

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

IN THE MATTER OF THE EMPLOYES OF :
 :
 : PERA-U-15-191-W
 : (PERA-R-89-686-W)
WILKINSBURG BOROUGH :

FINAL ORDER

Service Employees International Union, Local 668 (SEIU) filed timely exceptions on February 1, 2016 with the Pennsylvania Labor Relations Board (Board) to a Proposed Order of Unit Clarification and Dismissal issued on January 11, 2016.¹ In its exceptions, SEIU challenges the Hearing Examiner’s determination that a Code Enforcement Officer for Wilkensburg Borough (Borough) is a management level position and therefore is excluded from the bargaining unit of employees certified by the Board at PERA-R-89-686-W.² On February 18, 2016, the Borough filed a timely response to the exceptions. Based on the testimony and evidence presented at a hearing held on October 8, 2015, the Hearing Examiner made Findings of Fact which are summarized as follows.

The Borough has a Code Enforcement Department to enforce Borough ordinances relating to: Brush, Grass and Weeds; Unsafe Buildings; Graffiti; Public Nuisances; Occupancy Permits; Streets and Sidewalks; and Rental Properties. (FF 5). There are four Code Enforcement Officers. (FF 3). The chain of command in the Borough’s Code Enforcement Department is as follows. The Code Enforcement Officers report to the Administrative Assistant, who reports to the Code Enforcement Director, who in turn reports to the Borough Manager. (FF 4). Code Enforcement Officers spend approximately 75% of their time in the field inspecting properties throughout the Borough for violations of Borough ordinances, and issuing notices of violations to property owners.³ (FF 3).

Borough ordinances provide that the Borough shall issue occupancy permits for residences in the Borough prior to anyone occupying a structure. The current practice in the Borough is that Code Enforcement Officers sign off on occupancy permits without direction from the Borough Manager, Code Enforcement Director, or Administrative Assistant. (FF 7).

There is also a Borough ordinance concerning unsafe buildings, which provides that a Code Enforcement Officer has the authority to order an owner of a property to remove a dangerous structure as a public nuisance. If the property owner does not comply with the order of the Code Enforcement Officer, the Code Enforcement Officer has the power under the unsafe building ordinance to demolish the unsafe structure at the owner’s expense. (FF 6).

As part of their normal job duties, Code Enforcement Officers inspect properties in the Borough for compliance with the Property Maintenance Ordinance and the International Property Maintenance Code (IPMC). Code Enforcement Officers are alerted to possible violations either by their own observation or by a citizen’s complaint submitted to the Borough. As part of the inspection process, Code Enforcement Officers will consult a prepared checklist of enforcement issues. (FF 8 and 9). In determining whether a

¹ SEIU’s exceptions are timely because the twentieth day following issuance of the Hearing Examiner’s Proposed Order of Unit Clarification and Dismissal was a Sunday and is therefore excluded from the computation of the twenty-day period for filing exceptions. 34 Pa. Code §95.100(b).

² The Hearing Examiner also dismissed the Borough’s Petition for Unit Clarification to the extent that it sought to exclude Code Enforcement Trainees and Building Inspectors from the bargaining unit because no evidence was offered at the hearing to support exclusion of those positions from the unit. No exceptions were filed to that portion of the Proposed Order of Unit Clarification and Dismissal. 34 Pa. Code §95.98(a)(3).

³ Code Enforcement Officers spend approximately 25% of their time in the Code Enforcement Department performing office support, including clerical work, and catching up on their case files. (FF 3).

property is in violation of Borough ordinances, Code Enforcement Officers are interpreting the Property Maintenance Ordinance and the IPMC. (FF 12).

When a Code Enforcement Officer finds a violation of an ordinance or the IPMC, the Code Enforcement Officer drafts a notification letter which describes the violation and sends the letter to the property owner. (FF 9). The notification letter normally instructs the property owner that he or she has ten days to respond and discuss remediation of the violation. If the property owner does not ultimately comply with the requirements set forth in the notification letter, the Code Enforcement Officer may file a private criminal complaint with the District Magistrate for failure to repair or remedy an ordinance violation. (FF 10). Code Enforcement Officers do not need permission from the Borough to file private criminal complaints. Code Enforcement Officers have the authority and independence to prosecute violations in their discretion, and testify before the Magistrate Judge in order to further prosecute their complaints. (FF 10 and 11). Additionally, Code Enforcement Officers have the authority to appeal a District Magistrate decision to the Court of Common Pleas. (FF 11).

