

STATE OF NEW YORK  
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of:

VILLAGE OF TARRYTOWN,

Petitioner,

To Review Under Section 101 of the Labor Law:  
A Notice of Violation and Order to Comply dated  
December 16, 2010,

DOCKET NO. PES 11-003

RESOLUTION OF DECISION

- against -

THE COMMISSIONER OF LABOR,

Respondent,

CIVIL SERVICE EMPLOYEES ASSOCIATION,  
INC., LOCAL 100, AFSCME, AFL-CIO,

Intervenor.  
-----:

**APPEARANCES**

Bond, Schoeneck & King, PLLC (John Ho of counsel), for petitioner.

Pico Ben-Amotz, Acting Counsel, NYS Department of Labor (Michael Paglialonga of counsel), for respondent.

Steven A. Crain, Deputy Counsel, Civil Service Employees Association, Inc., Local 100, AFSCME, AFL-CIO, for intervenor.

**WITNESSES**

Michael Blau, James Hart, Michael McGarvey, William Helmstadt, and Peter Saracelli, for petitioner.

Scott Weaver, and Douglas Dubner, PESH Industrial Hygienist, for respondent.

Patricia Russell, for intervenor.

**WHEREAS:**

On February 14, 2011, petitioner Village of Tarrytown (petitioner or Tarrytown) filed a petition contesting a Notice of Violation and Order to Comply issued on December 16, 2010, by the Department of Labor (DOL or respondent) Public Employee Safety and Health Bureau (PESH). DOL answered the petition on April 22, 2012. Intervenor Civil Service Employees Association, Inc., Local 100, AFSCME, AFL-CIO (CSEA) filed a Motion to Intervene on June 2, 2011, which was granted by the Board on September 12, 2011.

The PESH investigation and citations arose out of two tragic incidents which occurred on September 6, 2010. A Tarrytown Department of Public Works (DPW) employee, Anthony Ruggiero entered a manhole in an attempt to unblock a sewer clog and died by asphyxiation since there was insufficient oxygen in the manhole. In an attempt to rescue Mr. Ruggiero, volunteer firefighter John Kelly followed Mr. Ruggiero into the manhole and was likewise asphyxiated and died.

PESH issued two citations to Tarrytown and each citation contained two items. Petitioner is appealing Citation 1, Items 1 and 2 related to a violation of standards concerning entry into a "confined space" listed at 29 CFR 1910.146 *et seq.* and admits the violations but disputes their classification as willful violations. The citations in question read as follows:

**"Citation 1 Item 1 Type of Violation: Willful – serious**

"29 CFR 1910.146(c)(3): If the employer decides that its employees will not enter permit spaces, the employer shall take effective measures to prevent its employees from entering the permit spaces and shall comply with paragraph (c)(1), (c)(2), (c)(6), and (c)(8) of this section.

"(a) Tarrytown Vill Fatality 2010 – The Village of Tarrytown did not communicate to its employees that they cannot enter the permit spaces. The Village of Tarrytown did not take measures to prevent its employees from entering permit spaces. Anthony Ruggiero entered the permit space in view of management. This is willful because the DPW produced a permit-required confined space program developed in the 1990's to address the confined spaces in the DPW; acknowledged that employees entered permit-required confined spaces during the 1990's; the village provided training to their employees on the hazards of permit-required confined spaces; they purchased confined space entry equipment; they purchased jet vac trucks to facilitate non entry; management representatives indicated the employees do not enter permit-required confined spaces but employee statements indicate that employees entered permit-required confined spaces which management was aware of and took no action. The employer did not produce any document or information that indicated that they instructed or informed their employees not to enter permit-required confined spaces. The

employer should have done a survey of all spaces when they developed their confined space program; they did not effectively inform exposed employees of dangers posed by the confined spaces; they did not produce a method to give information to contractors who worked in their permit-required confined spaces.”

**“Citation 1 Item 2 Type of Violation: Willful – serious**

“29 CFR 1910.146 (c)(4): The employer failed to develop and implement a written permit required confined space program that complies with this section for employees entering permit spaces. A written permit required confined space program identifies and evaluates the hazards of permit spaces before employees enter them; develops means, procedures and practices for safe permit space entry; evaluate permit space atmospheric conditions and training on working in permit spaces.

