

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

IN THE MATTER OF THE EMPLOYES OF :
: Case Nos. PERA-U-16-334-E
: (PERA-R-2180-C)
: PERA-U-16-335-E
COMMONWEALTH OF PA : (PERA-R-3368-C)

PROPOSED ORDER OF UNIT CLARIFICATION

On November 22, 2016, the American Federation of State, County, and Municipal Employees, Council 13 (AFSCME or Union) filed with the Pennsylvania Labor Relations Board (Board) a Petition for Unit Clarification pursuant to the Public Employee Relations Act (PERA or Act), seeking to include the Assistant Construction Project Managers employed with the Commonwealth of Pennsylvania, Department of General Services (Commonwealth or DGS) in the rank and file bargaining unit certified at PERA-R-2180-C. The Petition was docketed at PERA-U-16-334-E. On November 22, 2016, AFSCME also filed a Petition for Unit Clarification with the Board pursuant to PERA, seeking to include the Construction Project Managers employed with DGS in the first level supervisory meet and discuss unit certified at PERA-R-3368-C. The Petition was docketed at PERA-U-16-335-E.

On December 9, 2016, the Secretary of the Board issued an Order and Notice of Hearing in both matters, designating a January 19, 2017 pre-hearing conference for the purpose of resolving the matters in dispute through mutual agreement of the parties, and assigning March 20, 2017, in Harrisburg, as the time and place of hearing, if necessary. The hearing was continued twice, once at the request of the Commonwealth and without objection from AFSCME and once at the request of both parties.

The hearing was necessary and was ultimately held on June 15, 2017 before the undersigned Hearing Examiner, at which time all parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses, and introduce documentary evidence. The parties both filed timely post-hearing briefs in support of their respective positions on August 31, 2017.

The Examiner, on the basis of the testimony and exhibits presented at the hearing, and from all of the matters and documents of record, makes the following:

FINDINGS OF FACT

1. The Commonwealth is a public employer within the meaning of Section 301(1) of PERA. (N.T. 5)
2. AFSCME is an employe organization within the meaning of Section 301(3) of PERA. (N.T. 5)
3. The Commonwealth stipulated that if the Assistant Project Manager position is not found to be managerial, it shares an identifiable community of interest with the employes in the proposed rank and file unit. (N.T. 11)

4. The Commonwealth stipulated that if the Project Manager position is not found to be managerial, it shares an identifiable community of interest with the employees in the proposed supervisory unit. (N.T. 10-11)

5. In July 2016, the Commonwealth implemented a modernization program with regard to its business model involving construction projects. In doing so, the Commonwealth moved from an inspection system to a project management system. (N.T. 14-15)

6. Prior to the change in July 2016, the Commonwealth employed inspectors within the Bureau of Construction, who were primarily responsible for observing work in the field and reporting their findings. The chain of command consisted of mechanical, electrical, and building inspectors, who worked under a construction inspector supervisor, who in turn reported to a construction inspector manager. The construction inspector manager worked under a regional director, who reported to the director of construction. (N.T. 15-16; Exhibit C-1)

7. After the change in July 2016, the Commonwealth renamed the Bureau of Construction to the Bureau of Capital Projects and eliminated the inspector positions, along with the construction inspector supervisors and construction inspector managers. (N.T. 14-19)

8. Since the change in July 2016, DGS employees are no longer performing inspections at construction sites; instead, the inspection work is being performed by various third parties. (N.T. 20-23)

9. Following the change in July 2016, the Commonwealth also created two new positions, Assistant Project Manager (APM) and Project Manager (PM). The inspectors and construction inspector supervisors were moved into the APM position, while the construction inspector managers became PM's. There were also some employees who were inspectors or inspector supervisors under the old system, who interviewed for and were promoted to the PM position. (N.T. 17-19; Exhibit C-2)

9. The DGS Bureau of Capital Projects construction projects are governed by the contracts between the Commonwealth and contractors, as well as DGS' General Conditions of the Construction Contract (GCs) and the Administrative Procedures for DGS Construction Contracts (APs). The GCs and APs are a binding part of every contract. (N.T. 28, 34; Exhibit C-3, C-4)

10. The GCs contain the specific responsibilities of the contractor regarding the construction project. (N.T. 28; Exhibit C-4)

