

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

IN THE MATTER OF THE EMPLOYES OF :  
 :  
 : Case Nos. PERA-U-10-71-E  
 : (PERA-R-3294-C)  
COMMONWEALTH OF PENNSYLVANIA :  
DEPARTMENT OF ENVIRONMENTAL PROTECTION :

**PROPOSED ORDER OF DISMISSAL**

On March 9, 2010, AFSCME Council 13 (Union or AFSCME) filed with the Pennsylvania Labor Relations Board (Board) a petition for unit clarification pursuant to the Public Employee Relations Act (PERA) requesting that the Nisi Order of Certification issued by the Board on July 10, 1974, at Case No. PERA-R-3294-C, be amended to include the position of environmental protection compliance specialist (Specialist) in the bargaining unit of professional, non-supervisory engineering and scientific employes employed by the Commonwealth under the jurisdiction and control of the Governor and represented by AFSCME.

On March 17, 2010, the Secretary of the Board issued an order and notice of hearing directing that a hearing be held on June 28, 2010, in Harrisburg. After two granted continuance requests, the hearing was held on November 18, 2010, during which both parties were afforded a full and fair opportunity to present evidence and cross-examine witnesses. The Commonwealth and the Union filed post-hearing briefs.

The hearing examiner, on the basis of the evidence presented at the hearing and from all other matters of record, makes the following:

**FINDINGS OF FACT**

1. The Commonwealth of Pennsylvania is a public employer within the meaning of Section 301(1) of PERA. (N.T. 4).
2. The Union is an employe organization within the meaning of Section 301(3) of PERA. (N.T. 4).
3. The parties stipulated and agreed that the position of Specialist is a professional position. (N.T. 4-5).
4. The Specialist is a class of employes assigned to certain regions of the Commonwealth within the jurisdiction of the Department of Environmental Protection (Department) who ensure compliance with Commonwealth and Federal rules and regulations governing environmental protection. (Joint Exhibit 1).
5. Field inspectors conduct inspections of and collect evidence from sites posing environmental threats. The evidence can be documentary, physical or chemical. (N.T. 14-15, 60).
6. A Specialist evaluates evidence collected from field staff, coordinates with other Department professionals, such as permit and planning engineers and Department attorneys. The Specialist is responsible for preparing search warrants, and the supporting affidavits, and for serving those warrants on violators. The Specialist determines when to initiate an enforcement action based on his/her evaluation of whether the evidence indicates that a violation exists. The Specialist will draft and issue a notice of violation which contains an initial penalty determined by the Specialist, a request for a plan for reversing the violation and a deadline for response. Specialists follow up on notices of violation and arrange enforcement conferences with permit holders and alleged violators. (N.T. 14-16, 27, 36, 56-58, 60, 79, 81, 83; Commonwealth Exhibit 3 at 5-6).

7. The enforcement meetings are designed to present the violator with evidence of non-compliance and determine what the violator will do to correct the violation. The Specialist develops the agenda for and chairs the meeting. The Specialists in South Central Water Management adjust penalties at the meetings in cases in the \$10,000-\$15,000 range. (N.T. 16-17, 64-65, 81, 97).

8. A consent assessment of civil penalty is an agreement between the Department and the violator on a penalty assessed for past discrete violations that have already been corrected or no longer pose a threat. A consent order and agreement is a settlement agreement between the violator and the Department wherein the parties have agreed to certain penalties for past corrected violations, further actions by the violator to correct unremedied violations and contingent penalties for failing to meet agreed upon deadlines. (N.T. 20-21, 99-101; Commonwealth Exhibit 3 at 7).

9. Consent orders are negotiated between the Specialist and the violator. These negotiations occur at enforcement meetings but they may take a year or more and may involve several meetings and phone conversations. Consent orders and agreements are reviewed and signed by program managers and Department attorneys. (N.T. 19-20, 41-42; Commonwealth Exhibit 3 at 6-7).

