

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

IN THE MATTER OF THE EMPLOYEES OF :  
 :  
 : Case No. PERA-U-09-254-W  
 : (PERA-R-5284-W)  
DORMONT BOROUGH :

**FINAL ORDER**

The Construction, General Laborers and Material Handlers, Local 1058 (Union) filed timely exceptions and a supporting brief with the Pennsylvania Labor Relations Board (Board) on May 29, 2010, challenging a Proposed Order of Unit Clarification (POUC) issued on May 13, 2010. In the POUC, the Board's Hearing Examiner granted the Petition for Unit Clarification filed by Dormont Borough (Borough) and determined that a Building Inspector/Code Enforcement Officer (Code Enforcement Officer) should be excluded from the bargaining unit as a management level employe within the meaning of Section 301(16) of the Public Employe Relations Act (PERA). The Borough filed a response to the Union's exceptions and a supporting brief on June 21, 2010.

The Hearing Examiner's findings of fact are summarized as follows. Patrick Kelly is the Code Enforcement Officer for the Borough. The parties stipulated and agreed that the Code Enforcement Officer position was included in the bargaining unit by joint request when the unit was originally certified and that its inclusion in the unit was not determined through litigation. Borough Manager Gino Rizza does not possess the certifications or training for code enforcement duties as does Mr. Kelly, and he is not competent to perform those duties. When homeowners or contractors plan structural work on properties within the Borough, they must apply for a permit and provide a drawing. Mr. Kelly reviews building permit applications and drawings to determine whether proposed structures or structural modifications comply with the Borough's building code. Based on that review, he either grants or denies permits. Mr. Kelly is the only Borough employe who approves building permits.

Mr. Kelly evaluates building proposals for fire safety and sufficient egress. He also sometimes requires an architect's stamp for the proposed building plan. Mr. Kelly has the discretion to waive an architect's stamp for one and two-family dwellings if, in his discretion, the construction is minor. Applicants have been denied permits in the past by Mr. Kelly until they have modified their construction drawings to meet with Mr. Kelly's approval.

Mr. Kelly conducts building inspections to ensure that the construction conforms to the drawings submitted for permit approval. When construction has not in the past conformed to the approved drawings, Mr. Kelly has issued stop-work or correction orders. The subsequent corrections are also subject to Mr. Kelly's approval. Mr. Kelly has discretion to order contractors to cease replacing roof shingles when they have not previously obtained a permit. He has permitted contractors to complete the work in the best interest of the home and the homeowner considering weather conditions. In such a case, he would allow the contractor to obtain the permit after completion.

Mr. Kelly has ordered the stoppage of fence construction that has commenced without first obtaining a permit. Pursuant to enforcing the Borough's zoning laws, Mr. Kelly inspects single-family dwellings when they are sold to evaluate whether to issue an occupancy permit to the buyer with the deed transfer. If the dwelling does not pass his inspection, the buyer must not occupy the premises until problems are remedied. After a dwelling has been damaged by fire, Mr. Kelly reviews drawings and rebuilding plans for compliance with the building code and a permit. Mr. Kelly assesses the extent of damage and amount of rebuilding and then determines whether to waive an architect's approval stamp. Mr. Kelly inspects and reviews all new fire alarm systems under the Borough building code and issues permits for those systems.

Mr. Kelly enforces the Borough's property maintenance laws. Mr. Kelly causes citations to be issued pursuant to his code enforcement duties. He defends those

citations in court. Mr. Kelly determines whether free-standing accessory structures are sound. He orders property owners to repair unstable structures. Mr. Kelly determines whether shrubs or trees create sidewalk obstructions. He has ordered homeowners to trim their hedges and trees to remedy such obstructions.

Mr. Kelly uses his discretion in determining whether a property owner has allowed garbage, dog feces or exposed storage to accumulate to unsanitary levels, or has allowed grass or weeds to overgrow. Mr. Kelly determines whether sidewalk cracks require repairs. He also issues the permits to fix sidewalks. Mr. Kelly determines whether roofs, walls and downspouts are in sound condition; if not, he orders homeowners to make repairs. Mr. Kelly cited one homeowner because his wall was about to fall onto his neighbor's property. Mr. Kelly grants extensions of time to homeowners when requested.

Mr. Kelly determines whether a homeowner's exterior steps are in safe and sound condition. He has notified homeowners to take corrective action and has issued citations for homeowner inaction regarding unsafe steps. During the winter of 2008-2009, Mr. Kelly issued numerous snow-and ice-removal notices requiring homeowners to clear and salt their sidewalks. Mr. Kelly determines whether building plans comply with lot coverage, green space and water absorption requirements. Mr. Kelly causes citations to be issued for abandoned or junk vehicles on private property.

