

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

IN THE MATTER OF THE EMPLOYES OF :
:
: Case No. PERA-U-08-446-W
: (PERA-R-89-462-W)
SLIPPERY ROCK BOROUGH :

PROPOSED ORDER OF UNIT CLARIFICATION

On November 24, 2008, Slippery Rock Borough (Borough) filed with the Pennsylvania Labor Relations Board (Board) a petition for unit clarification pursuant to the Public Employe Relations Act (PERA) seeking to exclude the position of code/ordinance enforcement officer (CEO) from the bargaining unit of nonprofessional employes as a management level employe. On December 12, 2008, the Secretary of the Board issued an Order and Notice of Hearing directing that a hearing be held on Wednesday, March 25, 2009. The hearing examiner thereafter continued the hearing at the joint request of the Borough and the Municipal Employees of Slippery Rock (Union). The parties agreed to reschedule the hearing for April 8, 2009, and the hearing was in fact held on that date. At the hearing, both parties were afforded a full and fair opportunity to present testimonial and documentary evidence and to cross-examine witnesses. On May 27, 2009, the Board received the Borough's post-hearing brief, and received the Union's post-hearing brief on June 24, 2009.

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

FINDINGS OF FACT

1. The Township is a public employer within the meaning of Section 301(1) of PERA. (N.T. 8; PERA-R-89-462-W).
2. The Union is an employe organization within the meaning of Section 301(3) of PERA. (N.T. 8; PERA-R-89-462-W).
3. The CEO position at the Borough is currently held by Jesse Hines, who has held the position for approximately eight years. Mr. Hines is certified as a residential building code inspector. (N.T. 13, 29, 53-54, 58; Employer Exhibits 4 & 5).
4. The written job description for the CEO position is an accurate representation of the actual job duties performed by Mr. Hines, with a few minor exceptions. (N.T. 16-17, 43, 54, 99-113; Employer Exhibit 1).
5. Mr. Hines applies and enforces the following Borough ordinances: Grass Ordinance, Snow Removal Ordinance, the ordinance adopting the International Building Code and State Mandated Building Codes, Zoning and Land Development Ordinance, ordinance adopting the International Property Maintenance Code (IPMC), Parking Enforcement Ordinance, Plumbing and Fire Protection Ordinance, Rental Licensing Ordinance and Garbage Ordinance. (N.T. 17, 34-35, 55, 58, 71, 100-101; Employer Exhibit 1).
6. Mr. Hines has no direct supervisor approving or reviewing his enforcement of Borough ordinances or his resulting determinations. (N.T. 17).
7. Mr. Hines has received training and receives continuing training regarding code enforcement. (N.T. 18-19).
8. Mr. Hines exercises discretion to determine whether to issue building and occupancy permits. Mr. Hines independently decides under all the codes and ordinances that he applies and enforces whether to issue citations and/or warning letters or to

pursue prosecution at the local magisterial district court. He independently determines whether to issue permits. His determinations are not subject to review or approval from any other Borough employe or official. (N.T. 23-26, 34-35, 58, 71-72).

9. As part of his routine duties to issue permits, Mr. Hines ensures compliance with zoning ordinance and building codes. Mr. Hines inspects individual lots within subdivisions. Mr. Hines reviews residential building plans before he issues permits for residential construction. Hines has required individuals to make changes to those plans to comply with Borough ordinances. Mr. Hines requires alterations to be made before he will issue the permit. (N.T. 74, 103).

10. Mr. Hines has conducted building site inspections during which he has discovered non-conforming conditions with respect to proposed building plans, and he has ordered builders to conform to the approved plans, the building code or zoning ordinance. (N.T. 75).

11. Mr. Hines has denied occupancy permits for failure of property owners to properly install certain required elements of the structure such as HVAC systems, handrails or decks. (N.T. 81-82).