10. The Specialist determines the initial penalty prior to the enforcement meeting using a procedure containing a range of factors and guidelines. The Specialist has the authority to increase a penalty for continuing or additional violations that occur after the notice of violation but before the enforcement meeting. The Specialist balances the following factors: willfulness or culpability of the violation, quantity of pollution, damage to the resource or environment, costs to the Department, cost to restore resource, cost to other resource users, economic benefits to the violator for non-compliance and other unidentified aggravating and mitigating circumstances. The specialist also investigates the violator's history and may consider deterrence for a habitual offender in determining penalties. The Specialist may lower a penalty when presented with mitigating or reasonable reasons presented by the violator for non-compliance. Specialists also offset construction costs to remedy a violation in determining penalties or lower penalties for good violator cooperation. (N.T. 20-21, 23, 45-46, 51, 61-64, 72-73, 78, 82, 85-86; Union Exhibits 1, 2 & 3; Commonwealth Exhibits 2, 3(at 16-18, 29-39) & 5, 6(at 117-126, 141-143)).

11. The Specialist does not plug numbers into a fixed formula to arrive at a penalty figure. (N.T. 63).

12. In determining willfulness, there are four categories from accidental to deliberate. The Specialist examines the evidence and determines the level of willfulness. (N.T. 22, 33).

13. When the penalty is less than \$7,500, the Specialists in the South Central Water Management Program settle the matter and develop the penalty without involvement from superiors or attorneys. When a notice of violation letter contains a penalty under \$7,500 and the violator counter offers with a penalty that is not below half the original penalty, the Specialist may agree to settle for a lower penalty without approval. For settlements exceeding this amount, the Specialist seeks approval from supervisors, engineers and attorneys. (N.T. 19, 22-23, 38, 40-46, 91, 109-113).

14. The Specialist determines the reasonableness of the timelines inserted into consent orders and agreements. Sometimes these timeline provisions are changed by the engineers or the program chief. After a consent order and agreement has been issued, the Specialist is responsible for monitoring deadlines for compliance. The Specialist imposes the agreed upon contingent penalties when the violator fails to meet deadlines. (N.T. 24, 48-49; Commonwealth Exhibit 3 at 7).

15. Specialists review federal and state databases and monthly reports filed by the violator of major dischargers (such as the City of Harrisburg which discharges approximately 28 million gallons of pollutants into the Susquehanna River daily) to determine permit compliance. (N.T. 25-26).

16. The Department also initiates non-traffic citations before local magistrates. The Specialist has authority to draft the non-traffic citation, file it and prosecute the case before the magistrate. (N.T. 28, 82).

17. Specialists are involved with developing procedures for calculating penalties. (N.T. 32-33).

18. In the Watershed Management Program, Specialists issue immediate orders in the field. At construction sites, they issue stop-work orders where ground disturbances cause pollution or soil to discharge into a water system. This happens frequently. The Specialist signs the order. When the Specialist issues a field order on site, he/she determines the necessary corrective action on site and incorporates that action, as well as any available field staff suggestions, into the field order. (N.T. 57, 66, 71, 102; Commonwealth Exhibit 3 at 7).

### DISCUSSION

The Commonwealth opposes the Union's petition asserting that the Specialists are managerial employees within the meaning of Section 301(16) of PERA. I agree with the Commonwealth.

A "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). In applying this definition, the Board has held that:

[T]his provision establishes a disjunctive three-part test and that an employe who satisfies any of the following three criteria is a manager: (1) either the employe is directly involved in the determination of policy; (2) the employe directly implements policy; or (3) the employe is above the first level of supervision.

In the Matter of the Employes of Allgheny-Clairion Valley School District, 41 PPER 21 (Final Order, 2010); See also, In the Matter of the Employes of Lower Providence Township, 16 PPER ¶ 16117 (Final Order, 1985). The Board has interpreted the statutory requirement of one who "responsibly directs" the implementation of policy in the following manner:

[T]hose 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.

In the Matter of the Employes of Horsham Township, 9 PPER ¶ 9157, at 327 (Order and Notice of Election, 1978).

In its post-hearing brief, the Commonwealth analogizes this case with the recent decision of the Board and the Commonwealth Court in In the Matter of the Employes of Slippery Rock Borough, 40 PPER 122 (Final Order, 2009), aff'd, sub nom., 14 A.3d 189 (Pa. Cmwlth. 2011). I agree with the Commonwealth that Slippery Rock is controlling here.

