore, any references to the Water Manager/Superintendent’s activities prior to September of 2022 pertain to Gootée, and any activities thereafter pertain to Marlowe.

The Water Manager/Superintendent spends approximately 35% to 60% of his time performing manual labor/construction, depending on the season. A large percentage of the Water Manager/Superintendent’s remaining duties include completing regular reports required by the Massachusetts Department of Environmental Protection, water testing reports, and project planning in conjunction with the Town Manager and other department

heads and the BOWC. When the Town's budget is being prepared, the Water Superintendent may also spend a larger percentage of time performing budgetary work instead of the aforementioned duties.

Job Description

The Water Manager/Superintendent is responsible for "the management of the water supply for the Town of West Newbury, including operation and maintenance of the treatment and distribution systems." The position's job description states the essential functions of the position as follows:

- Delivers safe potable water to the public.
- Responds appropriately to all complaints from the public in a timely manner.
- Plans and directs all maintenance activities, emergency repair work, operational data collection, and recordkeeping within the Department, in accordance with Department regulations and guidelines.
- Provides for the maintenance and orderly upkeep of the Department's facilities (i.e. pumping station, garage, office area, etc.).
- Provides for the monitoring of the pumping station operations, recording of pumping data and reporting any irregularities to the BOWC.
- Provides for the collection of all data (meter reading) for timely billing.
- Makes recommendations for special article submissions to Town Meeting.
- Reports to the BOWC on a regular basis, including regarding the results of water quality testing, changes in federal and state regulations, operational problems, and complaints that cannot be immediately resolved.
- Keeps the BOWC informed of any and all problems that relate to the water system operations and maintenance, including providing immediate notice upon an emergency of a serious nature that may affect the public health or safety as relates to water.
- Attends all meetings of the BOWC.
- Submits or delegates water quality, operations, and maintenance reports to the Department of Environmental Protection and/or Environmental Protection Agency as required by state and federal regulations and the Town's Municipal Water Supply permit.
- Supervises all employees in the Department, including communicating Department policies, motivating employees to perform work at the highest level possible, ensuring work is completed in a satisfactory manner, and evaluating employee performance annually. Can perform

1 or arrange for the performance of all duties performed by the
2 Department's employees.

- 3 • Schedules and participates in on-call duty.
- 4 • Maintains knowledge regarding opportunities for non-local funds
5 (grants, low-interest financing, etc.); leads the preparation of
6 grant/financing applications as directed.⁴
- 7 • Maintains an orderly and accurate inventory of the Department's
8 consumable goods.
- 9 • Participates in continuing education to stay current with all State and
10 Federal Regulations regarding the operations of the municipal water
11 system; advises the BOWC of any changes to the regulations and
12 makes recommendations to the BOWC on how to minimize the impact
13 of any regulation changes.
- 14 • Prepares and trains to handle any emergency situations related to the
15 Water Department operations.
- 16 • Interacts with residents/customers in matters concerning complaints and
17 questions, using skill and diplomacy in order to resolve problems.
- 18 • Interfaces with other departments, e.g., Fire, Police, DPW in routine
19 operations and in emergency situations, using skill and diplomacy to
20 effect timely results.
- 21 • Performs a variety of related duties.

22
23 Additionally, the Water Manager/Superintendent is responsible for "coordinating
24 departmental paperwork involving other Town departments, including daily and as-
25 needed communications regarding bill-paying (A/P warrants)..., contracts administration,
26 and grants administration."⁵ The position of Water Manager/Superintendent is not eligible
27 for overtime compensation. However, the Water Manager/Superintendent may be
28 required to be on call for 24 hours or be available for a long period of time during
29 emergency situations.

⁴ Marlowe stated in his affidavit that contrary to the job description, he has not led the preparation of grant/financing applications and does not have or maintain knowledge about opportunities for non-local funds.

⁵ Marlowe stated in his affidavit that contrary to the job description, he does not perform these functions, and that the Department Administrative Assistant performs these functions at the direction of the BOWC.