11. The APs supplement the GCs for the contract and list the procedures that the contractors, professionals, and anybody else involved in the project must follow to meet the contract's requirements. (N.T. 28; Exhibit C-3)

12. APMs and PMs monitor various aspects of the DGS construction projects, ensuring that all work conforms to the contract, including the GCs and APs, as well as any applicable laws, codes, and regulations. (N.T. 62, 71, 109; Exhibit C-5, C-10)

13. The GCs and APs provide that, within 45 days of the contract's effective date, the contractor must submit a schedule of values (SOV) to DGS. The SOV details the work to be performed and the materials to be used, along

with their value. The SOV creates the construction project's budget and is used for approving invoices. (N.T. 27, 78; Exhibit C-3, C-4)

14. The PMs are responsible for reviewing and approving the contractor's SOV for their assigned projects. The APs provide that no invoice will be approved until the SOV has been approved. (N.T. 82; Exhibit C-3, C-5, C-10)

15. The GCs and APs provide that, as a project progresses, the contractor shall submit to DGS invoices for work completed and materials used. (N.T. 29-30; Exhibit C-3, AP-7, C-4 at p. 69, 13.2)

16. The APMs are responsible for processing invoices for their assigned projects. The APMs have discretion to approve or reject an invoice and may direct the contractor to correct an invoice. In doing so, the APMs consider whether the work performed or the materials used are in accordance with the contract. There is no monetary limit to an APM's approval authority regarding invoices, and the APM's decision is not subject to internal review or oversight. (N.T. 30-32, 77, 80; Exhibit C-3 at AP 7, C-4 at p. 69, 13.2-13.5)

17. The GCs and APs provide that, where a change to the contract is required, a change order must be processed. Such changes include changes in design, materials, or budgetary and scheduling alterations. A change order may be commenced by the professional, DGS personnel, and under limited circumstances, the contractor. The professional is required to provide an opinion regarding the reason for the change order, along with a detailed explanation supporting his or her choice for the cause of the same. DGS reviews the change order and makes a final determination on cause based on all applicable factors including the professional's input. (N.T. 34; Exhibit C-3 at AP 8; C-4 at p. 65-67)

18. The APMs are responsible for reviewing all change orders related to their assigned projects. The APMs have authority to approve or reject a change order with a value of up to \$5,000.00. In doing so, the APMs must consider whether the proposed change is necessary, whether the materials are proper, whether the change will have an impact on the project's schedule, and whether the cost is valid. If an APM determines that the proposed change will have a significant effect on the project's schedule, he or she may issue a directive to proceed, authorizing the start of the work before the change order receives final approval. The APM may also negotiate a lower cost, or if the parties cannot reach an agreement, mandate that the contractor perform the work at a cost determined by the APM, which is then subject to the GC's dispute resolution article. (N.T. 35-42, 69, 81, 96, 104; Exhibit C-3 at AP 8, C-4 at p. 65-67)

19. The PMs are responsible for reviewing change orders related to their assigned projects ranging in value from \$5,000.01 to \$20,000.00. The PMs have authority to approve or reject a change order in this range. In doing so, the PMs must consider whether the proposed change is necessary, whether the materials are proper, whether the change will have an impact on the project's schedule, and whether the cost is valid. If a PM determines that the proposed change will have a significant effect on the project's schedule, he or she may issue a directive to proceed, authorizing the start of the work before the change order receives final approval. The PM may also negotiate a lower cost, or if the parties cannot reach an agreement, mandate that the contractor perform the work at a cost determined by the PM, which is

then subject to the GC's dispute resolution article. (N.T. 35-42, 69, 81, 96, 104; Exhibit C-3 at AP 8, C-4 at p. 65-67)

20. The GCs provide that if a contractor is unable to complete work in accordance with the project schedule, the contractor may request an extension of time. (Exhibit C-4 at p. 65)

21. The PMs are responsible for reviewing requests for an extension of time. The PM may approve or reject a request for an extension of time. (N.T. 81-82; Exhibit C-4 at p.65)

22. The GCs and APs provide that, if there is a dispute between the contractor and DGS regarding a construction project, the dispute must be submitted to a field dispute resolution. (N.T. 45-46; Exhibit C-3 at AP 11, C-4 at p. 78-79)