In Slippery Rock, the Board held (and the Court agreed) that a code enforcement officer, who utilized discretion in applying the Borough's building codes and zoning ordinances and who prosecuted violations before the local magistrate, was a management level employe under the second prong of the definition of management level employe. Similar to the code enforcement officer in Slippery Rock, the Specialists here also exercise independent discretion to implement Commonwealth policy in performing their duties to enforce state and federal environmental laws. Specialists thereby satisfy the second prong of the definition of managerial employe.

The record is replete with evidence that Specialists fulfill Commonwealth environmental policies by concrete measures which are not routine or clerical. The Specialists exercise managerial discretion throughout all phases and aspects of their job duties beginning with the monitoring of reports and databases of permit holders that discharge pollutants. Based on such review, Specialists determine when or if to initial an investigation or enforcement action. Specialists evaluate evidence collected by field staff. Based on that evaluation, Specialists use their independent judgment on a case-by-case basis to obtain search warrants for further site investigations and to open an enforcement action, if the evidence indicates that a violation exists.

One of the primary areas of discretion and policy implementation is the Specialists' penalty determinations. The Specialist develops an initial penalty based on the evidence. He/she evaluates several factors including but not limited to the willfulness or culpability of the violator in damaging the environment. In determining whether the misconduct was negligent, reckless or willful, the Specialist will weigh the evidence and the amount of damage. Also, the Specialist will weigh factors such as the cost to the environmental resource, the cost to the Department and the cost to other resource users and neighbors. The Specialist also examines the violator's history of violations and factors a deterrence value into the penalty calculus unique to that particular case. The Specialist also has the authority and discretion to consider the violator's level of cooperation and mitigating factors that may reasonably excuse the initial conduct or delays in remedying the violation.

Another important exercise of discretion occurs when a Specialist exercises his/her authority to issue a field order that requires a violator to immediately cease its operations when there is an earth disturbance causing soil or pollutants to discharge into a stream or other water system. Such an order requires an on-site determination of whether damage is occurring and whether that amount of damage could be properly remedied without a stop-work order. These types of field orders are issued by Specialists frequently and demonstrate how Specialists responsibly direct, through concrete measures, the implementation of Commonwealth environmental policies to protect Commonwealth natural resources.

Once an enforcement action is initiated by the Specialist and an initial penalty is established, the Specialist organizes an enforcement meeting with the violator and other Department personnel. The Specialist typically chairs the meeting and attempts to negotiate a settlement with the violator. When a violation has occurred and the matter has been corrected or it was a discrete violation, then the penalty is the only issue for settlement, and a consent assessment of civil penalty is issued. When a violation has yet to be remedied by future action, the Specialist negotiates a consent order and agreement containing a time frame and the particular course of corrective action that the violator must take. Although both documents are reviewed by program managers, the Specialist's determinations and assessments are usually approved when properly substantiated.

The Specialist also has the authority to increase a penalty assessment for additional or continuing violations occurring after the initial determination is made and notice of violation is issued. Additionally, the Specialist may lower an initial penalty determination based on the violator's cooperation with the Department during meetings and negotiations. When a penalty assessment is less than 7,500, the Specialist in the Water Management Program may settle a matter without review from superiors as long as the violator's counteroffer is within fifty percent of the original penalty. The Specialist often confers and consults with other Department personnel regarding a course of action and penalties. Many of these decisions are made by the Specialist after weighing the input from others, the evidence, negotiations and the behavior of the violator.

The Union argues that the Specialists merely plug numbers into a matrix to arrive at a penalty and that there is no discretion involved in determining a penalty. However, the record belies this assertion. The evidence demonstrates that the so-called "matrix" that the Specialists utilize in formulating a reasonable penalty is a checklist of considerations with penalty ranges. Evaluating the evidence against the penalty considerations contained in the matrix to quantify a penalty amount involves discretionary application of Commonwealth rules and policies exactly like the code enforcement officer in Slippery Rock, supra.

