

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

IN THE MATTER OF THE EMPLOYES OF :
 : PERA-U-15-227-E
 : (PERA-R-08-331-E)
UPPER ALLEN TOWNSHIP :

PROPOSED ORDER OF UNIT CLARIFICATION

On August 7, 2015, Upper Allen Township (Township or Employer) filed a Petition for Unit Clarification with the Pennsylvania Labor Relations Board (Board) seeking to exclude the following four positions from a unit of non-professional employees, certified by the Board at Case No. PERA-R-08-331-E:

- (1) Fire Marshall/Fire Inspector/Code Enforcement Officer;
- (2) MS4 Coordinator/PW Administrative Support Assistant - Public Works Department;
- (3) Assistant Zoning Officer/GIS Specialist; and,
- (4) Codes Enforcement/Zoning Officer 2.¹

On August 18, 2015, the Secretary of the Board issued an Order and Notice of Hearing, assigning the matter to conciliation, and designating October 15, 2015, in Harrisburg, as the time and place of hearing, if necessary.

The hearing was necessary. A hearing was held on October 15, 2015, 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 December 16, 2015. The American Federation of State, County and Municipal Employees (AFSCME) District Council 89 (Union) filed a post-hearing brief in opposition to the Petition on December 16, 2015.

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. 9).
2. The Union is an employe organization within the meaning of PERA. (N.T. 9).
3. Fire Marshall/Fire Inspector/Code Enforcement Officer ("Fire Marshall") is a current and vacant position in the Township. (N.T. 16; Township Exhibit B).
4. The Fire Marshall conducts inspections of properties in the Township for compliance with applicable Fire Codes, assists in the review of applications and permits under the applicable building codes and Township ordinances, and issues permits pursuant to the Fire Code as needed. More specifically, the Fire Marshall inspects all hotels, boarding houses, business places, apartments and public buildings, and generates a report on any violations or hazards found. The Fire Marshall makes initial, ongoing, and final inspections for premises for which permits have been issued to ensure compliance with the Building and Fire Codes. (N.T. 17-21; Township Exhibit B).
5. If the Fire Marshall, using his or her independent judgment, finds a fire safety hazard in one of the buildings inspected, he or she has the authority to shut the business down. When reviewing operational permits, the Fire Marshall has the independent authority to deny permits. (N.T. 18).

¹ At the hearing it was determined that the current title for this position is "Building Code Inspector". See Finding of Fact 21, below.

6. The Fire Marshall is independently responsible for evaluating buildings for fire safety and compliance with the Fire Code and determining if they are compliant before issuing Certificates of Compliance. If the Fire Marshall finds a property to be out of compliance, he or she could revoke the Certificate of Compliance and require corrective action. The Fire Marshall exercises independent judgment in deciding to issue a Certificate of Compliance. (N.T. 18-20; Township Exhibits C, D, E, F).
7. The MS4 Coordinator/PW Administrative Support Assistant - Public Works Department (MS4 Coordinator) is a position in the Township that is currently filled by Brian Rotolo. (N.T. 22, 39).
8. The MS4 Coordinator ensures compliance with the municipal separate storm water system requirements that are required by the Department of Environmental Protection. Additionally, the MS4 Coordinator has responsibilities with regard to storm water plant reviews. (N.T. 23).

9. The job description for the MS4 Coordinator is generally described as:

The [MS4 Coordinator] is responsible for performing a wide variety of tasks mainly, but not limited to the Township's MS4 requirements and the Public Works department's administrative needs. At times he/she may be asked to be solely responsible to carry out assigned tasks as the job Foreman with no supervision.

(Township Exhibit G).

10. The job description for the MS4 Coordinator contains a list of primary duties. Among these listed primary duties are:

Review plans for compliance with the Township's Storm Water Control Ordinance and other applicable storm water laws.
 Review plans for compliance with the Township's Erosion Control Ordinance and other applicable erosion control laws.
 Issue storm water permits and maintain records.
 Issue site improvement permits and maintain records.
 Inspect construction sites for compliance with the Storm Water and Erosion Control Ordinances and other related state and federal laws.
 Enforce Storm Water Control and Erosion Control Ordinances, as necessary. . . .

(Township Exhibit G).

11. The MS4 Coordinator reviews all applications for excavation and field permits and issues or denies those permits. The MS4 Coordinator conducts inspections throughout the process of construction to ensure compliance with Township ordinances. (N.T. 24).
12. The MS4 Coordinator reviews all applications for Street Cut Permits and issues or denies those permits. The MS4 Coordinator also ensures that contractors and others comply with Township ordinances to repair public streets after a construction project. (N.T. 24, 54; Township Exhibits J, K, L, M, 1).
13. The MS4 Coordinator uses his independent judgement when making determinations regarding the issuance of permits and determining compliance with Township ordinances. (N.T. 25, 54, 57, 60).
14. The MS4 Coordinator reviews permit applications for permits under the Township's storm water and erosion control ordinances. The MS4 Coordinator does

inspections to ensure that the erosion and storm water measures in place are effective. (N.T. 25, 52).