“(a) Tarrytown Vill Fatality 2010 – The Village of Tarrytown did not implement a written confined space program, and it did require that Fire Department employees enter permit spaces. Fire Fighter Kelly went into a confined space to rescue Anthony Ruggiero; two firefighters went in to retrieve Anthony Ruggiero and John Kelly during which time management was present and did not stop their employees from entering and did not have a permit-required confined space program. A written confined space program would have required that the gas levels be tested before employees entered the manhole, SCBA be worn before entering the manhole if oxygen levels were below the required levels, and that employees would be attached to the tripod before entering the manhole. This is willful because the village is aware of the need for a confined space program given the development of the DPW plan; they approved the purchase of confined space entry equipment; Chief Peter Saracelli indicated that they plan to answer emergency calls involving confined space rescue.”

Upon notice to the parties, a hearing was held on December 1 and 2, 2011, in White Plains, New York before Anne P. Stevason, Esq., Chairperson of the Board and the designated hearing officer in this proceeding. Each party was afforded a full opportunity to present documentary evidence, to examine and cross-examine witnesses, to make statements relevant to the issues, and to file closing briefs.

## **SUMMARY OF EVIDENCE**

### ***Undisputed Evidence***

At the time of the incidents, Michael Blau was Tarrytown’s Village Administrator and responsible for the day to day operations of the village. Michael McGarvey was the Village Engineer and also did the jobs of a Building Inspector and Superintendent of Public Works. Scott Weaver was the General Foreman of Public Works and was responsible for

administering its day to day operations. Weaver was the number two person in DPW, after McGarvey, and supervised the 30 plus employees in DPW. Weaver does not attend Tarrytown's management meetings and does not make policy.

The Tarrytown Fire Department is incorporated separately from Tarrytown and has its own by-laws and constitution. Tarrytown provides the Fire Department with buildings, equipment and a yearly budget of approximately \$400,000. Disciplinary appeals may be heard by the Tarrytown Board of Trustees.

DPW employees were given OSHA confined space safety training in 1995.<sup>1</sup> At the union's request another training on confined space was given to the DPW employees in 2007. McGarvey and Weaver attended the 2007 session. A copy of the 1995 and 2007 training manuals were entered into evidence at the hearing. The manuals contain a copy of the complete text of OSHA safety standards on entering confined spaces, 29 CFR 1910.146, and also describe the potential dangers in entering into confined spaces. The manuals instruct that all confined spaces are to be tested prior to entry to determine if they are a permit-required confined space. Examples were given of the seriousness of the danger. The first example of a fatality given in the 2007 manual describes two deaths which were due to oxygen deficiency of both a worker who descended into a service chamber to do maintenance, and a passerby who attempted to rescue the worker. The 2007 manual also discusses the requirement that a confined space be evaluated prior to entry and includes a "Permit-Required Confined Space Decision Flow Chart" (Appendix A). It further discusses the fact that a written program is required and that if employees are not to enter permit required confined spaces that employees must be informed and effective measures must be taken to prevent entry. After the training, confined space safety equipment was purchased by the village at the request of the union. The equipment included a gas meter and a tripod. Tarrytown failed to have a written program on confined space until 2010.

DPW employees are responsible for clearing sewer lines which are accessed through manholes in the ground. In 1997 Tarrytown purchased a sewer jet for \$90,000. In 2005 the Village purchased a "Vac-All" which could produce high pressure water to push through any sewer blockage and a vacuum which could suck the blockage out. Both machines can be used from outside of the manhole to clear sewer clogs. Tarrytown employees also read water meters which are located below ground. When Tarrytown replaced the 13 year old water meters in 2007 due to the fact that they were inaccurate and costing the village money, Tarrytown changed how the meters were read and put in radio transmitters. The new system cost \$700,000. Prior to the purchase of the transmitters, employees would have to enter confined spaces to read the meters. The village purchased the equipment so that employees would not have to go into confined spaces.

In 2007, PESH Industrial Hygienist Douglas Dubner conducted an inspection of Tarrytown DPW. While violations were discovered, no citation was issued regarding confined spaces. Dubner's report states that the DPW employees do not enter confined spaces if they are permit required. Dubner conducted his closing conference with Weaver

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<sup>1</sup> The OSHA safety standards for entry into confined spaces is 29 CFR 1910.146 *et seq.* and was first promulgated in 1993.

and the union president. Tarrytown was cooperative with PESH and quickly remedied the violations cited.