As noted above, the Specialist is charged with the responsibility of judging culpability based on the evidentiary description of the level of violator knowledge and damage. The Specialist must draw inferences from the evidence to make determinations about culpability. The Specialist must also weigh aggravating and mitigating factors and assign values to these amorphous concepts based on guidelines and numerical ranges to develop penalty figures that he/she can defend in litigation. The Specialist does not input numbers or other information into a computer program or formula to arrive at a penalty.

At the hearing in this case, the Commonwealth presented two partial transcripts each containing the testimony of a specialist at different Environmental Hearing Board hearings. Both specialists' testimony provided support for their penalty assessments in those cases. Specialist Landis testified that he considered the specific affect to the water supply of two private homes neighboring a farm the owner of which permitted the leaching of silage into the ground water. The farmer in that case also failed to cooperate with established deadlines for taking corrective action. The water was not potable for six or seven months.

Specialist Landis utilized a penalty matrix which supplied a checklist of factors for him to consider with numerical ranges. He evaluated such factors as deterrence, the amount of damage and the number of violations. In the case of the farmer, a high damage value was assessed because the pollution rendered the drinking water in two homes undrinkable for seven months. Mr. Landis also testified that he assessed the farmer penalties for missing deadlines. Significantly, he testified that, in most cases, the Department would penalize a violator a per diem rate of five dollars per day for missing deadlines. However, Mr. Landis assessed a penalty of one dollar per day to give the farmer a better chance to achieve compliance, rather than imposing insurmountable penalties. In deciding to lower the per diem penalty (to achieve the Commonwealth's overriding policy of obtaining compliance with environmental laws and regulations) Mr. Landis exercised independent judgment and managerial discretion.

At another hearing before the Environmental Hearing Board, Specialist Jonathan Bower similarly testified to the manner in which he assessed penalties against a violator utilizing the matrix of guidelines and ranges set forth therein. He considered culpability, history, Department costs, number of violations and other factors. Significantly, however, he testified that rather than arbitrarily plugging numbers into a formula or matrix, he selected the culpability category based on the number of times that the violator was ordered to comply as well as the number of notices of violation. He specifically testified that he tried to make a conservative calculation for the penalties. Again, the goal in assessing penalties and corrective action is to obtain compliance and not to cripple the violator financially. This difficult task requires a delicate balancing of multiple and various considerations of each unique case.

There is nothing routine or clerical about the complex discretionary assessments made by Specialists, even if some of those decisions must be approved by superiors. As demonstrated by the record in this case, the discretionary assessment of penalties involves a great deal of experience and judgment and is one of the most important and powerful tools of the Specialist in implementing the Commonwealth's environmental policies through enforcement. Accordingly, the enforcement of Commonwealth environmental laws and regulations involves the implementation of Commonwealth policy within the meaning of Slippery Rock, supra.

The Commonwealth also argues that this case is analogous to In the Matter of the Employes of Commonwealth of Pennsylvania (Environmental Chemist II) (DER), 15 PPER ¶ 15204 (Proposed Decision and Order, 1984), 16 PPER 16087 (Final Order, 1985), aff'd, AFSCME v. PLRB, 510 A.2d 150 (Pa. Cmwlth. 1986). The Commonwealth maintains that the facts in DER, relied upon by the Examiner and the Board to conclude that Chemist IIs were managerial employes, are similar to the facts in this record. I agree.

In the DER case, the hearing examiner concluded, inter alia, as follows:

Mr. Arnold, directs the implementation of policy in two ways. First, he conducts regular field inspections to determine whether generators of

hazardous wastes are complying with the law. Sanctions, ranging from notice of violation to criminal penalties, can result from these inspections. Second, Mr. Arnold makes a substantial number of central office sanction decisions arising from field investigations. These decisions result from Mr. Arnold's interpretation of DER hazardous waste policy.

DER, 15 PPER at 468. As noted by the Commonwealth in its post-hearing brief, the findings of fact relied upon by the examiner in the DER case to support this conclusion are identical in nature to the findings of fact here. The DER examiner made the following relevant findings of fact:

43. That Mr. Arnold is responsible for conducting inspections of facilities to determine compliance with the statute and regulations. The inspections are done after consultation with staff and review of records, files and correspondence of the particular facility.