12. The Borough has an ordinance prohibiting the accumulation of garbage. On October 2, 2006, Mr. Hines issued a garbage enforcement notice informing the resident that he was in violation of the garbage ordinance and demanded corrective measures with the threat of prosecution which could result in a fine of \$300. Mr. Hines enforces the garbage ordinance as part of his regular duties without guidance or approval from any other Borough employe or official. Mr. Hines is solely responsible for determining whether to prosecute garbage ordinance violations before a local magisterial court. (N.T. 28-29, 57; Employer Exhibit 6).

13. In August 2008, Mr. Hines issued permits for fence construction, a road cut, the remodeling of a single-family home and the demolition of a single-family home. (N.T. 23-24; Employer Exhibit 3).

14. In the same month, Mr. Hines enforced ordinances and issued enforcement actions for overgrown bushes and trees, the failure of a rental property owner to submit the proper rental application and fees, the existence of interior furniture on a front porch and the failure of an owner to properly maintain his building exterior. He also issued citations for garbage and long grass violations. (N.T. 25-26; Employer Exhibit 3).

15. Mr. Hines is solely responsible for and independently determines whether property owners within the Borough have violated the International Property Maintenance Code. (N.T. 27-28, 56-57; Employer Exhibit 1).

16. On October 27, 2008, Mr. Hines, under his sole discretion and inspection, issued an IPMC enforcement notice to a Borough property owner for violations regarding sanitation, deteriorated exterior walls, inadequate fire protection systems and inadequately anchored exterior stairways. (N.T. 27-28; Employer Exhibit 5).

17. On October 27, 2008, Mr. Hines issued an occupancy enforcement notice to a Borough property owner. The notice cited violations of the Borough's rental property ordinance by permitting more than the allowable number of unrelated tenants in a structure within the R-1 zoning district. The notice demanded compliance via a revised tenant list and warned that failure to comply may result in prosecution and a \$300 fine if convicted. Hines independently exercised his discretion to issue this notice without review or approval from any other Borough employe or official. (N.T. 56; Employer Exhibit 4).

18. In December 2008, Mr. Hines issued and approved permits for the remodeling of a law office, a coffee shop, a coffee bar, a fitness/rehabilitation center and a garage demolition. Hines approved these matters and issued the proper permits without review or input from any other Borough employe or official. (N.T. 21-22; Employer Exhibit 2).

19. In the same month, Mr. Hines issued citations for unsafe property, garbage accumulation, plumbing system failures, and the failure of a property owner to remove indoor furniture from the front porch. (N.T. 21-23; Employer Exhibit 2).

20. Mr. Hines issues parking enforcement notices to residents who park vehicles on grass or dirt which is prohibited by Borough ordinance. He issues these notices as part of his regular duties without review or approval from any other Borough employes or officials. (N.T. 30-33, 57; Employer Exhibit 7).

DISCUSSION

The Borough has sought to exclude the CEO position from the bargaining unit of non-professional employes as a management level employe. As the party seeking to exclude the position from the unit, the Borough has the burden of proving the exclusion. In the Matter of the Employes of State System of Higher Education, 29 PPER ¶ 29234 (Final Order, 1998), aff'd, 737 A.2d 313 (Pa. Cmwlth. 1999). Under Section 301(16) of PERA, a management level employe is defined as follows:

[A]ny 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).

In the case, In the Matter of the Employes of Lower Macungie Township, 39 PPER 59 (ODSEL, 2008), this examiner stated the following:

The Board has long held that township code enforcement officers are management employes under the second part of Section 301(16) of PERA (i.e., they directly implement policy). Lower Providence Township, supra (stating that "[t]he Board has consistently held that employes who are responsible for administering and interpreting township building codes and zoning ordinances satisfy part two of the test and accordingly are management level employes"). In In the Matter of the Employes of Horsham Township, 9 PPER ¶ 9157 (Order and Notice of Election, 1978), the Board explained that the statutory phrase to "responsibly direct[] the implementation [of policy]" means as follows:

[T]hose persons who have a responsible role in giving practical effect to and ensuring the actual fulfillment of policy by concrete measures, proved that such role is not of a routine or clerical nature and bears managerial responsibility to insure completion of the task.