In January 2010, the first Tarrytown Safety and Health Committee meeting was held. The Committee was set up by the collective bargaining agreement and included both management and employee representatives. No one brought up the issue of confined spaces at that meeting. The committee was supposed to meet quarterly but meetings after that were called off since no one had anything to discuss. Pursuant to the collective bargaining agreement DPW employees are supposed to report what they believe to be health and safety violations to Weaver.

On September 3, 2010, Village Administrator Blau and Weaver inspected a storm drain so that Blau could answer a citizen complaint. Weaver asked Blau if a photograph would be helpful in answering the complaint and Blau replied in the affirmative. Weaver transported Blau back to his office and then called Pedro Ramirez who Weaver directed to go into the manhole and down a ladder to take the picture. The depth of the drain was approximately 20 feet. The pictures were developed and given to Blau that afternoon.

On September 6, 2010, a citizen of Tarrytown called in to report a sewer blockage. The call was transferred to Weaver who called in Ruggiero and Bruce Conca to deal with the problem. After attempting to clear the blockage with the jet vac, Ruggiero called Weaver for assistance. Starting with the manhole closest to the complaining citizen's house, the men checked each manhole leading away from the house. They were unable to clear the blockage in any of the first three manholes. Three manholes were then located in or adjacent to the firehouse. Weaver called Fire Chief Saracelli to arrange to have the fire truck moved from the firehouse to allow access to the manholes and so it would not be blocked by the DPW equipment. The first manhole, in front of the firehouse, was "jet vac"ed but the blockage remained. One of the volunteer firefighters at the station, Sean Scogna Jr., pointed out that there was another manhole behind the station. Conca and Ruggiero went to refill the jet vac machine truck with water; and Weaver and Scogna located the manhole and cleared the brush around it. Ruggiero came back first and with a shovel pried opened the manhole. He looked inside and noted that it was full and indicated that the blockage was just toilet paper. Ruggiero then proceeded down the ladder into the manhole. He descended about halfway when he fell off the ladder and hit the bottom of the manhole. Observers at first thought that he had slipped and fallen but he was unresponsive to their calling. At that point Weaver called for someone to get his boots and he intended to go into the manhole to retrieve Ruggiero. Prior to that occurring, John Kelly, a volunteer firefighter also on the scene, put on boots and lowered himself into the manhole. When he was about halfway down the ladder, his eyes rolled back into his head and he fell to where Ruggiero was. Ambulances and emergency assistance and an alarm were called in for both gentlemen.

At this point, Weaver retrieved a gas meter from the firetruck and lowered it into the hole. The reading was either 14% or 11.4% oxygen, in any event significantly lower than the required 19.5%. After the oxygen level was tested, two firefighters, Felix Santario and Eugene Gasparre, came to rescue Kelly and Ruggiero. Rope, a tripod and breathing equipment was then removed from the firetruck. Gasparre went down first, was not attached to the tripod and since the hole was narrow, his breathing equipment was lowered into the

hole after Gasparre descended. Kelly was then raised using the tripod. Santario repeated the same procedure and Ruggiero was retrieved. They were both rushed to the hospital in ambulances but tragically they did not survive.

Douglas Dubner of PESH was assigned to investigate the fatalities. During his investigation Dubner interviewed a number of people, wrote down statements and also collected the witness statements given to the police department. As a result of the investigation PESH issued two citations against Tarrytown.

### ***Petitioner's Additional Evidence***

Village Administrator Blau was aware that there were safety regulations regarding confined spaces and aware that Tarrytown had a program but did not know the specifics of the program and did not check if they were implemented. He was also unaware that employees were entering manholes after the village had acquired the sewer jet and "Vac-All." His door was always open to safety concerns and as soon as any were raised, the village would take care of it. Although he requested the photograph of the storm drain on September 3, 2010, he did not know that the manhole was entered until he received the picture that afternoon. He was not present at the time.

Tarrytown is separate from the Fire Department and although it supplies its budget and provides safety equipment, it cannot mandate confined space training. Weaver is not a high level manager and does not attend Village management meetings. However, DPW employees are expected to report unsafe conditions to Weaver.