44. That Mr. Arnold and his team, in determining compliance do the following: inspect the facility, meet with the owner, operator or manager of the facility, describe the inspection, and make findings of the inspection including problem areas, deficiencies, and violations of regulations. Then the team writes a report on the inspection, which is used for central management purposes. If necessary, the regional staff will cite the facility for violations.

DER, 15 PPER at 467. The Board, in affirming the examiner, stated that "Mr. Arnold is frequently involved in sanction decisions which are based upon his interpretation of DER hazardous waste policy." DER, 16 PPER at 231. As with Mr. Arnold, the Chemist II in the DER case, the Specialists here inspect and collect evidence from sites and facilities to determine compliance with Commonwealth policies contained in statutes and regulations, and they are involved in sanction decisions based on their interpretation of Commonwealth laws and policies.

The Union argues in its post-hearing brief that the Specialists are not managers because their work is reviewed and approved by superiors and they must consult with Department lawyers and engineers before committing to a course of action. The Commonwealth Court, however, has rejected the Union's position that consultation or approval negates managerial status. In DER, 510 A.2d 150 at 151, the Commonwealth Court stated that "the law is contrariwise. Even though an employee's decisions may be subject to review by superiors, they may still be considered 'management' employees." Id. The fact that the DER chemists consulted with other staff did not detract from their managerial status. Indeed, it is the hallmark of a good manager that he/she makes informed, intelligent decisions after consulting with staff and superiors. Similarly, here, the fact that Specialists consult with other staff and have some of their penalty assessments and compliance requirements reviewed by superiors, engineers and lawyers does not detract from the basic principle that the Specialists utilize judgment and discretion in implementing policy by inspecting sites and determining whether to shut down an operation immediately with a field order or to evaluate evidence and initiate enforcement procedures against a violator. DER, supra.

The Union also relies on the testimony of Anne F. Toth and Keith Pauley who are classified as Specialists but testified to duties that were more routine and clerical in nature. I have wholly rejected the testimony of these two witnesses. The record shows that Mr. Pauley lacks the experience to be given the level of independence and discretion trusted to more experienced Specialists. The record also indicates that the Excel Spreadsheet that his office uses for formulating penalties is unique to his office only and is not used throughout the Commonwealth. The record also shows that Ms. Toth's duties are not typical of a Specialist and that she may even be misclassified.

In PLRB v. AFSCME, 342 A.2d 155 (Pa. Cmwlth. 1975), the Commonwealth Court concluded that it would be "impractical and overly burdensome" for the Board to consider the job duties of each and every employe in a given classification. The Court stated that such a procedure "would result in the Board supplanting the duty of a public employer to

insure that its employes are working within their job description." Id. at 157-158. The job duties of Mr. Pauley and Ms. Toth are not typical of those in the class of Specialist. The Board has held that such aberrations in job duties should not impact on the proper placement of an entire classification and is more appropriately addressed by employe reclassification. Pennsylvania Ass'n of State Mental health Physicians v. Commonwealth of Pennsylvania, Office of Administration, 18 PPER ¶ 18118 (Final Order, 1987). In the Office of Administration case, the Board stated that "[i]t is the Board's position in certifying units under PERA that it will determine appropriate units on the basis of the unit as a whole. Individual or limited exceptions to that result (which may have adequate basis in fact) should be addressed by employe reclassification as the facts warrant." Id. at 343 (citation omitted).

Accordingly, the Commonwealth has met its burden of establishing that the position of Environmental Protection Compliance Specialist is a management level employe within the meaning of Section 301(16) of PERA.

### CONCLUSIONS

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

1. The Commonwealth is a public employer within the meaning of Section 301(1) of PERA.
2. AFSCME Council 13 is an employe organization within the meaning of Section 301(3) of PERA.
3. The Board has jurisdiction over the parties hereto.
4. The position of Environmental Protection Compliance Specialist at the Department is a management level employe 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 examiner

### HEREBY ORDERS AND DIRECTS

that the petition for unit clarification is dismissed.

### IT IS HEREBY FURTHER ORDERED AND DIRECTED

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

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania this thirteenth day of July, 2011.

PENNSYLVANIA LABOR RELATIONS BOARD

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JACK E. MARINO, Hearing Examiner