1 The job description states that the Water Manager/Superintendent will work from
2 policies, goals, and objectives under “policy direction by the Board of Water
3 Commissioners and administrative direction of the Town Manager,” and will “consult with
4 the supervisor only where clarification, interpretation, or exception to policy may be
5 required or as requested by the supervisor.” The Water Manager/Superintendent
6 “exercises control in the development of departmental policies, goals, objectives and
7 budgets and is expected to exercise whatever means are necessary to resolve conflict
8 that cannot be addressed at the department level.”⁶ In addition, the Water
9 Manager/Superintendent is responsible for leading and coordinating “long-range planning
10 for the Town’s public water supply, including operational, financial and capital planning.”
11 This includes “analyzing program objectives, determining the various departmental work
12 operations needed to achieve them..., reporting periodically on the achievement and
13 status of the program objectives, and recommending new goals.”

14 The Water Manager/Superintendent performs work outside “regardless of weather
15 conditions” and may be exposed to the “continuous presence of unpleasant or irritating
16 elements, such as considerable noise, odors, chemical fumes, dust, smoke, heat, cold,
17 oil, dirt, or grease.” The Water Manager/Superintendent position requires “a great deal of
18 physical effort” and “lifting and carrying heavy objects.”

19 The Water Manager/Superintendent is required to have a high school degree or
20 equivalent, a Massachusetts Drinking Water Supply Operators Grade II Water Distribution
21 License and Grade II Treatment License, and a valid driver’s license. Additionally, the

⁶ Marlowe stated in his affidavit that contrary to the job description, he does not perform these policy, goal, and objective setting functions, and that these functions are performed by the BOWC.

1 Water Manager/Superintendent must have 6 to 8 years of related experience in a water
2 system, including at least 3 years in a supervisory and/or administration position, or any
3 equivalent combination of education, training, certification, or experience. A Bachelors'
4 degree is preferred.

5 Project Management
6

7 The Water Manager/Superintendent's work includes the Water Capital Program,
8 which consists of water main replacements and upgrades. There are approximately
9 twenty such projects in the current Water Capital Program, as well as other major
10 departmental investments (such as vehicle replacements, building upgrades, and major
11 equipment such as well pumps). While the dollar threshold to be considered a "capital
12 project," per the Town bylaws, is only \$20,000, the projected cost of water projects
13 included in the Water Capital Program often exceeds \$100,000, with several projects
14 projected to cost between \$500,000 and \$1,000,000, and two projects projected to cost
15 between \$1,000,000 and \$3,000,000.

16 The Town's Finance Department has relied heavily on the Water
17 Manager/Superintendent's input and involvement in making these decisions. The Water
18 Manager/Superintendent (Gootée, then Marlowe) worked with the Finance Department
19 and Town Manager regarding the timing and issuance of debt to support Water Capital
20 Projects, advised the BOWC in making decisions regarding the issuance of short and
21 long-term borrowing instruments, and worked with the BOWC to ensure that water rates
22 are set appropriately to fund future debt service payments.

23 At the BOWC's meeting on March 10, 2021, Gootée notified the BOWC that the
24 Church/Prospect engineering contract with an engineering firm, Tata & Howard, had

1 increased by \$1,500. There is no evidence that there was a BOWC vote or action was
2 taken to authorize such increase. At the BOWC's August 17, 2021 meeting, Gootée
3 notified the BOWC of his intent to initiate a spending article to fund "engineering and
4 permitting work" for the replacement of water mains within Church Street and Prospect
5 Street. Gootée additionally advised the BOWC on the consolidation of Church/Prospect
6 borrowing with prior BAN-financed capital projects. The portion of this bond issue
7 supporting the Church/Prospect project was approximately \$1.5M. After notifying the
8 BOWC, Gootée initiated the article at the Fall 2021 Town Meeting. At the BOWC's
9 October 18, 2021 meeting, the BOWC was briefed on the Church/Prospect proposal. The
10 BOWC signed the proposed contract on November 8, 2021, without a vote taking place.
11 The BOWC discussed the Church/Prospect proposal at meetings on April 12, 2022, May
12 15, 2023, and September 18, 2023. At its meeting on October 19, 2023, the BOWC
13 agreed to sign a contract with the Select Board governing the aforementioned award, by
14 the Select Board, of \$625,000 in Federal ARPA funds toward the Church/Prospect
15 project. At its November 15, 2023 meeting, the BOWC agreed to put the Church/Prospect
16 project out to bid. Following the public bidding process, the BOWC, at its meeting on
17 January 10, 2024, signed the recommendation of award for the project construction
18 contractor. The Water Manager/Superintendent was not involved in the bid process – it
19 was primarily managed by Tata & Howard.