McGarvey and Weaver attended the 2007 Confined Space Training with all of the DPW employees. McGarvey came away from the training with the impression that if no one goes into manholes, or other confined spaces, then they do not need a policy. No written policy was issued prior to 2010. McGarvey believes that at the training or thereafter an announcement was made, either by him or Weaver, that no one is to go into confined spaces. Weaver testified that between 2007 and 2010, he never made an announcement to the DPW employees not to enter confined spaces. He believes that McGarvey may have made a statement at the seminar but he is not sure.

On September 3, 2010, Weaver directed Pedro Ramirez to open the manhole and go into the storm drain and take a picture. At the time, he did not believe that it was a confined space.

On September 6, 2010, Weaver was about 20 feet away from Ruggiero when Ruggiero went into the manhole. He did not direct him or see him descend into the manhole and was waiting for the jet vac to be brought to clear the blockage. He did not have the time or opportunity to prevent Ruggiero from going into the hole. After Ruggiero fell, Weaver instructed Kelly to get him a rope and some boots since Weaver was intending on rescuing Ruggiero. Before he had the chance to go in, Kelly descended into the manhole, lost consciousness and fell. An alarm was issued, Weaver measured the oxygen content and found it to be 14%. Then Gasparre and Santario arrived and took over the rescue of Ruggiero and Kelly.

In September 2010, Peter Saracelli was the Tarrytown Fire Chief. The Fire Department policy is that no firefighter goes into manholes and he has never directed anyone to go into a manhole. Saracelli was at the scene of the fatalities but he was not close to the manhole since he was manning a command center. He called for equipment and manpower to get Ruggiero out of the hole. All fire trucks have gas meters and tripods. They had this equipment because they are first responders and want to be able to initiate rescue, if necessary, until the rescue team, trained in confined spaces, arrived. After the incidents on September 6, 2010, all firefighters had confined space training and a written policy was disseminated.

#### ***Respondent's Additional Evidence***

Dubner took witness statements and also got statements from the police concerning the incidents. Dubner allowed each witness to review and correct their statements prior to signing and even if they did not sign.

Respondent produced witness statements from DPW employees William McGuire, Bruce Conca and Pedro Ramirez that they were never told not to enter confined spaces or manholes. In fact, Ramirez stated that he did enter manholes prior to 2010 and after 2007 at least twice a year. He entered the storm drain through a manhole and down a ladder to take a picture on September 3, 2010 at the direction of Weaver. Conca also indicated that in his 25 year career with DPW he had entered confined spaces.

The statement of Sean Sogna, Jr. indicated that Weaver was above the hole when Ruggiero descended and made no effort to stop Ruggiero.

#### ***Intervenor's Additional Evidence***

Patricia Russell, a Labor Relations Specialist for CSEA, testified that based on Weaver's statements to her concerning his viewpoint in watching Ruggiero go down the manhole that he was standing above the manhole at the time.

### **STANDARD OF REVIEW**

When a petition is filed, the Board reviews whether the Commissioner's Order is valid and reasonable. The Petition must specify the order "proposed to be reviewed and in what respects it is claimed to be invalid or unreasonable. Any objections . . . not raised in the [petition] shall be deemed waived" (Labor Law § 101).

The Board is required to presume that an order of the Commissioner is valid. (Labor Law § 103 [1]). Pursuant to the Board's Rules of Procedure and Practice 65.30 [12 NYCRR 65.30]: "The burden of proof of every allegation in a proceeding shall be upon the person asserting it." Therefore, the burden is on the Petitioner to prove that the Order under review is not valid or reasonable.

## BACKGROUND INFORMATION

### 1. The PESH Statutory Scheme

Every covered public employer has the duty to comply with the safety and health standards promulgated under PESH (Labor Law § 27-a [3]). PESH enforcement procedures are detailed in Labor Law § 27-a (6) and provide that “[i]f the commissioner determines that an employer has violated a provision of this section, or a safety or health standard or regulation promulgated under this section, he or she shall with reasonable promptness issue to the employer an order to comply which shall describe particularly the nature of the violation including a reference to the provisions of this section, standard, regulation or order alleged to have been violated . . . .”

The employer bears the ultimate responsibility for compliance with the Act. It cannot shift responsibility for the violations to another party or delegate its authority or responsibility for assuring a safe and healthy work place. (*See Bianchi Trison Corp. v Chao*, 409 F3d 196 [3<sup>rd</sup> Cir 2005] citing *Secretary of Labor v Well Solutions, Inc.*, No. 91-340, 17 OSH Cas [BNA] 1211, 1214 [(1995)]). Therefore, the fact that Tarrytown has a labor-management safety committee which failed to raise the issue of confined spaces, nor was it raised by an earlier PESH inspection, are not defenses to the violations.

