

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

IN THE MATTER OF THE EMPLOYES OF :
: :
: PERA-U-16-56-E
: (PERA-R-93-717-E)
EXETER TOWNSHIP :

PROPOSED ORDER OF UNIT CLARIFICATION AND DISMISSAL

On March 9, 2016, Exeter Township (Township or Employer) filed a Petition for Unit Clarification with the Pennsylvania Labor Relations Board (Board) seeking to exclude the following three positions from a unit of non-professional employees, certified by the Board at Case No. PERA-R-93-717-E, as management level employees: (1) Building Code Official; (2) Zoning Officer / Assistant Code Enforcement Officer (Zoning Officer); and (3) Code Enforcement / Assistant Zoning Officer (Code Enforcement Officer).

On March 29, 2016, the Secretary of the Board issued an Order and Notice of Hearing, assigning the matter to conciliation, and designating July 13, 2016, in Harrisburg, as the time and place of hearing, if necessary.

The hearing was necessary. After a continuance, a hearing was held on July 7, 2016, in Harrisburg, 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 Township filed a post-hearing brief in support of its position on August 29, 2016. Teamsters Local No. 429 (Association or Union) filed a post-hearing brief in opposition to the Petition on October 5, 2016.

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

FINDINGS OF FACT

1. The Township is a public employer within the meaning of PERA. (N.T. 3).
2. The Association is an employe organization within the meaning of PERA. (N.T. 3).
3. The position of Zoning Officer is currently unfilled. The previous Zoning Officer was discharged in April, 2016. (N.T. 9).
4. The Building Code Official is currently staffed by Gregg Koontz. (N.T. 12).
5. The Building Code Official enforces Pennsylvania's Building Code within the Township and is the sole person who is authorized to issue building permits in accordance with the statewide Building Code. Additionally, the Building Code Official performs building and plumbing inspections, responds to complaints, inspects existing buildings for code compliance, issues notices of non-compliance, and institutes enforcement actions as necessary. The Building Code Official uses independent judgment and discretion when performing these tasks. (N.T. 10-12, 23).
6. If a contractor was not performing work in accordance with the Uniform Construction Code, the Building Code Official could issue a stop work order and require the contractor to provide either revised plans or to make corrections to the improperly constructed work. (N.T. 12).
7. Pursuant to the Township's adopted Building Code, the Building Code Official has the duty to enforce the Building Code by interpreting the Building Code, reviewing and approving applications for permits under the Building Code, issuing permits under the Building Code, issuing notices to ensure compliance under the Building Code, and perform inspections to ensure compliance under the Building Code. (N.T. 13; Township Exhibit 5, Section 104).

8. Pursuant to the Township's adopted Building Code, the Building Code Official has the duty to issue notices of violation for any building or construction that is in violation with the Building Code. Further, the Building Code official has authorization to request an enforcement action for continuing violations. The Building Code Official may also order the removal or termination of unlawful occupancy of a building or structure. Additionally, the Building Code Official is authorized to issue stop work orders when he or she finds any work that violates the Building Code or is dangerous or unsafe. (N.T. 13, 24; Township Exhibit 5, Sections 114-115).

9. The Code Enforcement Officer is currently staffed by Linda Seltzer. (N.T. 19).

10. The Code Enforcement Officer investigates complaints and issues notices of violation and citations in accordance with the Township's adopted Property Maintenance Code. The Code Enforcement Officer also files complaints with the local District Magistrate for violations. The Code Enforcement Officer appears in Court to provide testimony as required. The Code Enforcement Officer exercises her own judgment when interpreting the Township's codes, when issuing citations, and when filing complaints with the District Magistrate. (N.T. 19-21, 23; Township Exhibit 7).

DISCUSSION

The Township petitioned to remove as management level employees the positions of: (1) Building Code Official; (2) Zoning Officer; and (3) Code Enforcement Officer.

Section 301 of PERA states:

(16) "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). This section of PERA has been interpreted by the Board and our Courts. A position is at the management level if the employe holding that position (1) is involved directly in the determination of policy; (2) directs the implementation of policy; or (3) is above the first level of supervision. **Pennsylvania Association of State Mental Hosp. Physicians v. PLRB**, 554 A.2d 1021 (Pa. Cmwlth. 1988); **Commonwealth of Pennsylvania (Attorneys Examiner I)**, 12 PPER ¶ 12131 (Final Order, 1981). With regard to the "implementation of policy" section of the definition of management level employe, the definition includes 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 ensure completion of the task. **Horsham Township**, 9 PPER ¶ 9157 (Order and Notice of Election, 1978).

The Board has consistently held that code enforcement officers and similar positions are management level employees due to the performance of duties that would fall under the second part of Section 301(16) since they are responsibly implementing the employer's policies. See **Horsham Township, supra**; **Employes of Lower Providence Township**, 16 PPER ¶ 16117 (Final Order, 1985); **Derry Township v. PLRB**, 36 PPER 166 (Final Order, 2005); **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); **Wilksburg Borough**, 47 PPER ¶ 108 (Final Order, 2016). Specifically, in **Horsham Township**, the Board concluded that:

. . .a code enforcement officer met the policy implementation portion of the test for management level status because he was required to interpret the various codes and regulations in accepting or rejecting applications under the township's building, housing

and zoning codes, and demanding that corrections be made after inspecting construction sites.