20 Gootée also ordered the draining of 150,000 gallons of water from the Brake Hill
21 Water tank in or about March 20, 2021, and the re-filling of the tank to facilitate re-testing;
22 he reported this decision to the BOWC at a later date. Marlowe was then involved with
23 the tank's reinspection. Gootée authorized the emptying of the tank because its residual

1 odors were too high pursuant to the Massachusetts Department of Environmental
2 Protection's regulations.

3 Plans for water installations in Town are approved by the Town's BOWC. Marlowe,
4 along with other Department field personnel, can make exceptions to the Department's
5 Standard Specifications for Water Service Installation without BOWC approval where
6 appropriate. For example, the Water Manager/Superintendent or the other operators may
7 modify the distance or locations of certain pipes or other equipment where necessary or
8 appropriate for a certain project. The Water Manager/Superintendent, and the other
9 operators, exercise some discretion in shutting off water during certain line repairs, etc.
10 Water shutoffs due to billing concerns are handled by the Department's Administrative
11 Assistant at the direction of the BOWC. The Water Manager/Superintendent does not
12 have discretion to negotiate payment plans, or to decide to shut off a customer's water.

13 The Town bylaws vest in the BOWC the authority to declare a State of Water
14 Supply Conservation, with the Water Manager/Superintendent merely authorized to issue
15 written warnings and fines for violations. However, in practice, the Water
16 Manager/Superintendent has issued such declarations without a vote of the BOWC. In
17 these instances, the Water Manager/Superintendent has provided notice to the BOWC
18 but has not sought their vote or specific authorization. On at least one occasion, the
19 BOWC voted to confer upon the Water Manager/Superintendent the authority to change
20 the restrictions on the level of Town-wide water use, and Gootée exercised that authority
21 two times in July 2022. He advised the BOWC that he would be doing so shortly before
22 he did.

1 Budgeting

2
3 According to the Water Manager/Superintendent job description, the position is
4 responsible for “estimating the financial and staff resources required” for projects and
5 “allocating the available funds and staff.” However, the Water Manager/Superintendent
6 does not have the authority to determine what projects the Department will or will not take
7 on in the coming year, or to otherwise commit the Department to any specific actions. The
8 Water Manager/Superintendent works annually with the Department’s Administrative
9 Assistant and the Town Manager to prepare a proposed budget on behalf of the BOWC,
10 for review by the Select Board, Finance Committee, and ultimately voters at Town
11 Meetings. These requests have included a proposed \$270,000 expense to repair the
12 Pipestave Water Tank, and a proposed \$500,000 transfer from Water Retained Earnings
13 to the Water Stabilization Fund. However, it is ultimately the BOWC’s decision to make
14 any capital investment.

15 Gootée had, at times, approved amendments to contracts to which the BOWC is
16 a signatory and notified the BOWC only afterwards that the contract was amended. This
17 has included authorizing an increase in the amount of funds that the Town is contractually
18 obligated to pay. As of March 19, 2026, however, Marlowe had not approved
19 amendments to contracts to which the BOWC was a signatory without the BOWC’s prior
20 approval.⁷ The Water Manager/Superintendent does not have the authority to make
21 significant purchases or otherwise spend Department resources, apart from purchasing

⁷ Pursuant to the Union’s show cause response, we have added the fact that Marlowe has not approved amendments to contracts without the BOWC’s prior approval.

1 relatively inexpensive, day-to-day materials and supplies which are accounted for in the
2 Department's annual budget.

3 Employee Relations
4

5 The Water Manager/Superintendent does not have the authority to hire or
6 terminate Licensed Operators or set the terms or conditions of employment for
7 Department employees. However, in practice, the Town Manager has involved and relied
8 on the Water Manager/Superintendent in the decision-making process regarding what
9 specific wage rate to offer a prospective new employee, within the approved range.
10 Additionally, Gootée screened applicant resumes for employment positions, short-listed
11 applicants for interview, and conducted site visits to West Newbury water facilities with
12 employment applicants. No new employees have been hired since Marlowe became the
13 Water Manager/Superintendent. The Town Manager is responsible for updating job
14 descriptions for positions in the Department.⁸

15 The Town Manager has the ultimate authority to appoint or remove Department
16 employees. The signed letters offering employment to Department employees in 2021
17 and 2022 are signed by the Town Manager and, at times, the Chair of the BOWC. Gootée
18 signed the letters offering employment in or about 2007 and indicated that the offer of
19 employment was made on behalf of the BOWC.