23. The GCs provide for a three-step process to resolve disputes. The field dispute review (FDR) meeting is the first step in the process. The FDR meetings are held at certain intervals when a percentage of the contract duration has elapsed. The PMs are responsible for serving as the chair of the FDR meeting, which is an informal good faith discussion of the current status of the project and identification of potential and actual disputes. The PMs facilitate the discussion and make sure that all the parties involved are present and able to present their arguments. The objective of the FDR meeting is for the parties to reach a mutually agreeable resolution. (N.T. 43-47; Exhibit C-4 at p. 78-82)

24. If the parties do not reach an agreement, the PMs deny the claim and require the contractor to continue with the work. The contractor can then move the dispute to the second and third steps in the process, which include a Claim Settlement Conference with the Deputy Secretary and filing a claim with the Board of Claims, respectively. (N.T. 43-47; Exhibit C-4 at p. 78-82)

25. The GCs and APs provide that job conferences are to be held at biweekly intervals once the project begins. The APMs conduct the job conferences, which are attended by all prime contractors, professionals, as well as other individuals involved in the project. The purpose of the job conference is to identify and discuss issues related to the project. The APMs may seek resolution of any issues, and the job conferences sometimes result in a change order. (N.T. 47-49, 73-77, 144-145; Exhibit C-3 at AP 2, C-4 at p. 19)

DISCUSSION

AFSCME has petitioned to include the APM in the rank and file bargaining unit and the PM in the supervisory meet and discuss unit. The Commonwealth opposes the petitions on the basis that both the APM and PM positions are managerial employees under the Act, and therefore, not eligible for inclusion in either unit. As the party seeking to exclude the APMs and PMs from the respective units, the Commonwealth has the burden of proving by substantial evidence the asserted statutory exclusions apply. Westmoreland County v. PLRB, 991 A.2d 976 (Pa. Cmwlth. 2010) *alloc. denied* 17 A.3d 1256 (Pa. 2011). The Board reviews actual job duties and will only consider written job descriptions to corroborate testimony of actual duties. *Id.* at 980.

Section 301(16) of PERA provides that:

“Management level employe” means any individual who is involved directly in the determination of policy or who responsibly directs the implementation thereof and shall include all employes above the first level of supervision.

43 P.S. § 1101.301(16).

The Board has held that if employes meet only one part of the three-part test set forth in Section 301(16), then those employes are managerial. Pennsylvania Ass’n of State Mental Hospital Physicians v. PLRB, 554 A.2d 1021 (Pa. Cmwlth. 1990). In Horsham Township, 9 PPER ¶ 9157 (Order and Notice of Election, 1978), the Board stated:

An individual who is involved directly in the determination of policy would include not only a person who has the authority or responsibility to select among options and to put a proposed policy into effect, but also a person who participates with regularity in the essential process which results in a policy proposal and the decision to put such a proposal into effect. Our reading of the Statute does not include a person who simply drafts language for the statement of policy without meaningful participation in the decisional process, nor would it include one who simply engaged in research or the collection of data necessary for the development of a policy proposal.

The remaining criteria for designating an employe as managerial concerns one “who responsibly directs the implementation (of policy)” and shall include “all employes above the first level of supervision.” We interpret these criterion to include those persons who have a responsible role in giving practical effect to and ensuring the actual fulfillment of policy by concrete measures, provided that such role is not of a routine or clerical nature and bears managerial responsibility to insure completion of the task. The administration of a policy involves basically two functions: (1) observance of the terms of the policy and (2) interpretation of the policy both within and without the procedures outlined in the policy. The observance of the terms of the policy is largely a routine and ministerial function. There will be occasion where the implementation of policy will necessitate a change in procedure or methods of operation. The person who effects such implementation and change exercises that managerial responsibility and would be responsibly directing the implementation of policy. Furthermore, the interpretation of policy would constitute responsible implementation of policy as a continuation of the managerial decision making process.

* * *

In City of Lebanon, 4 PPER 24 (1974), we stated that policy formulation and implementation must be distinguished from technical expertise. To define the problem and directly implement the proposed solution to a problem is not the same as performing a function within a known discipline with competence. The former has to do with policy and the latter deals with technical expertise.