15. If an MS4 Coordinator determines that a site is not in compliance with a storm water control ordinance, he may, using his independent judgment, shut down an operation until proper storm water measures are implemented. (N.T. 25, 48-49, 61-63).
16. The MS4 Coordinator reviews post-construction review plans to ensure that a developer implements them correctly. The MS4 Coordinator uses his or her independent judgment to determine if a post-construction review plan has been complied with. (N.T. 30-31).
17. The Assistant Zoning Officer/GIS Specialist (Assistant Zoning Officer) is a position within the Township. This position is currently staffed by Michael Welt. (N.T. 31, 97).
18. The Assistant Zoning Officer reviews applications for zoning permits and also issues zoning permits. The Assistant Zoning Officer is responsible for conducting inspections to determine compliance with zoning ordinances and the property maintenance code. If the Assistant Zoning Officer finds non-compliance with the zoning ordinance or the property maintenance code, he will contact the developer to explain the issue. If there is no compliance, the Assistant Zoning Officer may issue a citation. The Assistant Zoning Officer testifies on behalf of Township before the District Magistrate if there is a hearing on the citation. The Assistant Zoning Officer employs independent judgment in these functions. (N.T. 32-33, 99-108, 110-112, 115; Township Exhibits H, U, V, 3, W, X).
19. The Assistant Zoning Officer's determinations with regard to the zoning ordinances may be appealed to the Zoning Hearing Board. The Assistant Zoning Officer presents the Township's case before the Zoning Hearing Board. (N.T. 109).
20. The Assistant Zoning Officer uses his independent judgment and discretion when determining to accept or reject a zoning permit application and enforcing the zoning ordinances and property maintenance codes. (N.T. 104, 114).
21. The Code Enforcement/Zoning Officer 2 is a position within the Township. This position is currently called the "Building Codes Inspector". It is currently staffed by Frank Grottola. The duties of the Building Codes Inspector include reviewing plans, issuing building permits, and certificates of occupancy, and conducting safety inspections to determine the safety of premises under construction. The Building Codes Inspector is also the Building Code Official for the township. (N.T. 35, 69, 73-76; Township Exhibits I, N, O, P, Q, 2).
22. The Building Code Inspector may not issue a Certificate of Occupancy if he finds that a building does not meet the minimum requirements under Township ordinances and code. (N.T. 35-36).
23. The Building Code Inspector uses his independent judgment when implementing the Township's building codes, conducting inspections, issuing stop work orders and condemnation orders, accepting permit applications, and issuing building permits and certificate of occupancy. (N.T. 36, 71, 74-76, 79-86; Township Exhibit R).
24. If the Building Code Inspector finds a site to not be in compliance with zoning ordinances, he may order a remedial action. If there is no agreement on remedial action, the resident may go to the Appeals Board. The Building Code Inspector provides testimony at the Appeals Board. (N.T. 72-73).
25. The Building Code Inspector may issue non-criminal citations for violations of the Township's ordinances and codes. The Building Code Inspector solely

represents the Township before the District Magistrate in order to prosecute such citations. (N.T. 87).

DISCUSSION

The Township petitioned to remove the positions of: (1) Fire Marshall/Fire Inspector/Code Enforcement Officer; (2) MS4 Coordinator/PW Administrative Support Assistant - Public Works Department; (3) Assistant Zoning Officer/GIS Specialist; and, (4) Codes Enforcement/Zoning Officer 2 as management level employes. At the hearing, it was determined that the current title for the Codes Enforcement/Zoning Officer 2 position is Building Code Inspector.

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 employes 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); 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). 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 a management level employe 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 employe when implementing the employer's policies is necessary to satisfy the second prong of the statutory test for management level employe 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 Employes of Pottstown Borough**, 44 PPER ¶43 (Proposed Decision and Order 2012).

Addressing the position of Fire Marshall/Fire Inspector/Code Enforcement Officer, or "Fire Marshall", the Township has presented substantial and legally credible evidence

that the Fire Marshall should be excluded from the bargaining unit as a management level employe because the duties of the Fire Marshall satisfy the second prong of Section 301(16) of PERA. The Fire Marshall conducts inspections for compliance with applicable Township fire codes and issues permits pursuant to the Fire Code as needed. The Fire Marshall may exercise his or her independent judgment to shut down a business if code violations or hazardous conditions are found during an inspection. The Fire Marshall uses his or her independent judgment and discretion in issuing or denying Fire Code related permits to businesses within the Township. Thus, by using his or her independent judgment and discretion to conduct inspections for compliance, issue or deny permits, and enforce matters of non-compliance, I conclude that the Fire Marshall is a management level employe pursuant to PERA.