9 PPER at 327. In Horsham, as here, the following job duties of the code enforcement officer were determinative: he could accept or reject applications based upon their conformance with the applicable code under consideration; he inspected an applicant's construction site to ensure the applicant's compliance with various codes and ordinances; he had the authority to demand that violations be corrected. Id. at 327-328. Based upon these factors, the Horsham Board concluded that the code officer is required to exercise independent judgment by interpreting and implementing the policies of the Township, as embodied in their adopted ordinances and codes. This implementation of policy satisfies the second element of the three-part disjunctive standard for a management level employe under Section 301(16) of PERA. Id. at 328; 43 P.S. ¶ 1101.301(16).

The record in this case establishes that the job duties of Mr. Hines are consistent with those which the Board has repeatedly deemed to be those of a management level employe. The same determinative factors that existed in Horsham also exist in this case. There is no dispute that Mr. Hines is "responsible for administering and interpreting township building codes and zoning ordinances" which satisfies the second prong of the statutory test for management level employe under Section 301(16) of PERA. Mr. Hines exercises independent judgment and discretion in the application and enforcement of multiple Borough ordinances involving the acceptable height of grass, snow removal, building and construction, zoning, garbage, property maintenance, rental housing, fire protection and plumbing. By passing these ordinances and adopting various codes, the Borough has established its policy regarding the subjects regulated by those respective ordinances. As the employe solely responsible for enforcing the provisions of those ordinances, Mr. Hines is independently implementing Borough policy, especially since he has no direct supervisor approving or reviewing his applications or enforcements of Borough ordinances or his resulting determinations.

Specifically, Mr. Hines exercises discretion to determine whether to issue building and occupancy permits. He independently decides under all the codes that he applies and enforces whether to issue citations and/or warning letters or to pursue prosecution at the local magistrate court. He independently makes these determinations without review or approval from any other Borough employe or official. As a part of his routine duties, Mr. Hines ensures compliance with zoning ordinance and building codes. Mr. Hines inspects individual lots within subdivisions. He reviews residential building plans before issuing permits for residential construction. Mr. Hines has required individuals to make changes to those plans to comply with Borough ordinances. Mr. Hines has discovered during site inspections that conditions do not conform to plans, and he has ordered builders to conform to the approved plans and the building code or zoning ordinance. Mr. Hines has denied occupancy permits for failure of property owners to properly install certain required elements of the structure such as HVAC systems, handrails or decks.

The Borough has an ordinance prohibiting the accumulation of garbage. On October 2, 2006, Mr. Hines issued a garbage enforcement notice to a Borough resident informing him that, after Hines inspected the property, he determined that the resident was in violation of the garbage ordinance and demanded corrective measures with the threat of prosecution, which could result in a fine of \$300. Hines enforces the garbage ordinance as part of his regular duties without guidance or approval from any other Borough employe or official. Mr. Hines is solely responsible for determining whether to prosecute garbage ordinance violations before a local magisterial district court.

In August 2008, Mr. Hines issued permits for fence construction, a road cut, the remodeling of a single-family home and the demolition of a single-family home. In the same month, Mr. Hines initiated enforcement actions for overgrown bushes and trees, the failure of a rental property owner to submit the proper rental application and fees, the failure of a property owner to remove furniture from the front porch and the failure of an owner to properly maintain building exterior integrity. He also issued citations for garbage and long grass violations at this time.

Mr. Hines is solely responsible for and independently determines whether property owners within the Borough have violated the IPMC. On October 27, 2008, Mr. Hines, under his sole discretion, issued an IPMC enforcement notice to a Borough property owner for violations regarding sanitation, deteriorated exterior walls, inadequate fire protection systems and inadequately anchored exterior stairways. Also on October 27, 2008, Mr. Hines issued an occupancy enforcement notice to a Borough property owner citing violations of the Borough's rental property ordinance for permitting more than the allowable number of unrelated tenants in a structure within the R-1 zoning district. The notice demanded compliance via a revised tenant list and warned that failure to comply may result in prosecution and a \$300 fine if convicted. Hines independently exercised his discretion to issue this notice without review or approval from any other Borough employe or official.

