

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 :

PROPOSED ORDER OF UNIT CLARIFICATION

On July 8, 2009, Dormont Borough (Borough) filed with the Pennsylvania Labor Relations Board (Board) a petition for unit clarification pursuant to the Public Employee Relations Act (PERA) seeking to exclude, as a manager, the position of Building Inspector/Code Enforcement Officer (Code Officer) from the bargaining unit of nonprofessional employees. On July 17, 2009, the Secretary of the Board issued an order and notice of hearing directing that a hearing be held on Wednesday, December 16, 2009.¹ At the hearing, the Borough and the Construction, General Laborers and Material Handlers, Local 1058 (Union) were afforded a full and fair opportunity to present evidence and cross-examine witnesses. Both parties timely filed post-hearing briefs.

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 Borough is a public employer within the meaning of Section 301(1) of PERA. (N.T. 6; PERA-R-5284-W).
2. The Union is an employe organization within the meaning of Section 301(3) of PERA. (N.T. 6; PERA-R-5284-W).
3. Patrick Kelly is the Code Officer for the Borough. 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. (N.T. 10, 13, 17, 64, 71-72; Joint Exhibits 6, 7 & 8).
4. 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. (N.T. 17, 20-23, 64; Joint Exhibits 6 & 8).
5. 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. (N.T. 18-19, 64-65; Joint Exhibit 8).
6. 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. (N.T. 23-25, 64).
7. 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. (N.T. 26, 64; Joint Exhibit 6).
8. 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

¹ The hearing schedule was delayed due to the state budget impasse and resulting travel restrictions.

conditions. In such a case, he would allow the contractor to obtain the permit after completion. (N.T. 27-29, 64).

9. Mr. Kelly has ordered the stoppage of fence construction that has commenced without first obtaining a permit. (N.T. 29, 64).

10. 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. (N.T. 31-32, 64; Joint Exhibits 4, 6 & 8).

11. 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. (N.T. 33-34, 64-65; Joint Exhibits 6 & 8).

12. Mr. Kelly inspects and reviews all new fire alarm systems under the Borough building code and issues permits for those systems. (N.T. 36, 64; Joint Exhibit 8).

13. Mr. Kelly enforces the Borough's property maintenance laws. (N.T. 42, 64; Joint Exhibit 6 & 8).

14. Mr. Kelly causes citations to be issued pursuant to his code enforcement duties. He defends those citations in court. (N.T. 45-46, 57, 64; Joint Exhibit 6; Borough Exhibit 1).

15. Mr. Kelly determines whether free-standing accessory structures are sound. He orders property owners to repair unstable structures. (N.T. 39, 47-49, 64; Joint Exhibits 4 & 6; Borough Exhibit 1).

16. Mr. Kelly determines whether shrubs or trees create sidewalk obstructions. He has ordered homeowners to trim their hedges and trees to remedy such obstructions. (N.T. 50-53, 64; Joint Exhibits 4, 6 & 8).

17. 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. (N.T. 50-51, 59, 64; Joint Exhibit 6; Borough Exhibit 1).

18. Mr. Kelly determines whether sidewalk cracks require repairs. He also issues the permits to fix sidewalks. (N.T. 51-52, 64; Joint Exhibits 4, 6 & 8).

19. 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. (N.T. 53-54, 64; Joint Exhibits 4, 6 & 8; Borough Exhibit 1).

20. 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. (N.T. 22, 56, 64; Joint Exhibits 4 & 8; Borough Exhibit 1).

21. During the winter of 2008-2009, Mr. Kelly issued numerous snow-and ice-removal notices requiring homeowners to clear and salt their sidewalks. (N.T. 58-59, 64; Joint Exhibits 4 & 8).

22. Mr. Kelly determines whether building plans comply with lot coverage, green space and water absorption requirements. (N.T. 63-64; Joint Exhibits 6 & 8).

23. Mr. Kelly causes citations to be issued for abandoned or junk vehicles on private property. (N.T. 69; Borough Exhibit 1).