In the POUC, the Hearing Examiner relied on the Board's consistent precedent dating back to at least 1978 and concluded that the Code Enforcement Officer is a management level employe under PERA because he exercises independent discretion in implementing the Borough's policy. See e.g. Lower Macungie Township, 39 PPER ¶ 59 (Order Directing Submission of Eligibility List, 2008); In the Matter of the Employes of Derry Township, 36 PPER 166 (Final Order, 2005); Indiana Township, 28 PPER ¶ 28074 (Proposed Order of Dismissal, 1997); In the Matter of the Employes of Swatara Township, 14 PPER ¶ 14145 (Order Directing Submission of Eligibility List, 1983); In the Matter of the Employes of Horsham Township, 9 PPER ¶ 9157 (Order and Notice of Election, 1978). Thus, the Hearing Examiner granted the Borough's Petition for Unit Clarification and excluded the Code Enforcement Officer from the nonprofessional bargaining unit represented by the Union.

In its exceptions, the Union argues that the Hearing Examiner erred in failing to make certain findings of fact and by concluding that the Code Enforcement Officer is a management level position. In support of its position, the Union makes arguments that are nearly identical to the ones presented by the union in a recent case decided by the Commonwealth Court in which the Court affirmed the Board's determination that a Borough code enforcement officer was a management level employe under PERA. In the Matter of the Employes of Slippery Rock Borough, 40 PPER 122 (Final Order, 2009), affirmed sub nom. Municipal Employes of the Borough of Slippery Rock v. PLRB, \_\_\_ A.3d \_\_\_, No. 2444 C.D. 2009 (Pa. Cmwlth. January 26, 2011).

Section 301(16) of PERA defines management level employe as "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). The Board has held that this provision establishes a disjunctive three-part test and that an employe who satisfies any of the following three criteria is a manager: (1) either the employe is directly involved in the determination of policy; (2) the employe directly implements policy; or (3) the employe is above the first level of supervision. In the Matter of the Employes of Lower Providence Township, 16 PPER ¶ 16117 (Final Order, 1985). See also Commonwealth of Pennsylvania (Attorney Examiners), 12 PPER ¶ 12131 (Final Order, 1981).<sup>1</sup>

In this case, the Hearing Examiner determined that the Code Enforcement Officer met the second part of the test for management level status under PERA in that he directs the implementation of policy. In Horsham Township, supra, which also involved the issue of

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<sup>1</sup> As in Slippery Rock Borough, the Union in this case relies in part on cases under Act 111 of 1968, which grants collective bargaining rights to police officers and firefighters. However, Act 111 does not define a management level employe or expressly exclude such employes from collective bargaining units. Instead, the managerial exclusion under Act 111 was established by Board and appellate court caselaw. Moreover, the tests for managerial status under PERA and Act 111 developed independently, such that the Union's reliance on Act 111 caselaw is misplaced. See City of Pittsburgh v. PLRB, 536 A.2d 928 (1989), appeal denied, 522 Pa. 626, 564 A.2d 917 (1989).

whether a code enforcement officer is a management level employe, the Board explained 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.

9 PPER at 327. 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. Similarly, in Derry Township, the Board relied on Horsham Township and other Board precedent in holding that a code enforcement officer was a management level employe:

The discretion to determine the existence of an unsafe structure is the kind of discretion that is not routine or ministerial in nature and amounts to the responsible implementation of policy as outlined in Horsham Township, supra. ... The discretion to initially determine that the accumulation of rubbish on a particular property has risen to the level of a health danger in the Township is also not merely routine or ministerial in nature and would support the exclusion of the Code Enforcement Officer as a management level employe. The Board has consistently held that code enforcement officials exercising the level of discretion evident in this case meet the second part of the test for management level employe in that they are responsibly implementing the employer's policies. See Horsham Township, supra; Millersville Borough, 9 PPER ¶ 9020 (Final Order, 1978); Indiana Township, 28 PPER ¶ 28074 (Proposed Order of Dismissal, 1997); Penn Township, 15 PPER ¶ 15015 (Final Order, 1983).

Id., 36 PPER at 485.

The Commonwealth Court affirmed the Board's order in Slippery Rock Borough, supra, citing with approval the Board's decisions in Horsham Township and Derry Township and stating as follows:

In the present case, 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. Thus, the officer meets the Board's description of management employees in observing the terms of the policy and interpreting it within and without the procedures outlined in the policy. Further, in implementing policy and in taking action in situations where non-compliance is found, the code enforcement officer exercises independent discretion reflective of managerial responsibility. Based on the facts presented, and giving the deference afforded to the Board in these matters, we conclude that the Board did not act arbitrarily and capriciously in determining that Employer's code enforcement officer implements policy and, therefore, should be excluded from the bargaining unit as a management employe.

