

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 :

PROPOSED ORDER OF UNIT CLARIFICATION AND DISMISSAL

On July 16, 2015, Wilkinsburg Borough (Borough or Employer) filed a Petition for Unit Clarification with the Pennsylvania Labor Relations Board (Board) seeking to exclude the positions of Code Enforcement Officer, Code Enforcement Officer trainee and Building Inspector from a unit of non-professional employees, certified by the Board at Case No. PERA-R-89-686-W.

On July 27, 2015, the Secretary of the Board issued an Order and Notice of Hearing, assigning the matter to conciliation, and designating September 14, 2015, in Pittsburgh, as the time and place of hearing, if necessary.

The hearing was necessary. After a continuance requested by the parties, a hearing was ultimately held on October 8, 2015, in Pittsburgh, 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 Borough filed a post-hearing brief in support of its position on November 19, 2015. The Service Employees International Union Local 668 (Union) filed a post-hearing brief in opposition to the Petition on December 19, 2015.

The 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 Borough is a public employer within the meaning of PERA. (N.T. 4).
2. The Union is an employe organization within the meaning of PERA. (N.T. 4).
3. There are four Code Enforcement Officers within the Borough's code enforcement department. The four Code Enforcement Officers generally perform the same job duties and experience similar working conditions and experiences. Code Enforcement Officers spend approximately 75% of their time in the field inspecting properties, finding violations, and performing notices of violations. Code Enforcement Officers spend approximately 25% of their time in the code enforcement office performing office support, including clerical work, and catching up on their case files. (N.T. 7, 29-30, 41-42, 60).
4. The chain of command in the Borough's Code Enforcement Department starts with the Borough Manager. Under the Manger is the Code Enforcement Director. Under the Director is the Administrative Assistant. Under the Administrative Assistant are the Code Enforcement Officers. (N.T. 50).
5. The Borough has enacted ordinances relating to: Brush, Grass and Weeds; Unsafe Buildings; Graffiti; Public Nuisances; Occupancy Permits; Streets and Sidewalks; and Rental Properties. (N.T. 8-13; Borough Exhibit 1).
6. The Unsafe Buildings Ordinance provides that a Code Enforcement Officer has the authority to order an owner of a property to remove a dangerous structure. The Code Enforcement Officer also has the power to demolish an unsafe structure should the owner not comply with an order. (N.T. 8; Borough Exhibit 1, pages 3-4).
7. The Occupancy Permits Ordinance provides 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 the Code Enforcement Officers sign off on occupancy permits without direction from management. (N.T. 10-11, 28, 57, 62; Borough Exhibit 1, pages 12-13; Borough Exhibit 8).

8. Pursuant to the Property Maintenance Ordinance, the Borough adopted the International Property Maintenance Code (IPMC). The Code Enforcement Officers have the duty and authority to enforce the Property Maintenance Ordinance and the IPMC. Pursuant to the Ordinance, the Code Enforcement Officers have the authority to institute summary criminal proceedings and issue citations as a means of enforcing the provisions the Property Maintenance Ordinance and the IPMC. (N.T. 12; Borough Exhibit 1, pages 14-18).
9. As part of their normal job duties, the Code Enforcement Officers inspect Borough properties for compliance with Borough ordinances and the IPMC. As part of the inspection process, the Code Enforcement Officers will consult a prepared checklist of enforcement issues. Generally, when a Code Enforcement Officer finds a violation of an ordinance or the IPMC, they will take pictures of the violation to document it. After researching the property to determine the owner and other relevant information, the Code Enforcement Officer will create a notification letter which describes the violation and send the notification letter to the property owner. Code Enforcement Officers are alerted to possible violations either by their own observation or by a citizen's complaint submitted to the Borough. (N.T. 13-17, 52; Borough Exhibit 3, pages 50-52, 54-56, 58-59, 62-64; Union Exhibit 4).
10. As part of the notification letter, the Code Enforcement Officer 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 notification of violation, the Code Enforcement Officer may write a private criminal complaint for failure to repair or remedy an ordinance violation. The Code Enforcement Officers testify before the Magistrate Judge in order to further prosecute their complaints. (N.T. 17-19, 50; Borough Exhibits 4-7).
11. Code Enforcement Officers do not need permission from the Borough to file private criminal complaints before the District Magistrate and have the authority and independence to prosecute violations in their discretion. Additionally, the Code Enforcement Officers have the authority to appeal District Magistrate decisions to the Court of Common Pleas. (N.T. 21-22, 57, 61).
12. When Code Enforcement Officers issue notices of violations and file private criminal complaints, they are interpreting the Borough's ordinances and the IPMC. (N.T. 21, 56).