In December 2008, Mr. Hines issued and approved permits for the remodeling of a law office, a coffee shop, a coffee bar, a fitness/rehabilitation center and a garage demolition. Hines approved these matters and issued the proper permits without review or input from any other Borough employe or official. In the same month, Mr. Hines issued citations for unsafe property, garbage accumulation, plumbing system failures, and the failure of a property owner to remove indoor furniture from the front porch. Mr. Hines also issues parking enforcement notices to residents who park vehicles on grass or dirt which is prohibited by Borough ordinance. He issued these notices as part of his regular duties without review or approval from any other Borough employes or officials.

In In the Matter of the Employes of Derry Township, 36 PPER 166 (Final Order, 2005), the Board recently affirmed an examiner's exclusion of the Derry Township code enforcement officer on a less supportive record than the one here but one containing similar indicia of managerial status by way of independent discretion in the implementation of public employer policy. In Derry Township, although the code enforcement officer was no longer responsible for enforcing the building codes, he was responsible for enforcing the Township's health and safety ordinances. The Board recognized that the code enforcement officer issued written and oral warnings regarding unhealthy conditions or unsafe properties. In this regard, the Board opined that "[t]he 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."

In this case, Mr. Hines similarly determines when structures and properties within the Borough become unsanitary or unsafe enough to warrant the issuance of warning letters and, if not subsequently remedied, the initiation of enforcement before the local district justice. He determines whether garbage piling up on a property has reached unsanitary, unhealthy levels. He further exercises discretion in determining whether the integrity of building exteriors has reached unsafe or uninhabitable levels. He also controls whether structures are inhabitable through the occupancy permit process and has denied such permits for unsafe living conditions such as lack of handrails or HVAC systems. In addition to all this and the duties of the code enforcement officer in Derry Township, Mr. Hines administers and enforces the building codes and zoning ordinance through the permit process. Accordingly, on this record, the Borough CEO is a management level employe within the meaning of Board's consistent holdings in Derry Township, Horsham and Lower Providence.

In its post-hearing brief, the Union directly challenges the Board case law cited above consistently holding that municipal code enforcement officers exercising discretion in the application of municipal zoning and building code ordinances. (Union Brief at 3). The Union set forth the following argument:

The Union recognizes that the Board has found in several cases that Code Enforcement Officers are managerial employees and the Employer has cited those cases in its Brief. The Union respectfully submits that the Board has deviated from the express language of the statute and Board precedent by so finding. Code Enforcement Officers are no more managerial employees than the Parking Enforcement Officer in the instant case, a police officer, a Housing Authority inspector, a street Commissioner, a road master, or sewage plant superintendent.

(Union Brief at 3). The Union further argues that "a strange anomaly has developed in the cases involving Code Enforcement Officers." (Union Brief at 9). The Union maintains that "the Board has found Code Enforcement Officers to be managerial in direct contravention of the statutory language and Board decisions involving other positions." (Union Brief at 9). In furtherance of this argument, the Union contends as follows:

It defies logic that Chiefs of Police, police officers, physicians, lawyers, college head coaches, sewage plant superintendents, Borough street commissioners and the Slippery Rock Parking Enforcement Officer can be considered bargaining unit employees and Code Enforcement Officers

managerial. It makes absolutely no logical or legal sense to treat these similarly situated employees differently.

(Union Brief at 9). The Union's belief that "the Board has deviated from the express language of the statute and Board precedent" notwithstanding, I am not authorized to challenge, confront, disobey, ignore, refute, disavow or undermine mandatory, binding Board precedent. The Board's precedent clearly requires the removal of Mr. Hines from the bargaining unit as a managerial employe on these facts.