20 The Water Manager/Superintendent is also responsible for ensuring the
21 submission of employee timesheets, approving requests for time off (i.e. vacation and

⁸ Pursuant to the Town's Show Cause response, we have added the fact that the Town Manager is responsible for updating the job descriptions and removed the statement that the Water Manager/ Superintendent and the BOWC are involved in updating job descriptions for Department.

1 personal days) and conducting performance evaluations for other Department
2 employees. Marlowe completed performance reviews for Department employees in or
3 about December 2023.⁹ The Water Manager/Superintendent is authorized to issue
4 disciplinary warnings, oral and written, to the Licensed Operators and the Administrative
5 Assistant, but cannot suspend or discharge any Department employees; the Water
6 Manager/Superintendent may recommend suspension, discharge, or other disciplinary
7 action to the Town Manager.

8 Pursuant to the Town's Personnel Policies, the Town Manager is responsible for
9 authorizing overtime in advance for Department employees.¹⁰ However, at times, the
10 Water Manager/Superintendent has authorized Water Operators' overtime without
11 obtaining prior authorization from the Town Manager. Marlowe stated that "most overtime
12 work occurs automatically when an on-call Operator is called into work outside of their
13 regular work hours to address an emergent issue." When there is an emergency and
14 overtime is required, the Water Manager/Superintendent is expected to seek approval
15 from the Town Manager for the overtime.

⁹ This fact was included in the Show Cause letter. In response to the Show Cause letter, in an affidavit dated March 19, 2026, Marlowe stated that "since the time I became the Water Manager/Superintendent, I have not completed any employee performance reviews." However, the Union submitted another affidavit dated March 17, 2025 in response to Chair Kantany's request for information in which Marlowe stated: "At the Town Manager [sic] direction, I have conducted performance evaluations of Water Operators. The last evaluation I completed occurred in 2023, and I added the evaluation results to the other employees' respective personnel files." Further, the Town provided copies of two performance evaluations Marlowe completed in or about 2023. Based on this cumulative evidence, we credit Marlowe's earlier March 17, 2025 affidavit that he completed performance evaluations in or about 2023.

¹⁰ We have added clarifying facts from the Town's response to the Show Cause letter regarding the Town Manager's and the Water Manager/Superintendent's role in authorizing overtime.

Collective Bargaining

The Town and the Union have commenced negotiations for a first contract. Marlowe has not been involved in management's preparation for the contract negotiation process and has not been involved in collective bargaining issues on behalf of the Town. In petitioning for the bargaining unit at issue, Marlowe acted in concert with the two Licensed Operators to advocate for their mutual interest.

However, the Town states that if the Water Manager/Superintendent is excluded from the bargaining unit as a managerial employee, the Town intends to consult with the Water Manager/Superintendent and/or have the incumbent participate in negotiations. In this case, the Water Manager/Superintendent would take on a variety of responsibilities "comparable to department head positions overseeing union personnel" such as the Police Chief and Highway Superintendent. These responsibilities could include:

- Compiling data regarding compensation and other employment benefits for comparable communities;
- Advising the Town Manager/Select Board regarding the degree to which positions in other towns are truly comparable to the work performed by Union employees in West Newbury;
- Participating in working meetings with the Town Manager to discuss collective bargaining terms and strategy;
- Participating in executive session meetings with the Select Board to discuss collective bargaining terms and strategy, upon request; and
- Serving as a member of the Town's bargaining team (along with the Town Manager, Select Board designee and, as needed, Town Counsel) during in-person meetings with the union representatives.