Addressing the position of MS4 Coordinator/PW Administrative Support Assistant - Public Works Department, or "MS4 Coordinator", the Township has presented substantial and legally credible evidence that the MS4 Coordinator should be excluded from the bargaining unit as a management level employe because the duties of the MS4 Coordinator satisfy the second prong of Section 301(16) of PERA. The MS4 Coordinator has a variety of duties including: reviewing plans for compliance with the Township's Storm Water Control Ordinance and other applicable storm water laws; reviewing plans for compliance with the Township's Erosion Control Ordinance and other applicable erosion control laws; issuing storm water permits; issuing site improvement permits and maintain records; inspecting construction sites for compliance with the Storm Water and Erosion Control Ordinances and other related state and federal laws; and enforcing Storm Water Control and Erosion Control Ordinances. The MS4 Coordinator reviews all applications for excavation and field permits and issues or denies those permits. The MS4 Coordinator reviews all applications for Street Cut Permits and issues or denies those permits. The MS4 Coordinator uses his independent judgement in making decisions regarding the issuance of permits and determining compliance with Township ordinances. Further, if an MS4 Coordinator determines that a site is not in compliance with storm water control ordinances, he may, using his independent judgment, shut down an operation until proper storm water measures are implemented. 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 MS4 Coordinator is a management level employe pursuant to PERA.

Addressing the position of Assistant Zoning Officer/GIS Specialist, or "Assistant Zoning Officer", the Township has presented substantial and legally credible evidence that the Assistant Zoning Officer should be excluded from the bargaining unit as a management level employe because the duties of the Assistant Zoning Officer satisfy the second prong of Section 301(16) of PERA. The Assistant Zoning Officer enforces the Township zoning ordinances and property maintenance code, including reviewing applications for zoning permits, and issues or denies zoning permits. The Assistant Zoning Officer is responsible for conducting inspections to determine compliance with zoning ordinances and the property maintenance code. If the Assistant Zoning Officer finds non-compliance with the zoning ordinance and the property maintenance code, he has the independent authority to ensure enforcement including the ability to issue a citation. The Assistant Zoning Officer testifies on behalf of the Township before the District Magistrate if there is a hearing on the citation. The Assistant Zoning Officer employs independent judgment and discretion in these functions. 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 Assistant Zoning Officer is a management level employe pursuant to PERA.

Addressing the position of Building Code Inspector, the Township has presented substantial and legally credible evidence that the Building Code Inspector should be excluded from the bargaining unit as a management level employe because the duties of the Building Code Inspector satisfy the second prong of Section 301(16) of PERA. The Building Code Inspector reviews permit applications for building, plumbing, and other related codes and ordinances adopted by the Township. The Building Code Inspector inspects residential, commercial, industrial and school buildings for compliance with applicable municipal code requirements and state regulations. If, during inspection of a building project, the Building Code Inspector determines that project is not in compliance with a

building permit, the Building Code Inspector has the independent authority to stop the project. The Building Code Inspector also has the independent responsibility to issue and lift condemnation orders. If the Building Code Inspector finds a site not to be in compliance with zoning ordinances, he may order a remedial action. The Building Code Inspector may issue citations for violations of the Township's ordinances and codes and solely represents the Township before the District Justice Magistrate in order to prosecute such citations. The Building Code Inspector uses his independent judgment when implementing the Township's building codes, conducting inspections, issuing stop work orders and condemnation orders, issuing citations, and accepting permit applications and issuing building permits and certificates of occupancy. 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 Inspector is a management level employe pursuant to PERA.

The Union argues in its brief that application of the second prong of Section 301(16) of PERA ("responsibly directs the implementation" of Employer policy), should not apply to these positions because many job classifications throughout the Commonwealth, such as Pennsylvania State Troopers, Cigarette Agents, and Dog Catchers have enforcement powers and issue citations but are not managerial employes under PERA. Additionally, the Union argues that other Commonwealth positions such as Drivers License Examiners, Health Inspectors and Elevator Inspectors have the authority to issue permits but are not managerial employes under PERA. I am not authorized to refute or undermine the Board's precedent, beginning with **Horsham Township, supra**, regarding the category of employes generally known as code enforcement officers, and the Board's precedent clearly requires the removal of the positions from the bargaining unit as managerial employes on these facts.

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 Union is an employe organization within the meaning of Section 301(3) of PERA.
3. The Board has jurisdiction over the parties.
4. The Fire Marshall/Fire Inspector/Code Enforcement Officer position is a management level employe and therefore is properly excluded from the bargaining unit.
5. The MS4 Coordinator/PW Administrative Support Assistant - Public Works Department position is a management level employe and therefore is properly excluded from the bargaining unit.
6. The Assistant Zoning Officer/GIS Specialist position is a management level employe and therefore is properly excluded from the bargaining unit.
7. The Building Code Inspector position is a management level employe and therefore is properly excluded from 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-08-331-E is amended to exclude the positions of (1) Fire Marshall/Fire Inspector/Code Enforcement Officer; (2) MS4 Coordinator/PW Administrative Support Assistant - Public Works Department; (3) Assistant Zoning Officer/GIS Specialist; and (4) Building Code Inspector as management level employes.

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 3rd day of February, 2016.

PENNSYLVANIA LABOR RELATIONS BOARD

STEPHEN A. HELMERICH, Hearing Examiner