Based on the testimony and evidence presented, the Hearing Examiner found that the duties of the Code Enforcement Officers include responsibly implementing the employer's policies through enforcement of Borough ordinances sufficient to render them management level employees under Section 301(16) of PERA. Relying on Board case law in **Horsham Township**, 9 PPER ¶ 9157 (Order and Notice of Election, 1978), **Employees of Lower Providence Township**, 16 PPER ¶ 16117 (Final Order, 1985), **Derry Township v. PLRB**, 36 PPER 166 (Final Order, 2005), and **Municipal Employees of Borough of Slippery Rock v. PLRB**, 40 PPER 64 (Proposed Order of Unit Clarification, 2009), 40 PPER 122, (Final Order, 2009), *aff'd* 14 A.3d 189, (Pa. Cmwlth. 2011), the Hearing Examiner concluded that the Borough's Code Enforcement Officers should be excluded from the certified bargaining unit as management level employees.

On exceptions, SEIU argues that the Hearing Examiner erred in finding that the Code Enforcement Officers have the authority under the Borough's Unsafe Building Ordinance to order a property owner to remove or demolish a dangerous structure. SEIU asserts that Section 110 of the IPMC vests that authority exclusively with the Borough's "Code Official", which SEIU contends would be the Borough's Code Enforcement Director, not the Code Enforcement Officers.

Notably, contrary to SEIU's argument, Section 103.3 of the IPMC permits appointment of "deputies" who have all powers delegated by the "code official". (Borough Exhibit 2). Further, the Hearing Examiner's finding that the Borough's Code Enforcement Officers have authority to order the demolition of a property (FF 6), is supported by substantial evidence of record. Chapter 125 of the Borough's Ordinances govern unsafe buildings, and provides at §125-3 that "[a]ll unsafe or dangerous structures within the Borough are hereby declared to be public nuisances and shall be repaired, vacated and/or demolished pursuant to the report and order of the Code Enforcement Officer." (Borough Exhibit 1). Also, Director of Code Enforcement Eric Parrish testified regarding Chapter 125 of the Borough's Ordinances as follows:

Q. Section 125-5 and 125-6, it refers to demolition; can you describe what this provides for?

A. This provides a mechanism for the officer that if they feel that the unsafe building needs to be removed, it gives them the authority to order a property owner to remove the said structure and – from the instances that they found. You know, it could be unsafe, dilapidated, not maintained.

Q. Does it give power to the officer to demolish the dangerous structure himself at the owner's cost if the owner won't comply?

A. It does, yes.

(N.T. 9). Accordingly, SEIU's first exception to Finding of Fact 6 is dismissed.

In exceptions 2 through 4, SEIU argues that the Code Enforcement Officers do not interpret the Borough Ordinances or IPMC in the course of inspecting properties. Specifically, SEIU argues that the Code Enforcement Officers use a preprinted checklist to identify those inspection items that are satisfied. SEIU asserts that there is a standardized form letter for those items that do not pass inspection. SEIU argues that if a property violates the Borough's Ordinances, any citizen may file a private criminal complaint. Therefore, the fact that the Code Enforcement Officers may also file such complaints does not render them management level employees. Further, SEIU claims that there is no evidence that Code Enforcement Officers have authority to appeal a District Magistrate's decision to the Court of Common Pleas. Thus, SEIU argues that the Code Enforcement Officers do not exercise independent policy decision-making authority for the Borough and therefore they cannot be management level employees under Section 301(16) of PERA.

Section 301(16) of the Act defines management level employee as "any individual who is involved directly in the determination of policy or who responsibly directs the implementation thereof and shall include all employees above the first level of supervision." 43 P.S. §1101.301(16). The Board has read Section 301(16) as creating a three part, disjunctive test to determine whether an employee is a management level employee. **Commonwealth of Pennsylvania (Attorney Examiners)**, 12 PPER ¶ 12131 (Final Order, 1981). A management level employee is (1) any individual who is involved directly in the determination of policy; (2) any individual who directs the implementation of policy; or (3) any employee above the first-level of supervision. **Id.** 12 PPER at 203. In **Horsham Township**, 9 PPER ¶ 9157 (Order and Notice of Election, 1978), the Board explained the implementation of policy as follows:

We interpret [the implementation of policy] 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.