Slippery Rock Borough, slip opinion at 6.

Here, the record similarly indicates that the Code Enforcement Officer exercises the same type of discretion exercised by the code enforcement officers in Slippery Rock

Borough, Horsham Township and Derry Township and cases cited therein in interpreting the Borough's various ordinances and codes. In exercising that discretion, the Code Enforcement Officer responsibly implements the Borough's policy. Therefore, the Hearing Examiner did not err in concluding that the Code Enforcement Officer is a management level employe within the meaning of Section 301(16) of the Act.

The Union also argues that the Hearing Examiner erred by failing to make a finding of fact that: 1) the position of Code Enforcement Officer has been included in the bargaining unit for almost 35 years; 2) the material duties of the Code Enforcement Officer position have remained basically unchanged since 1974; 3) the codes that are enforced are quite specific; 4) the Code Enforcement Officer is well-versed in the various codes that he applies, which do not provide for the exercise of any significant discretion; 5) the Code Enforcement Officer does not have the authority to waive code requirements, except for minor matters which are specifically set forth in the code and he does not have the authority to deviate from code requirements; 6) the Borough contracts out the same kind of work performed by the Code Enforcement Officer with respect to commercial property; 7) the Code Enforcement Officer does not attend any Borough meetings or play any role in the budget process or in policy making, or in determining what code provisions the Borough wishes to adopt; 8) the Code Enforcement Officer does not view himself as managerial and has made it known that he wishes to remain in the bargaining unit; and 9) the current collective bargaining agreement is effective through December 31, 2010.

However, as the Board stated in Colonial Intermediate Unit 20 Education Association v. Colonial Intermediate Unit, 36 PPER 36113 (Final Order, 2005), a hearing examiner is only required to set forth those facts that are necessary to support his decision and is not required to summarize all of the evidence presented, or to make findings that are unnecessary or irrelevant, even if there is substantial evidence to support such findings. See also Page's Department Store v. Velardi, 464 Pa. 276, 287, 346 A.2d 556, 561 (1975) ("When the fact finder in an administrative proceeding is required to set forth his findings in an adjudication, that adjudication must include all findings necessary to resolve the issues raised by the evidence and which are relevant to a decision."); Ford City Borough, 19 PPER ¶ 19117 (Final Order, 1988).

Here, none of the findings proposed by the Union are necessary or relevant to the Hearing Examiner's decision. Indeed, even if the record supported the findings proposed by the Union, they would not alter the result in this case. For example, under the three-part disjunctive test for management level status under PERA, there is no requirement that an employe develop a budget to qualify as a management level employe. Evidence that an employe develops policy through preparation of a budget would be relevant to a determination of whether the employe meets the first part of the test for managerial status, but is not relevant to determining whether the employe meets the second part of the test, which is the basis for the Hearing Examiner's conclusion that the Code Enforcement Officer is a management level employe.

As to the other findings proposed by the Union, based on the testimony he accepted as credible, the Hearing Examiner concluded that the position of Code Enforcement Officer does, in fact, exercise discretion during the performance of his job. As explained above, the Commonwealth Court has found, on a similar record, that a code enforcement officer who exercises such discretion is a management level employe. Absent compelling circumstances, the Board will not reverse the credibility determinations of its hearing examiners, who are able to observe the manner and demeanor of the witnesses during their testimony. Mt. Lebanon Education Association v. Mt. Lebanon School District, 35 PPER 98 (Final Order, 2004); Hand v. Falls Township, 19 PPER ¶ 19012 (Final Order, 1987); AFSCME District Council 84 v. Department of Public Welfare, 18 PPER ¶ 18028 (Final Order, 1986). We find no compelling reason to reverse the Hearing Examiner's credibility determination in this case concerning the manner in which Mr. Kelly performs his job as Code Enforcement Officer. Therefore, the Hearing Examiner did not err by failing to make the findings proposed by the Union.

After a thorough review of the exceptions and all matters of record, the Board shall dismiss the Union's exceptions and make the Proposed Order of Unit Clarification final.

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

HEREBY ORDERS AND DIRECTS

that the exceptions filed by the Union are hereby dismissed, and the May 13, 2010 Proposed Order of Unit Clarification 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, Anne E. Covey, Member, and James M. Darby, Member, this fifteenth day of February, 2011. 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.

L. DENNIS MARTIRE, CHAIRMAN, DID NOT PARTICIPATE IN THE CONSIDERATION OR DECISION IN THIS CASE.