### 2. Safety Standards Regarding Confined Spaces

The safety standards regarding confined spaces are located at 29 CFR 1910.146 *et seq.* A confined space is defined as a space that:

- “(1) is large enough and so configured that an employee can bodily enter and perform assigned work; and
  - “(2) Has limited or restricted means for entry or exit (for example, tanks, vessels, silos, storage bins, hoppers, vaults, and pits are spaces that may have limited means of entry.); and
  - “(3) Is not designed for continuous employee occupancy.”
- (29 CFR 1910.146[b])

As described in the training manuals entered into evidence, confined spaces pose special hazards for employees because of their configuration and the difficulty in protecting entrants from serious hazards, such as toxic, explosive or asphyxiating atmospheres. The requirements include testing the space prior to entry to determine atmospheric conditions. Any confined space which has the potential of having a hazardous atmosphere is a permit-required confined space (29 CFR 1910.146[b]).

Among the general requirements for employers are: evaluation of the workplace to determine if any spaces are permit-required confined spaces (1910.146[c][1]); “if the workplace contains permit spaces, the employer shall inform exposed employees, by posting danger signs or by another equally effective means, of the existence and location of and the danger posed by the permit spaces” (1910.146[c][2]); “if the employer decides that its employees will not enter permit spaces, the employer shall take effective measures to



prevent its employees from entering the permit spaces and shall comply with [other conditions]" (1910.146[c][3]).

The training manuals emphasize the hazards and give examples of possible fatalities from entering into confined spaces. As stated above, the first example mirrors the events of this case and involve the death of a maintenance worker and a potential rescuer who entered an oxygen deficient atmosphere.

### 3. Definition of Willful Violation

"Willful violation" is defined in the New York regulations at 12 NYCRR 830.2(k):

"Willful violation means a violation of a safety and health standard, provision, or regulation, where evidence shows either an intentional and knowing violation of the standard, provision, or regulation or plain indifference to the requirements of such standard, provision or regulation, as further defined below.

"(1) An intentional and knowing violation occurs when:

"(i) the employer was aware of the requirements of the standard, provision, or regulation was also aware of the existence of a condition or practice in violation of such requirement, and made little or no effort to correct the violation; or

"(ii) the employer was not aware of the requirements of Labor Law, section 27-a or of the regulations promulgated under Labor Law, section 27-a, but was aware of a comparable legal requirement (e.g., other state law or local law) and was also aware of a condition or practice in violation of that requirement.

"(2) A violation in plain indifference to the requirements of a standard, provision, or regulation occurs where:

"(i) the employer's higher management was aware of a requirement applicable to their operations but made little or no effort to communicate the requirement to lower level supervisors and employees; or

"(ii) management was aware of a continuing compliance problem but made little effort to avoid violations; or

"(iii) management was not aware of any legal requirement but was aware that a condition or practice was hazardous to the safety or health of employees and made little or no effort to determine the extent of the problems or to take corrective action; or

‘(iv) finally, particularly flagrant situations, willfulness can be found despite a lack of knowledge of either a legal requirement or of the existence of a hazard if the circumstances show that the employer would have placed no importance on such knowledge even if it had possessed it.’

Although federal OSHA provides for “willful violations” under 29 USC Section 666, it does not define the term “willful.” However, “courts have unanimously held that a willful violation of the [OSH] Act constitutes ‘an act done voluntarily with either an intentional disregard of, or plain indifference to, the [OSH] Act’s requirements.’” (See, e.g. *Ensign-Bickford Co. v Occupational Safety & Health Review Comm’n*, 717 F2d 1419, 1422 [DC Cir 1983]).