24. The parties stipulated and agreed that the Code 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 at any time determined through litigation. (N.T. 80).

DISCUSSION

1. Borough's Petition

The Borough filed the petition seeking to exclude the Code Officer from the nonprofessional unit as a management level employe. The analysis for such a case, which has been repeatedly, consistently and exhaustively reiterated by the Board and its examiners for over thirty years, is hereby presented as follows below:

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).

Lower Macungie Township, 39 PPER at 198-199 (emphasis added).

In the Matter of the Employes of Slippery Rock Borough, 40 PPER 64 at 254-255 (Proposed Order of Unit Clarification, 2009). In Slippery Rock, supra, I also relied on

the Board's decision in In the Matter of the Employees of Derry Township, 36 PPER 166 (Final Order, 2005), and stated the following:

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."

Slippery Rock, 40 PPER at 256 (quoting Derry Township, 36 PPER at 485).

The record in this case establishes that the job duties of Mr. Kelly are consistent with those duties that the Board has repeatedly determined to be the duties of a management level employe under PERA. The same determinative factors that existed in Horsham, supra, also exist in this case. Moreover, the code enforcement officer in Derry Township, supra, performed even less discretionary duties as the Code Officer in this case and in Horsham, supra, yet the Board therein held that those discretionary functions (regarding the limited enforcement of Derry Township's health and safety ordinances) qualified the Derry officer as a manager. Mr. Kelly is responsible for enforcing the Borough's health and safety ordinances in the interest of preserving the welfare of Borough citizens. When the Borough adopted a building code and enacted property maintenance and sanitation ordinances it formulated and developed policies to effectuate the goals of maintaining and ensuring the safety and welfare of its citizens. Borough employes, who implement those policies, as formulated by Borough Council, are managerial employes under Horsham, supra, and the second prong of State System of Higher Education, supra.

Mr. Kelly determines the safety of structures through his inspection duties during construction as well as through his review of construction drawings for proposed buildings during the permit application process. Because every individually proposed project for constructing or modifying various structures is unique, Mr. Kelly's structural and compliance determinations are neither routine nor standard. During this process, Mr. Kelly evaluates building proposals for fire safety and sufficient means of egress. Mr. Kelly inspects and reviews all new fire alarm systems under the Borough building code and issues permits for those systems. He also looks for 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. There is no clearly defined size of construction project that necessitates an architect's stamp. Rather the need for an architect's stamp is determined by Mr. Kelly in exercising his managerial discretion to implement the safety policies of the Borough. 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.

When construction has not conformed to the approved drawings, Mr. Kelly has exercised his discretion in implementing Borough safety and welfare policies by issuing stop-work and/or correction orders. The subsequent corrections are also subject to Mr. Kelly's approval. After a home has been damaged by fire, Mr. Kelly reviews the rebuilding plans. After assessing damage and necessary rebuilding, he determines whether the plans conform to the building code and whether an architect's approval is necessary. Mr. Kelly is the only Borough employe who approves building permits and construction. In fact, the Borough Manager does not possess the requisite training or certifications to responsibly perform Mr. Kelly's duties.

Mr. Kelly also enforces the Borough's property maintenance laws pursuant to which he causes citations to be issued to homeowners pursuant, which he defends in court. As part of these enforcement duties, Mr. Kelly determines whether, in his discretion, free-standing accessory structures are sound. He orders property owners to repair unstable structures. Unlike parking violations, there is no litmus test for determining whether a structure is sound. This type of discretion alone qualifies Mr. Kelly as a manager under Derry Township, supra. The Borough relies on Mr. Kelly to determine, on a case-by-case basis, how to

implement its health and safety policies without having exhaustively enumerated or defined for the Code Officer the myriad combinations of circumstances that may pose a threat to the safety of Borough residents, like municipalities do for parking and police officers.