Opinion

Section 1 of M.G.L. c. 150E, (the Law) contains the following three criteria to determine whether a person is a managerial employee:

1 Employees shall be designated as managerial employees only if they (a)
2 participate to a substantial degree in formulating or determining policy, or
3 (b) assist to a substantial degree in the preparation for or the conduct of
4 collective bargaining on behalf of a public employer, or (c) have a
5 substantial responsibility involving the exercise of independent judgment of
6 an appellate responsibility not initially in effect, in the administration of a
7 collective bargaining agreement or in personnel administration.
8

9 Employees are excluded from an appropriate bargaining unit as managerial under
10 Section 3 of the Law only if the employees' actual duties and responsibilities satisfy any
11 one of the three criteria set out above. Town of Bolton, 25 MLC 62, 66, MCR-4562
12 (September 10, 1998). The CERB traditionally applies all statutory exclusions from
13 collective bargaining narrowly, so as not to deprive employees not otherwise managerial
14 of the right to bargain collectively through representatives of their own choosing.
15 Commonwealth of Massachusetts, 6 MLC 1026, 1028, CAS-2291 (May 9, 1979). The
16 Town argues that the Water Manager/Superintendent is a managerial employee because
17 the position satisfies the criteria set forth in parts (a) and (b). The Town does not contend
18 that the Water Manager/Superintendent satisfies the criteria in part (c).

19 To be considered a managerial employee under the first part of the managerial
20 test, an employee must make policy decisions and determine the employer's objectives.
21 Wellesley School Committee, 1 MLC 1389, 1401, MUP-2009, CAS-2005 (April 25, 1975),
22 aff'd sub nom. School Committee of Wellesley v. Labor Relations Commission, 376 Mass.
23 112 (1978). The policy decisions must be of major importance to the mission and
24 objectives of the public employers, Wellesley School Committee, 1 MLC at 1403, and the
25 employee must participate in the policy decision-making process on a regular basis. Town
26 of Plainville, 18 MLC 1001, 1009, MCR-4019 (June 12, 1991). The employee must do
27 more than just have input into the decision-making process. Id. Merely consulting in

1 formulating policy or periodic discussions with higher administrators on policy matters is
2 not enough to make an employee managerial. City of Amesbury, 25 MLC 7, 9, MCR-4476
3 (July 14, 1998). Rather, this part of the analysis focuses on whether an employee
4 possesses independent decision-making authority or whether the employee's decisions
5 are screened by another layer of administration. Worcester School Committee, 3 MLC
6 1653, 1672, MUP-2044 (April 29, 1977). See Town of Bolton, 25 MLC at 66 ("Neither
7 limited participation in the decision-making process, nor attendance and participation in
8 policy making discussions is sufficient to consider an employee 'managerial' if the
9 person's input is merely informational or advisory in nature.").

10 The Town argues that the Water Manager/Superintendent is independently
11 formulating Water Department policy on matters of significance and informing the BOWC
12 only after the decision has been made and implemented. As an example, the Town
13 pointed out that according to the BOWC's March 10, 2021 meeting minutes, Gootée
14 notified the BOWC that the Church/Prospect engineering contract with an engineering
15 firm had increased by \$1,500. The Town points out that there is no evidence that there
16 was a BOWC vote or action taken to authorize such increase and therefore concludes
17 that Gootée made this decision and later informed the BOWC. However, there is also no
18 evidence that Gootée authorized the increase or that the increase was within his
19 discretion to accept or reject. The record also demonstrates that Gootée consulted with
20 the Town Manager and the BOWC and its chairman by email over matters concerning
21 the Department, including a capital improvement plan and cost increases. Although
22 Gootée had, at times, approved amendments to contracts to which the BOWC is a
23 signatory and notified the BOWC only afterwards that the contract was amended, the

1 record does not demonstrate that these amendments were not within the guidelines
2 approved by the BOWC or unbudgeted. See Town of Plainville, 18 MLC at 1013 (finding
3 that the Highway Superintendent was not a managerial employee where there were
4 restrictions on the Superintendent's discretion to spend the department's funds and he
5 had to use budgeted funds for unforeseen expenses).