Horsham, 9 PPER at 327.

The Commonwealth Court has opined that an employe's decisions are not managerial if they are part of the employe's routine discharge of professional duties. Municipal Employees of the Borough of Slippery Rock v. PLRB, 14 A.3d 189 (Pa. Cmwlth. 2011). Rather, in order to be considered a managerial level employe, the employe must be responsible for not only monitoring compliance with a policy, but also for taking action in situations where noncompliance is found. *Id.* at 192. The exercise of authority to take remedial action in the event of noncompliance with governmental regulations is the hallmark of a management level employe. In the Matter of the Employes of Jefferson Morgan School District, 31 PPER ¶ 31115 (Proposed Order of Unit Clarification, 2000) *citing* School District of Philadelphia v. PLRB, 719 A.2d 835 (Pa. Cmwlth. 1998).

In this case, the Commonwealth points to the APM's and PM's authority to issue change orders, as evidence of their managerial status.¹ In doing so, the Commonwealth maintains that the duties of the APMs and PMs are akin to the duties of the code enforcement officers in Slippery Rock, *supra*, which were found to be managerial. The Commonwealth also cites In the Matter of the Employes of Temple University, 46 PPER 93 (Final Order, 2015) for the proposition that change orders are actual spending decisions indicative of managerial status. Furthermore, the Commonwealth contends that the APMs and PMs exercise an effective role in the budgetary process when the PMs approve the SOVs for various projects and the APMs authorize the payment of invoices based on the SOVs. Finally, the Commonwealth relies on the PM's role in the FDR process, as further evidence of managerial status. However, the Commonwealth has not sustained its burden of proving the managerial exclusion for the APM and PM positions. Instead, this matter is controlled by the Board's decision in In the Matter of the Employes of Port Authority of Allegheny County, 48 PPER 47 (Final Order, 2016) wherein the Board concluded that the employer's Technical Trainers were not managerial employes under the second prong of the statutory test.

In Port Authority of Allegheny County, the Board reiterated the rule that, generally, code enforcement duties are managerial because the zoning or code enforcement officer must make an independent judgment that implements the public policy of an ordinance or law in deciding whether or not property violates the law or an ordinance, and must decide whether to enforce that public policy against the property owner. However, the Board distinguished its line of code enforcement cases from situations where the employes, such as the Technical Trainers for the Port Authority, were inspecting property for purchase or use by their employer.² The Board opined that the managerial

¹The Commonwealth argues that the APMs and PMs are managerial under the second prong of the test in that they both responsibly direct the implementation of policy. The Commonwealth does not contend that the APMs and PMs are involved directly in the determination of policy or above the first level of supervision.

²The Technical Trainers in that case traveled to a bus manufacturer in California to ensure that the buses ordered by the Authority were built to the custom specifications. The Technical Trainers inspected and ensured compliance with the Authority's specifications from the basic underlying structural, mechanical, electrical, and HVAC components through to the trimming and painting details of the completely assembled bus. The employes also identified discrepancies and shortages in bus construction and assembly,

decision making for equipment purchases was performed by those employees who had authority over the employer's budget, and actually established the need and specifications and had independent authority to expend the budgeted funds and purchase the equipment. Indeed, the Board found that the Technical Trainers were merely utilizing technical expertise at the direction of their employer by inspecting equipment or vehicles for purchase or use by the employer, and not independently enforcing, implementing or interpreting managerial policy. The same result must obtain here.

Indeed, the APMs and PMs are also merely utilizing technical expertise in their authority to approve change orders, and not independently enforcing, implementing, or interpreting managerial policy. The APMs and PMs are responsible for reviewing change orders related to their assigned projects. The APMs have authority to approve or reject a change order with a value of up to \$5,000.00, while the PMs have the same authority for change orders ranging from \$5,000.01 to \$20,000.00. In doing so, the APMs and PMs consider whether the proposed change is necessary, whether the materials are proper, whether the change will have an impact on the project's schedule, and whether the cost is valid. If an APM or PM determines that the proposed change will have a significant effect on the project's schedule, he or she may issue a directive to proceed, authorizing the start of the work before the change order receives final approval. The APM or PM may also negotiate a lower cost, or if the parties cannot reach an agreement, mandate that the contractor perform the work at a cost determined by the APM or PM, which is then subject to the GC's dispute resolution article. The PMs also approve or reject contractor requests for an extension of time.