Whether a violation is willful or not is a fact-based inquiry. (*National Engineering & Contracting Co. v Herman*, 181 F3d 715 [6<sup>th</sup> Cir 1999]). “A showing of evil or malicious intent is not necessary to establish willfulness.” (Rabinowitz, ABA Section of Labor and Employment Law, Occupational Safety and Health Law at 226 [2d ed 2003] [citations omitted]). While a showing of a good faith belief that the safety standard was complied with is a defense to willfulness, “good faith efforts to comply must be objectively reasonable.” *Id.* at 70 (2004 Supplement). “Minimal efforts will not suffice.” *Id.* at 229. Willful violations may also be based on imputed knowledge and willful actions of a company’s officer or other supervisory personnel. (See, e.g. *A.E. Staley Mfg Co. v Secretary of Labor*, 295 F3d 1341, 1347-48 [DC Cir 2002]; *Caterpillar Inc. v Occupational Safety and Health Review Comm’n*, 122 F3d 437 [7<sup>th</sup> Cir 1997]). In addition, a prior warning or citation may be part of a willfulness analysis, but is not a necessary element of willfulness. (*National Steel and Shipbuilding Co. v Occupational Safety and Health Review Comm’n*, 607 F2d 311 [9<sup>th</sup> Cir 1979]). “If an employer knowingly permits a serious hazard to exist, it has acted willfully even if the workplace is otherwise safe.” (*Valdak Corp. v Occupational Safety and Health Review Comm’n*, 73 F3d 1466, 1469 [8<sup>th</sup> Cir 1995]). An employee’s unforeseeable misconduct will also not establish a defense to willfulness unless the employer can prove “it had a work rule in place which implemented the standard and that it communicated and enforced the rule.” *Id.*

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

### 1. The Finding that Citation 1, Item 1 was a Willful Violation is Affirmed.

#### “Citation 1 Item 1 Type of Violation: **Willful – serious**”

“29 CFR 1910.146(c)(3): If the employer decides that its employees will not enter permit spaces, the employer shall take effective measures to prevent its employees from entering the permit spaces and shall comply with paragraph (c)(1), (c)(2), (c)(6), and (c)(8) of this section.”

Under the New York definition of willful violation, an intentional and knowing violation occurs when the employer is aware of the requirements and makes little or no effort to correct the violation. (12 NYCRR 830.2[k][1][i]). Tarrytown had knowledge of

this standard. Both McGarvey and Weaver took the 2007 training which contained a complete text of the standard and included examples of the hazards and how to comply. Although McGarvey, whom Tarrytown admits is higher management<sup>2</sup>, believed that Tarrytown was in compliance because no one went into confined spaces or manholes, this was not a good faith belief. First of all, there are the employee statements that, at the time, they were entering manholes. There were manholes into the sewer and confined spaces where the water meters were read. Statements from Ramirez and Ralph, a meter reader, that it was sometimes necessary to enter the manholes for maintenance or repair is credible. In addition, when Ramirez entered the manhole on September 3, 2010 to take a picture of the storm drain in the presence and at the direction of Weaver, no extra precautions or procedures were taken and when Blau was made aware of the entry into the manhole, he took no action.

McGarvey testified that he told the employees at the training in 2007 never to enter confined spaces but his testimony was equivocal and he was not sure if he told the employees or Weaver told them. There was no evidence that this instruction was ever repeated to the employees between 2007 and 2010. The employees' statements were consistent in that no one ever told them not to go into confined spaces and/or manholes. Therefore, it must be concluded that little or no effort was made to effectively communicate to the employees they should not enter manholes or any confined spaces. This also fits the definition of willful violation under the rubric of "plain indifference to the requirements of a standard" (12 NYCRR 830.2 [k] [2][i]).

Given the potential hazards of the situation, as illustrated by the incidents here, and the specifics contained in the standard on how to effectively communicate the standard to the employees, such as signs and a written policy, under either standard of intentional disregard or plain indifference to the standard, Tarrytown was properly charged with a willful violation of this standard by failing to effectively prevent employees from entering into confined spaces.

## 2. The Finding that Citation 1, Item 2 was a Willful Violation is Affirmed

### "Citation 1 Item 2 Type of Violation: **Willful – serious**

"29 CFR 1910.146 (c)(4): The employer failed to develop and implement a written permit required confined space program that complies with this section for employees entering permit spaces. A written permit required confined space program identifies and evaluates the hazards of permit spaces before employees enter them; develops means, procedures and practices for safe permit space entry; evaluate permit space atmospheric conditions and training on working in permit spaces."

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<sup>2</sup> "Higher Management" has not been defined by any of the parties. Given the fact that Weaver supervised 30 employees, was responsible for day to day operations, was designated to represent the employer during the PESH investigation in 2007, was number two man in the DPW, and employees were told to report safety violations to him, there was sufficient evidence to find that Weaver also was higher management.