Similarly, Mr. Kelly exercises discretion in making decisions about whether shrubs or trees create a visual or physical obstruction in the path of a sidewalk. He has ordered homeowners to trim hedges and trees to remedy such obstructions. Mr. Kelly has used his discretion in determining whether a property owner has allowed unsanitary levels of garbage, dog feces and exposed storage to accumulate or has allowed grass and weeds to overgrow. There is no quantified amount of fecal matter or refuse in any Borough ordinance dictating to Mr. Kelly the point at which he must issue citations for these conditions. He makes a determination based on his discretion in implementing the Borough's broader policies as embodied in the property maintenance ordinances.

As part of his duties, Mr. Kelly determines whether steps or sidewalks require repair, and he issues the permit to homeowners to perform the repairs. Mr. Kelly also determines whether roofs, walls and downspouts are in sound condition. He cited one homeowner because his wall was falling onto his neighbor's property. Mr. Kelly has the authority to grant extensions of time to homeowners, when requested, for remedying unsanitary, unsafe or unsound property conditions. Determining whether steps or sidewalks are in need of repair is an exercise of managerial discretion because no specific guidelines exist in the Borough's ordinances quantifying or identifying when steps or sidewalks become unsafe for pedestrians and homeowners within the Borough. In performing these duties, Mr. Kelly must exercise discretion in determining the proper course of conduct (through either preventative or corrective action) for adequately implementing Borough policy.

A further example of Mr. Kelly's managerial discretion involves instances when Mr. Kelly permits roofing contractors, who have not obtained a permit, to continue shingle replacement rather than ordering them to discontinue operations until they obtain a permit. If Mr. Kelly's enforcement duties were standard or routine, like a parking enforcement officer's, he would simply be duty bound to order a work stoppage upon observing the permit violation. However, the evidence in this case demonstrates that Mr. Kelly considers the effect of circumstances, such as contemporaneous or impending weather conditions, in determining whether to order a roofing contractor to stop working. In these situations, Mr. Kelly has exercised his managerial discretion and implemented the Borough's policy to preserve structural safety and integrity by preventing an unshingled roof from exposure to weather. This is not an automatic or standard response to a permit violation. In circumstances where the Borough's structural safety policies and goals are advanced, Mr. Kelly decides whether to permit the contractor to obtain the permit after the work has been completed.

2. Union's Objections

The Union challenges the Borough's petition on several grounds. The Union argues that although "the Board has found in several cases that Code Enforcement Officers are managerial employees[.]. . . "the Board has deviated from the express language of the statute and Board precedent by so finding." (Union's Post-hearing Brief at 3). The Union further argues that "Code Enforcement Officers are no more managerial employees than a parking enforcement officer, a police officer, a housing authority inspector, a street commissioner, a road master, or sewage plant superintendent." (Union's Post-hearing Brief at 3-4). The Union relies on the standard for managerial status in Township of Chartiers v. PLRB, 510 A.2d 884 (Pa. Cmwlth. 1986), an Act 111 case, for the applicable standard for determining managerial status and argues that "[a]lthough this case involves Act 111, both Act 111 and Act 195 exclude managerial employees from bargaining units hand have the same definition of managerial employees." (Union's Post-hearing Brief at 4, n.2).

I expressly rejected all of these identical arguments in In the Matter of the Employes of Slippery Rock Borough, 40 PPER 64 (Proposed Decision and Order, 2009), which the Board affirmed at 40 PPER 122 (Final Order, 2009). Also in Slippery Rock, *supra*, I distinguished the same and/or similar case decisions relied upon by the Union here as either factually or legally inapplicable. Consequently, I will address the Union's arguments by quoting the following language from Slippery Rock.

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 [code officer] 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. 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. Although the legal standards consistently apply in cases involving identical issues, the factual records determinative of whether those standards are satisfied, and therefore the legal determination in those other cases, are not applicable.

The Union relies on a roadmaster case wherein 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 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. Similarly, it is not relevant that a sewage plant superintendent was not sufficiently involved in the budget process to conclude that he formulated policy because the factual record was different and policy formulation is not at issue in this case. The issue here is whether Mr. Hines [code officer] exercises independent discretion in implementing Borough policy as formulated by the Borough through its ordinances. The Union's misconceptions (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

factual and legal determinations on different records in other cases involving similar positions with other employers somehow requires an identical conclusion here) expose why the Union perceives a "strange anomaly" among Board law, although one does not in fact exist.