Also, the Union cites and quotes extensively from Township of Chartiers v. PLRB, 510 A.2d (Pa. Cmwlth. 1986). However, Chartiers is an Act 111 case and is, therefore, inapplicable to the analysis herein. Unlike Act 111, PERA contains an overriding statutory definition of a management level employe. Because neither Act 111 nor the Pennsylvania Labor Relations Act contains such a statutory definition, it was necessary for the Court--based on exhaustively studying Board case law--to develop its own case-law standard. FOP, Start Lodge No. 20 v. PLRB (Star Lodge), 522 A.2d 697 (Pa. Cmwlth. 1987). The entire Chartiers analysis presented by the Union in its brief is, therefore, inapposite.

Moreover, contrary to the Union's argument, it does not "def[y] logic" for the Board to conclude in specific cases that lawyers, college head coaches, sewage treatment plant superintendents or police officers and chiefs of police are in bargaining units while the code enforcement officers are considered managerial on certain records. First, the Union mistakenly interchanges Act 111 and PERA managerial standards and cases in its brief. Also, the Union's argument confuses the analysis for determining whether a position is professional, which also has a separate, express statutory definition, with the analysis of a management level employe. The "consistent exercise of discretion and judgment" regarding work that is "predominantly intellectual and varied in character" where the output cannot be "standardized," are indicia of a professional employe under Section 301(7) of PERA, 43 P.S. §1101.301(7) and are not indicia of a managerial employe under Section 301(16) of PERA, § 1101.301(16), which emphasizes the formulation or implementation of the employer's policies. As such, a lawyer can be in a rank and file unit because he or she is professional and a code enforcement officer can be excluded because he or she implements the employer's policies.

The Union relies on specific cases where the Board and its hearing examiners concluded that a roadmaster, sewage plant superintendent and a director of vector control/zoning officer were not deemed management level employes. However, those cases are inapposite because they were decided on different records and, in some cases, on different issues (e.g., whether the employes in question meaningfully engaged in the budget process which relates to policy formulation and not policy implementation which is at issue here). In the roadmaster case, the Board concluded that "[t]he Township failed to present any evidence that the Roadmaster does anything more than merely follow the Township's policies regarding road repair." In the Matter of the Employes of West Penn Township, 37 PPER 120 (Final Order, 2006). The Union's reliance on this case and others only emphasizes that all unit determination cases are determined on a case-by-case basis, and the Board determines employe status based on the record evidence of actual job duties, which vary from case to case. Washington Township Municipal Auth. V. PLRB, 569 A.2d 402 (Pa. Cmwlth. 1989). Therefore, it is not relevant here that a roadmaster in another case did not implement his employer's policy or that a sewage plant superintendent was not sufficiently involved in the budget process to conclude that he formulated policy and that he was a management level employe. Those issues are not presented in this case. The issue here is whether Mr. Hines exercises independent discretion in implementing Borough policy as formulated by the Borough through its ordinances. The record in this case clearly requires a conclusion in the affirmative. The Union's misconception, that an employe's professional status is fungible with determining his or her managerial status, that Act 111 analysis is fungible with PERA analysis regarding managerial status and that Board determinations in other cases involving similar positions with other employers, exposes why the Union perceives a "strange anomaly" among Board law, although one does not in fact exist.

Accordingly, the Borough has met its burden of establishing that Mr. Hines is a management level employe who routinely implements and enforces Borough policies as the Code/Ordinance Enforcement Officer.

CONCLUSIONS

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

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 position of Borough Code Enforcement Officer, currently held by Jesse Hines, is a management level position and is thereby properly excluded from the bargaining unit.

ORDER

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

HEREBY ORDERS AND DIRECTS

that the bargaining unit of nonprofessional employes of Slippery Rock Borough certified by the Board at PERA-R-89-462-W is hereby amended to exclude the position of Code/Ordinance Enforcement Officer.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

that in the absence of any exceptions filed pursuant to 34 Pa. Code § 95.98(a) within twenty (20) days of the date hereof, this decision and order shall be and become absolute and final.

SIGNED, DATED and MAILED at Harrisburg, Pennsylvania, this sixth day of July, 2009.

PENNSYLVANIA LABOR RELATIONS BOARD

JACK E. MARINO, Hearing Examiner