By stipulation of the parties, this Citation item is based on the entry into the manhole of the firefighters John Kelly, Gasparre and Santario. Tarrytown's main defense against this citation is that the village has no control over the Fire Department. It agrees that the Fire Department like the village had no written permit- required confined space program but maintained that firefighters do not go into confined spaces. In the incident at hand, all three of these firefighters entered the confined space. Kelly entered without any testing for hazards, to rescue Ruggiero.<sup>3</sup> Weaver was prepared to enter as well. Gasparre and Santario entered the space after the atmosphere had been tested but the manner in which they entered the space violated the standards. They were not attached to the tripod and their breathing apparatus was lowered in after them.

Although Fire Chief Saracelli said that the firefighters do not go into confined spaces, he also testified that the firefighters were first responders who went to situations before the trained rescue teams arrived. He admitted that the firefighters were not properly trained to go into confined spaces and yet they had the equipment and had no hesitation in using it and no one stopped them during the prolonged operation. The Board, therefore, finds that the Village through its officials was aware of the standard and the violation was willful.

Tarrytown maintains that it cannot be cited for the violations committed by its Fire Department because it cannot control it. However, the village pays for the department's budget, supplies it with equipment and buildings. There are no paid employees of the Fire Department. (*See Hudacs v Village of Watkins Glen*, 208 AD2d 181 [3d Dept 1995] [citations for violation of the PESH act must be served on principal village official and not highest official of the Fire Department] and *Hartnett v Ballston Spa*, 152 AD2d 83 [3d Dept 1989] [volunteer firefighters are "employees" under PESH]).

Although the Fire Department's By-Laws and Constitution provides that the fire companies shall be governed thereby, it also provides that the By-Laws and Constitution "shall not conflict with New York State law" (Article 2, Section 2). In addition, Article 11, Section 1 provides that any provision that is inconsistent with State, Village or Membership Cooperation Law "shall be null and void." Article 14 provides that all "drivers of the Village of Tarrytown Fire Department" must be approved by the Board of Trustees of the Village of Tarrytown. In addition, New York State Village Law § 10-100 provides that the general powers of the board of fire commissioners of a village is subject to the approval of the board of trustees. New York Not-For-Profit Corp Law § 404(f) provides that the certificate of incorporation of a fire corporation shall be endorsed by the authorities of the village in which it proposes to act. New York Not-For-Profit Corp. Law § 1402 provides that a fire corporation shall be under the control of the village having control over the prevention of fires. Thus, while the Village of Tarrytown Fire Department has some autonomy over governance, it is still subject to the control of the Village.

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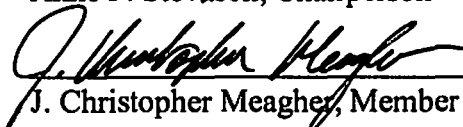
<sup>3</sup> According to the Compliance Training Manuals, most of the deaths due to entry into permit required confined spaces are suffered by would-be rescuers.

**NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:**

1. The Determination is hereby affirmed; and
2. The Petition is denied.



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Anne P. Stevason, Chairperson

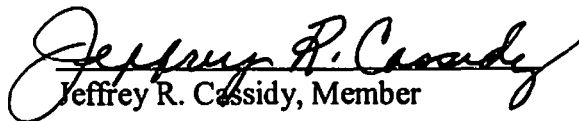


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J. Christopher Meagher, Member



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Jean Grumet, Member

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LaMarr J. Jackson, Member



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Jeffrey R. Cassidy, Member

Dated and signed in the Office  
of the Industrial Board of Appeals  
at New York, New York, on  
February 6, 2013.

**NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:**

1. The Determination is hereby affirmed; and
2. The Petition is denied.

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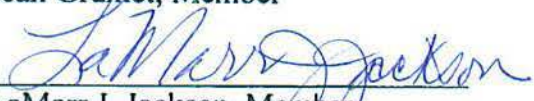
Anne P. Stevason, Chairperson

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J. Christopher Meagher, Member

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Jean Grumet, Member



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LaMarr J. Jackson, Member

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Jeffrey R. Cassidy, Member

Dated and signed by a Member  
of the Industrial Board of Appeals  
at Rochester, New York, on  
February 14, 2013.