6 The Water Manager/Superintendent's supervision over major projects does not
7 demonstrate substantial participation in policy determination either. The Water
8 Manager/Superintendent's work supervising the replacement of water mains within
9 Church Street and Prospect Street involved initiating a spending article at a Town Meeting
10 to fund engineering and permitting work and presenting proposed contracts for the
11 BOWC's review. Much of his work is at the direction and supervision of the BOWC. The
12 BOWC was responsible for signing contracts governing the award of federal funds,
13 putting the project out to bid, and recommending a public contractor. Similarly, the
14 Highway Superintendent in Town of Plainville was responsible for planning, directing, and
15 supervising department projects and "determining the nature of the work to be
16 performed"; the Labor Relations Commission (LRC)¹¹ nevertheless determined that the
17 Highway Superintendent was not a managerial employee because while he had "some
18 input into making those decisions, his role is "limited" and he ultimately implemented
19 Department policy rather than independently creating it. Id. Decisions the Water
20 Manager/Superintendent made, such as to modify the distance or location of certain pipes
21 or other equipment where necessary, are not the type of policy-making decisions that
22 render an employee a managerial employee. Masconomet Regional School District, 3

¹¹ The LRC is the predecessor agency to the DLR and CERB.

1 MLC 1034, 1040-1041, MCR-2010 (July 15, 1976) (employees who are involved in some
2 personnel decisions and have operational control over their respective areas of
3 responsibility do not exercise the breadth and scope of decision-making authority
4 necessary to be managerial employees).

5 Though the Water Manager/Superintendent proposed funding in the amount of
6 \$270,000 for expenses to repair the Pipestave Water Tank, the BOWC made the decision
7 to make this report. While the Water Manager/Superintendent independently ordered the
8 draining and refilling of the Brake Hill Water Tank following testing that showed elevated
9 odor levels, he did so following a state inspection and in accordance with Massachusetts
10 Department of Environmental Protection's regulations. In Town of Dedham, the LRC
11 found that a Cemetery Superintendent was not managerial because the employee
12 operated within a "broad framework of policy" determined by the Board of Selectmen; the
13 Superintendent's duties included "establishing personal standards of performance,
14 planning the development of facilities, and maintaining equipment, buildings and grounds
15 at prescribed standards." Town of Dedham, 16 MLC 1235, 1235, MUP-6561 (September
16 8, 1989). Similarly, the Water Manager/Superintendent's project supervision takes place
17 within the BOWC or other Town and State guidelines and does not involve the
18 promulgation of new, independent policies.

19 Though Marlowe attends BOWC meetings, provides the BOWC with "information
20 and advice", and prepares an annual fiscal year budget for the Department's review, this
21 does not demonstrate substantial participation in policy determination because his input
22 is ultimately consultative. See Town of Hudson, 40 MLC 42, 46, WMAM-12-2446 (August
23 7, 2013) (holding that an employee who provided advisory input in policy-making

1 meetings was not managerial). The Water Manager/Superintendent does not have the
2 authority to determine what projects the Department will or will not take on in the coming
3 year, or to otherwise commit the Department to any specific actions. The Water
4 Manager/Superintendent's proposed budget is reviewed and decided by the BOWC, the
5 Town Manager, the Select Board, and Finance Committee. See Town of Plainville, 18
6 MLC at 1013 (holding that the Highway Superintendent who prepared the budget for the
7 department was not managerial where the budget was reviewed by the Board of
8 Selectmen and the Finance Committee). Contrast Town of Greenfield, 32 MLC 133, 152-
9 153, MUP-04-4178, CAS-04-3588 (February 8, 2006) (finding that the DPW
10 Superintendent was a managerial employee where he was solely responsible for creating
11 the department's policies and did not share any policy-making authority with a board or
12 other elected or appointed body). In sum, the Water Manager/Superintendent does not
13 satisfy part (a) of the test to be considered a managerial employee exempt from coverage
14 under the Law.

15 The Town also argues that the Water Manager/Superintendent satisfies the
16 second part of the managerial test. Under that part, an employee is managerial if they
17 "assist in a substantial degree in the preparation for or conduct of collective bargaining
18 on behalf of a public employer." M.G.L. 150E, §1. When deciding unit placement issues,
19 the CERB looks at actual, not potential or future duties. Town of Athol, 36 MLC 188, 190,
20 CAS-10-3752 (May 7, 2010). Having input into how future labor agreements *might* need
21 to be negotiated is insufficient to satisfy this second criterion. Id. Similarly, merely
22 identifying problem areas to be discussed during bargaining or consulting about
23 bargaining proposals is insufficient to warrant designating an employee as managerial.