DISCUSSION

The Borough petitioned to remove the positions of Code Enforcement Officer, Building Inspector, and Code Enforcement Officer Trainee from the bargaining unit as management level employees. At hearing, evidence was presented only with respect to the four Code Enforcement Officers. Therefore, the positions of Code Enforcement Officer Trainee and Building Inspector shall remain in the unit as no evidence to support the conclusion that they should be excluded from the bargaining unit as management level employees was presented by the Borough.

Addressing the position of Code Enforcement Officer, Section 301(16) 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 insure completion of the task. **Horsham Township**, 9 PPER ¶ 9157 (Order and Notice of Election, 1978).

The Board has held that a code enforcement officer is a management level employe due to the performance of duties that would fall under the second part of section 301(16) because 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 **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.

In this matter, the Code Enforcement Officers inspect properties in the Borough and interpret Borough ordinances relating to: Brush, Grass and Weeds; Unsafe Buildings; Graffiti; Public Nuisances; Occupancy Permits; Streets and Sidewalks; and Rental Properties. The Code Enforcement Officers also interpret the IPMC. While interpreting Borough ordinances and the IPMC, the Code Enforcement Officers decide when it is appropriate to issue a notice of violation to a property owner. The Code Enforcement Officers research the property and communicate with property owners regarding violations and decide whether to file a complaint against the property owner before the District Magistrate. When cases come before the District Magistrate, the Code Enforcement Officers represent the Borough as witnesses to ensure prosecution of the complaint. The Code Enforcement Officers also conduct inspections of residencies in the Borough when a resident applies for an occupancy permit and have the authority to decide whether to issue an occupancy permit. All of these factors fit the Code Enforcement Officers in this matter into the category of managerial employes defined in **Horsham Township, supra**. Following **Horsham Township**, substantial and legally credible evidence establishes that the Code Enforcement Officers are required to exercise independent judgment and observe and interpret the terms of the Borough's ordinances and adopted codes. The Code Enforcement Officers' judgements with respect to finding and enforcing violations and permit approvals are controlling. Additionally, following **Slippery Rock, supra**, substantial and legally credible evidence establishes that the Code Enforcement Officers accept or deny Occupancy Permit applications, conduct inspections, issue violation letters and complaints, and present enforcement actions to the local magistrate. I find that the Code Enforcement Officers are management level employes and thus are not properly members of the bargaining unit pursuant to PERA.

The Union urges that the Code Enforcement Officers in this matter are not management level employes and can be distinguished from Board precedent because they are the lowest ranking employees in the Code Enforcement Department and are subject to the supervision of the Borough Manager, the Director and the Administrative Assistant. However, the Board has held that a code enforcement officer who works under the supervision of a Director of Code Enforcement is a management level employe. **Swatara Township**, 14 PPER ¶ 14145.

The Union also argues that the Code Enforcement Officers are not management level employes because they receive extensive instruction and oversight. Reviewing the facts of this matter, I find that the instruction and oversight of the Code Enforcement Officers in this matter predominantly pertains to scheduling work assignments and does not touch

the crucial aspect of independent interpretation and enforcement of Borough ordinances and the IPMC. The Director does assign complaints and make other assignments to the Code Enforcement Officers however, once they are in the field, the Code Enforcement Officers have the independent duty and authority to review a property to determine if violations exist and issue violations when they deem appropriate. Additionally they are not directed and use independent judgment when they review and approve occupancy permits. In additional support of this argument, the Union introduced evidence at the hearing to establish that previously, under a different Director than is now employed by the Borough, there was a mandate that only the Code Director could issue Occupancy Permits. (N.T. 53; Union Exhibit 5). I find Union Exhibit 5 not to be relevant because that policy described in Union Exhibit 5 was not in place at the time of the hearing or at the time of the Petition. Even if Union Exhibit 5 were relevant, and even if the policy described therein were the current policy, the Code Enforcement Officers would still be managerial employes pursuant to PERA due to their job duties concerning finding and enforcing violations of Borough ordinances and codes.

CONCLUSION

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

1. The Borough 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 Code Enforcement Officer position is a management level employe and therefore is properly excluded from the bargaining unit.
5. The Building Inspector and Code Enforcement Officer Trainee positions are not management level employes and are properly included 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-89-686-W is amended to exclude the Code Enforcement Officer position as a management level employe. The Petition for Unit Clarification is dismissed to the extent it seeks to exclude the Building Inspector and Code Enforcement Officer Trainee positions 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 11th day of January, 2016.

PENNSYLVANIA LABOR RELATIONS BOARD

STEPHEN A. HELMERICH, Hearing Examiner