Horsham Township, supra. Additionally, in **Slippery Rock**, the Commonwealth Court held that code enforcement officers are management level employees where "the evidence establishes that the code enforcement officer accepts or denies permit applications, conducts inspections, issues citations and presents enforcement actions to the local magistrate." 14 A.3d at 193. The Board's policy is that the use of independent judgment and discretion by the employee when implementing the employer's policies is necessary to satisfy the second prong of the statutory test for management level employee under Section 301(16) of PERA. **Horsham Township, supra; 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 A3d 189 (Pa. Cmwlth. 2011); **In the Matter of the Employees of Pottstown Borough**, 44 PPER ¶43 (Proposed Decision and Order 2012).

Upon the record in this matter, it is clear that the Building Code Official and Code Enforcement Officer are management level employees pursuant to Board precedent. Indeed, in its brief, the Association concedes that the Township has presented sufficient evidence to support the removal of the Building Code Official and Code Enforcement Officer from the bargaining unit. (Association's Brief at 2).

Addressing the Building Code Official, the record in this matter clearly shows that the Building Code Official enforces Pennsylvania's Building Code within the Township and is the sole person who is authorized to issue building permits in accordance with the statewide Building Code. Additionally, the Building Code Official responds to complaints, inspects existing buildings for code compliance, issues notices of non-compliance, and institutes enforcement actions as necessary. The Building Code Official has the duty to issue notices of violation for any building or construction that violate the Building Code. Further, the Building Code official has authorization to request an enforcement action for continuing violations. The Building Code Official may also order the removal or termination of unlawful occupancy of a building or structure. Additionally, the Building Code Official is authorized to issue stop work orders when he or she finds any work that violates the Building Code or is dangerous or unsafe. The Building Code Official exercises his independent judgment when performing these tasks. Thus, by using his independent judgment and discretion to conduct inspections for compliance, issue or deny permits, and enforce matters of non-compliance, I conclude that the Building Code Official is a management level employee pursuant to PERA.

Addressing the Code Enforcement Officer, the record in this matter clearly shows that the Code Enforcement Officer investigates complaints and issues notices of violation and citations in accordance with the Township's adopted Property Maintenance Code. The Code Enforcement Officer also files complaints with the local District Magistrate for violations. The Code Enforcement Officer appears in Court to provide testimony as required. The Code Enforcement Officer exercises her own judgment when interpreting the Township's codes, when issuing citations, and when filing complaints with the District Magistrate. Thus, by using her independent judgment and discretion to investigate complaints, interpret the Township's Codes, issue notices of violation and citations, and file enforcement complaints with the District Magistrate, I conclude that the Code Enforcement Officer is a management level employee pursuant to PERA.

Addressing the position of Zoning Officer, the Association argues that the Township failed to satisfy its evidentiary burden to support a conclusion that the position should be removed from the bargaining unit. A party seeking to exclude a position from a bargaining unit has the burden of proving by substantial evidence that the statutory exclusion applies. **Westmoreland County**, 991 A.2d 976, 980 (Pa. Commw. Ct. 2010). The Board reviews actual job duties and will only consider written job descriptions to corroborate testimony of actual duties. **Id.; Lower Mount Bethel Township**, 22 PPER ¶ 22008 (Final Order, 1990). The Township in this matter relied upon the testimony of its current Township Manager, John Granger (Granger). Granger began working for the Township in May, 2016. The position of Zoning Officer has been unfilled since April, 2016, when the then Zoning Officer was terminated. Therefore, Granger never observed the Zoning Officer

performing his or her duties and has no personal knowledge of what duties the Zoning Officer performed. (N.T. 15, 26). In addition to the testimony of Granger, the Township presented corroborating evidence in the form of a job description (N.T. 14, Township Exhibit 5), testimony which describes Township ordinances relating to the Zoning Officer (N.T. 16-18), as well as testimony that zoning officer job duties "are standard across the state" (N.T. 16). This evidence could have been used to corroborate testimony of actual duties, however the Township did not provide any evidence as to the actual job duties of the Zoning Officer. Thus, the Township's petition with regard to the Zoning Officer will be dismissed for lack of evidence pursuant to Board precedent.

CONCLUSION

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

1. The Township is a public employer within the meaning of Section 301(1) of PERA.
2. The Association is an employe organization within the meaning of Section 301(3) of PERA.
3. The Board has jurisdiction over the parties.
4. The Building Code Official position is a management level employe and therefore is properly excluded from the bargaining unit.
5. The Code Enforcement / Assistant Zoning Officer position is a management level employe and therefore is properly excluded from the bargaining unit.
6. The Zoning Officer / Assistant Code Enforcement Officer position is not a management level employe and is properly included in the bargaining unit.

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 of employes certified by the Board at PERA-R-93-717-E is amended to exclude the positions of (1) Building Code Official and (2) Code Enforcement / Assistant Zoning Officer as management level employes. The Petition for Unit Clarification is dismissed to the extent it seeks to exclude the Zoning Officer / Assistant Code Enforcement Officer position as a management level employe.

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 nineteenth day of October, 2016.

PENNSYLVANIA LABOR RELATIONS BOARD

STEPHEN A. HELMERICH, Hearing Examiner