1 Commonwealth of Massachusetts, 25 MLC 121, 124, SCR-2227 (February 2, 1999).
2 Rather, the employee must either participate in actual negotiations or otherwise be
3 involved directly in the collective bargaining process by preparing bargaining proposals,
4 determining bargaining objectives or strategy, or having a voice in the terms of the
5 settlement. North Attleborough Electric Department, 32 MLC 66, 72, MCR-04-5091 (June
6 29, 2005). The Town expects the Water Manager/Superintendent to be consulted or
7 asked to participate in collective bargaining negotiations. There is no evidence, and the
8 Town does not assert, that the Water Manager/Superintendent has already assisted to a
9 substantial degree in the preparation for or conduct of collective bargaining. Where the
10 Water Manager/Superintendent's role in collective bargaining is a potential or future duty,
11 we do not find that he satisfies criteria (b) to be excluded from the bargaining unit as a
12 managerial employee.

13 Further, we do not find that the limited supervisory authority of the Water
14 Manager/Superintendent warrants excluding him from an appropriate bargaining unit of
15 water operators. Section 3 of the Law requires the CERB to determine appropriate
16 bargaining units that are consistent with the purpose of providing for stable and continuing
17 labor relations while giving due regard to the following statutory considerations: 1)
18 community of interest; 2) efficiency of operations and effective dealings; and 3)
19 safeguarding the rights of employees to effective representation. City of Everett, 27 MLC
20 147, 150-151, MCR-4824 (May 21, 2001). Applying the criteria set forth in Section 3 of
21 the Law, the CERB generally establishes separate bargaining units for supervisory
22 employees and the employees they supervise. Sheriff of Worcester County, 30 MLC 132,
23 137, CAS-03-3543 (April 7, 2004). This policy is rooted in the judgment that individuals

1 who possess significant supervisory authority owe their allegiance to their employer,
2 particularly in the areas of employee discipline and productivity. Town of Bolton, 25 MLC
3 at 67. Supervisors and the employees they direct have different obligations to the
4 employer in personnel and policy matters, therefore to retain them in the same bargaining
5 unit would likely lead to a conflict of interest within the bargaining unit. City of Chicopee,
6 1 MLC 1195, 1197-1198, MCR-1228 (November 18, 1974). To determine whether an
7 employee is a supervisor, the CERB distinguishes between a true supervisor and an
8 employee who possesses more limited supervisory authority. "A true supervisor has the
9 independent authority to make, or the power to effectively recommend, personnel
10 decisions such as whether to hire, transfer, suspend, promote or discharge employees or
11 resolve grievances." Greater New Bedford Regional Vocational School Committee, 15
12 MLC 1040, 1045, MCR-3769 (July 3, 1988). The record does not reflect that the Water
13 Manager/Superintendent is a "true" supervisor. Rather, these personnel decisions are
14 made by the Town Manager. See also Town of Greenfield, 32 MLC at 153 (holding that
15 a DPW Water Facilities Superintendent was neither a managerial nor a supervisory
16 employee where employees reported to her, but she did not have the authority to make
17 or recommend hiring, transferring, or disciplinary decisions about those employees).
18 Although Marlowe has completed performance evaluations for employees on one
19 occasion, the evaluations are not regularly performed, and it does not appear as though
20 they directly impact employees' terms and conditions of employment like wage increases
21 and promotions. In contrast, in Town of Seekonk, senior librarians who completed
22 performance evaluations were considered true supervisors because the evaluations

determined whether the employees would advance to the next step on the salary scale.¹²
Town of Seekonk, 30 MLC 121, 125 MCR-03-5053 (March 12, 2004).

Conclusion

For the foregoing reasons, we conclude that the Water Manager/Superintendent is not a managerial employee within the meaning of Section 1 of the Law, nor is he a supervisory employee. We therefore decline to modify the certification to exclude him from the bargaining unit.¹³

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
COMMONWEALTH EMPLOYMENT RELATIONS BOARD



LAN T. KANTANY, CHAIR



KELLY B. STRONG, MEMBER



VICTORIA B. CALDWELL, MEMBER

¹² We note that even though the senior librarians were determined to be true supervisors, the LRC declined to create a separate supervisory bargaining unit, citing its policy against small or single-person supervisory units. Id. Here, there is no separate supervisory bargaining unit in which to place a supervisor.

¹³ If the Water Manager/Superintendent should perform managerial job duties in the future, the parties are free to voluntarily discuss and resolve the unit placement issue, or the Town may timely file a petition with the DLR.