Slippery Rock Borough, 40 PPER 64 at 256-257. Contrary to the Union's claim in its Post-hearing Brief that both Act 111 and Act 195 have the same definition of managerial employes, (Union's Post-hearing Brief at 4, n.2), the Board, in affirming my decision in Slippery Rock, expressly opined that "the tests for managerial status under PERA and Act 111 developed independently, such that the Union's reliance on Act 111 caselaw is misplaced." Slippery Rock, 40 PPER 122 at 413, n.1 (citing City of Pittsburgh v. PLRB, 536 A.2d 928 (1989), appeal denied, 522 Pa. 626, 564 A.2d 917 (1989)). Certainly, therefore, the Union's reliance on Act 111 standards in this case after the Board's recent pronouncement is equally "misplaced."

The Union also maintains that the Code Officer, formerly known as the Chief Inspector, has been included in the bargaining unit since its certification in 1974. (Union's Brief at 3). The Union argues that the Borough's petition to exclude the Code Officer should also be denied because the position has been included in the bargaining unit for over thirty-five years and the job duties have not materially changed. (Union's Brief at 10). This argument, however, ignores both the facts of this case as well as the Board's case law.

The parties stipulated and agreed that the Code 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 at any time determined through litigation. (F.F. 24). An employer may file a petition for unit clarification to exclude a position from a bargaining unit one year after unit certification without having the burden of proving changed circumstances or job duties, when the parties agreed to include the position in the unit. In the Matter of the Employes of Chambersburg Area School District, 27 PPER ¶27263 (Order Directing Submission of Eligibility List, 1996). The Board has held that it is bound by the doctrine of res judicata in unit determination cases and that "[o]nce the Board has determined the status of positions and the scope of a bargaining unit through the certification process, there must be a showing of changed circumstances before the Board will re-examine those determinations. In the Matter of the Employes of Northern Tioga Sch. Dist., 40 PPER 17 (Proposed Order of Unit Clarification, 2009)(citing Midwestern Intermediate Unit IV v. PLRB, 16 PPER ¶ 16109 (Court of Common Pleas of Butler County, 1985)). However, only when the placement of a position is determined by the Board, after placement was contested by the parties, does a petitioner seeking the exclusion of the position have the burden of showing that the job duties and responsibilities have materially changed. Id. The Code Officer's inclusion in the unit for over thirty-five years and the Union's allegation that the job duties have not materially changed are not relevant inquiries in this case. A showing of changed duties is simply not required where the placement of the position was not previously litigated. Additionally, the Union did not proffer any evidence to establish the job duties of the Chief Inspector at or about the time of the unit's initial certification. Consequently, the Union would be unable to support its assertion (that the job duties have not materially changed) even if such an inquiry were relevant here.

Accordingly, the Borough has met its burden of establishing that Mr. Kelly is a management level employe who routinely exercises discretion in implementing and enforcing Borough policies as the Building Inspector/Code Enforcement Officer. The record overwhelmingly establishes that Mr. Kelly is a person who has "a responsible role in giving practical effect to and ensuring the actual fulfillment of policy by concrete measures [and the Borough has] proved that such is not of a routine or clerical nature and bears managerial responsibility to insure completion of the task." Horsham, 9 PPER at 327.

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 Building Inspector/Code Enforcement Officer, currently held by Patrick Kelly, 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 Employe Relations Act, the hearing examiner

HEREBY ORDERS AND DIRECTS

that the bargaining unit of nonprofessional employes of Dormont Borough certified by the Board at PERA-R-5284-W is hereby amended to exclude the position of Building Inspector/Code 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 thirteenth day of May, 2010.

PENNSYLVANIA LABOR RELATIONS BOARD

JACK E. MARINO, Hearing Examiner