Horsham Township, 9 PPER at 327; **Derry Township**, 36 PPER 166 (Final Order, 2005). The Board and the courts have further clarified this element in holding that "[a]n employee is directly involved in the implementation of policy if he or she ensures that the policy is fulfilled by concrete measures." **Municipal Employees of Slippery Rock**, 14 A.3d at 192. Thus, "in order to be considered a management level employee, the employee must be responsible for not only monitoring compliance with a policy, but also for taking action in situations where noncompliance is found." **Id.**; **Construction General Laborers and Material Handlers Union v. PLRB**, No. 391 C.D. 2011, *unreported* (Pa. Cmwlth. 2011).

The Hearing Examiner found that the duties of the Borough's Code Enforcement Officers satisfy the implementation of policy prong of the test for management level employee. Specifically, the Hearing Examiner found that the Code Enforcement Officers inspect Borough properties for compliance with Borough ordinances and the IPMC. (FF 9). Code Enforcement Officers determine whether a structure on property within the Borough is in an unsafe condition, and may demolish the structure if necessary. (FF 6). Further, Code Enforcement Officers issue notices to property owners instructing them to respond to the Code Enforcement Officer and discuss remediation of a violation of the Borough's Ordinances. If the property owner does not ultimately comply with the notification of violation, the Code Enforcement Officer may file a private criminal complaint with the District Magistrate for failure to repair or remedy an ordinance violation. (FF 10). Code Enforcement Officers have the authority and independence to prosecute violations of the Borough Ordinances in their discretion. (FF 11).

The fact that the Code Enforcement Officers may use a preprinted checklist to assist in their inspection of properties does not diminish the fact that the Code Enforcement Officers must make an

independent judgement as to whether the item inspected on the list meets the criteria under the Borough's Ordinances. Additionally, while any citizen may also file a private criminal complaint for a violation of a Borough Ordinance, not every citizen has the authority to discuss remedial measures with the property owner and amicably resolve alleged violations of the Borough's Ordinances. Although the record contains no direct evidence that a Code Enforcement Officer has appealed a District Magistrate's decision to the Court of Common Pleas, the record fully supports the Hearing Examiner's finding that the Code Enforcement Officers interpret the Borough's Ordinances and the IMPC when issuing notices of violations, discussing and resolving violations of Borough Ordinances with property owners, and prosecuting unresolved violations of Borough Ordinances by filing private criminal complaints with the District Magistrate. The Board and the courts have consistently held that performance of similar duties evidencing interpretation of municipal ordinances and exercise of discretion in ensuring compliance with such ordinances constitutes the implementation of employer policies and satisfies the test for a management level employe under PERA. **Horsham Township, supra.**; **Derry Township, supra.**; **Municipal Employees of Slippery Rock, supra.** SEIU's argument to the contrary ignores the nearly forty years of Board and court precedent directly on point that uniformly holds that code enforcement officers are management level employes under PERA.

In its final exception, SEIU argues that the Code Enforcement Officers, at best, exercise technical expertise when inspecting properties. As such, SEIU claims that the Code Enforcement Officers may be professional employes under 301(7), but are not management level employes under Section 301(16) of PERA. However, in **Horsham Township**, the Board stated as follows:

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 Township, 9 PPER at 327. The Borough's Code Enforcement Officers do not merely define the problem by finding properties in the Borough that violate Borough Ordinances, but also implement proposed solutions by providing notice to the property owner of the violation, discussing remedial action with the property owner, ordering the demolition of a structure, and if necessary, filing a private criminal complaint. Thus, the Code Enforcement Officers' enforcement of the Borough's Ordinances and the IMPC are not merely the application of technical expertise, but constitute the effective implementation of Borough policy. **Horsham Township, supra.**; **Derry Township, supra.** Accordingly, after a thorough review of the exceptions and all matters of record, the exceptions filed by SEIU shall be dismissed and the Proposed Order of Unit Clarification and Dismissal shall be made final.

ORDER

In view of the foregoing and in order to effectuate the policies of the Public Employe Relations Act, the Board

HEREBY ORDERS AND DIRECTS

that the exceptions filed by Service Employes International Union, Local 668 are hereby dismissed, and the January 11, 2016 Proposed Order of Unit Clarification and Dismissal, be and hereby is made absolute and final.

SEALED, DATED and MAILED at Harrisburg, Pennsylvania pursuant to conference call meeting of the Pennsylvania Labor Relations Board, L. Dennis Martire, Chairman, Robert H. Shoop, Jr, Member, and Albert Mezzaroba, Member this seventeenth day of May, 2016. The Board hereby authorizes the Secretary of the Board, pursuant to 34 Pa. Code 95.81(a), to issue and serve upon the parties hereto the within order.