The APMs and PMs simply utilize their knowledge of construction in performing these duties. They do not have authority over the DGS budget to establish the need and specifications for projects, nor do they exercise independent authority to expend the DGS budgeted funds to enter agreements with the contractors. This authority is akin to that of the Technical Trainers in Port Authority of Allegheny County to determine whether discrepancies in the employer's specifications would be permitted or rejected. Whether or not the APMs and PMs approve changes to the contract specifications via change orders does not transform the exercise of their technical expertise into the implementation of a managerial policy. *Id.*

Likewise, the Board's decision in Temple University, *supra*, does not support a managerial exclusion. In that case, the Board found that the University's Department Chairs were managerial employees, in part, due to the fact that their actual spending decisions went far beyond the recommendation to purchase equipment and spending monies budgeted by others for a particular routine expenditure. Instead, the Department Chairs were generating income for their departments and had the autonomy to allocate and spend that income and significant discretionary funds. In this case, the record does not show that the APMs or PMs make spending decisions anywhere near the level of the Department Chairs. To the contrary, the record shows that they affect the budget of a particular project only insofar as they might approve change orders, SOVs, and invoices with respect thereto. There is no evidence that the APMs or PMs have any effective role in the DGS budget or even in setting priorities for how funds should be expended with regard to individual projects. As a result, the APM's and PM's authority to approve change

and determined whether discrepancies in the Authority's specifications would be permitted or rejected.

orders, SOVs, and invoices is similar to the effective recommendation of office purchases, which fails to support a managerial exclusion. See In the Matter of the Employees of Berks County, 35 PPER 25 (Final Order, 2004) (holding that participation in the budgetary process must go beyond purchasing of equipment and extend to the overall budget to substantiate a managerial exclusion).

Nor does the PM's role in the FDR process or the APM's role in conducting job conferences support a managerial exclusion. The PMs are responsible for serving as the chair of the FDR meeting, which is an informal good faith discussion of the current status of the project and identification of potential and actual disputes. The PMs facilitate the discussion and make sure that all the parties involved are present and able to present their arguments. The objective of the FDR meeting is for the parties to reach a mutually agreeable resolution. If the parties do not reach an agreement, the PMs deny the claim and require the contractor to continue with the work. The APMs conduct the job conferences, which are attended by all prime contractors, professionals, as well as other individuals involved in the project. The purpose of the job conference is to identify and discuss issues related to the project. The APMs may seek resolution of any issues, and the job conferences sometimes result in a change order. These duties reflect nothing more than the routine discharge of the APM's and PM's technical job responsibilities. There is no evidence that serving as the point or lead person at these meetings equates to responsibly directing the implementation of Commonwealth policies. As such, the petitions for unit clarification will be granted and the respective units amended accordingly.

CONCLUSION

The Examiner, therefore, after due consideration of the foregoing and the record as a whole, concludes and finds:

1. The Commonwealth is a public employer within the meaning of Section 301(1) of PERA.
2. AFSCME is an employe organization within the meaning of Section 301(3) of PERA.
3. The Board has jurisdiction over the parties.
4. The APMs share an identifiable community of interest with the employes in the rank and file bargaining unit.
5. The PMs share an identifiable community of interest with the employes in the first level supervisory meet and discuss unit.
6. The APMs and PMs are not managerial employes within the meaning of Section 301(16) of PERA.

ORDER

In view of the foregoing and in order to effectuate the policies of PERA, the Hearing Examiner

HEREBY ORDERS AND DIRECTS

that the bargaining unit certified at PERA-R-2180-C is amended to include the Assistant Project Manager and the meet and discuss unit certified at PERA-R-3368-C is amended to include the Project Manager.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

that in the absence of any exceptions filed with the Board pursuant to 34 Pa. Code § 95.98(a) within twenty (20) days of the date hereof, this order shall be and become absolute and final.

SIGNED, DATED and MAILED at Harrisburg, Pennsylvania, this 13th day of November, 2017.

PENNSYLVANIA LABOR RELATIONS BOARD

JOHN POZNIAK, Hearing Examiner