

Can You Remove Your Code Enforcement Officers From the Union?

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In this economy, public employers should take care to ensure that they are not surrendering managerial authority unnecessarily. One area where Boroughs and other municipalities often do this is with respect to code enforcement personnel. Pay and benefits for employees have long been the most expensive continuing obligation for public employers and the limitations placed on management's authority by collective bargaining agreements only add to those costs. Managing union employees is much more difficult and expensive than managing "at will" employees because collective bargaining agreements limit the employer's authority on a whole range of issues from pay to working hours. Union employees also enjoy extensive due process requirements that make discipline much more difficult and expensive. Too often, code enforcement officers are included in rank-and-file bargaining units, such as public works or clerical units, even though the duties they perform make them quite different from those other employees. Unlike the road crew or front office clerks, code enforcement officers normally work like managers, with no fixed work location or supervision, and exercising substantial discretion on behalf of the municipality. Collective bargaining agreements written for rank-and-file employees nevertheless often curtail management's authority to direct the work of code enforcement personnel in ways that can be both frustrating and unnecessarily expensive.

The Public Employee Relations Act provides for the exclusion of managerial employees from rank-and-file bargaining units. The Act defines "management level employee" 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 employees above the first level of supervision.

43 P.S. § 1101.301(16). It is well settled that code enforcement officers are managerial employees under PERA. In Horsham Township, 9 PPER 09157 (Final Order, 1978), the Labor Board held that a Township employee who served as the Building Inspector, Assistant Zoning Officer, Plumbing Inspector, Sewage Enforcement Officer, and Sanitation Officer was management level employee and excluded from bargaining unit because he: (1) had the power and duty to effectuate and enforce various codes and ordinances adopted by Township Council, (2) had authority to accept or reject applications based upon their conformance with building code, housing code, zoning code, etc., and his determinations were binding unless appealed directly to the Township Council, (3) had authority to prosecute violations, and (4) interpreted various Township codes and regulations and made determinations based on his interpretation.

The Pennsylvania Commonwealth Court has held it is not important which codes a particular officer enforces, because the issue is whether or not he acts as a managerial employee on behalf of the municipality. The question of whether an employee is managerial under the law depends upon whether that employee "participate[s] directly in the policy-making process or ha[s] any significant impact on the formulation of or implementation of management policy." Sch. Dist. of Philadelphia v. PLRB, 719 A.2d 835, 838 (Pa. Commw. 1998). The Labor Board has established a three part test for determining whether an employee may properly be classified

as managerial. If an employee meets *any one* of the three parts, he is considered to be a managerial employee under the Act. Commonwealth of Pennsylvania (Dep't of Educ.), 14 PPER 14136 (1983). Under the three part test managerial employees include: (1) any individual who is involved directly in the determination of policy; (2) any individual who directs the implementation of policy; or (3) employees above the first level of supervision. Pennsylvania Ass'n of State Mental Hosp. Physicians v. PLRB, 554 A.2d 1021 (Pa. Commw. 1989) quoting Commonwealth of Pennsylvania (Attorney Examiners), 12 PPER 12131 (Final Order, 1981). An employee need not perform managerial work one hundred percent (100%) of the time to be considered a managerial employee under the Act. Employes of Carlynton School District v. Carlynton Sch. Dist., 377 A.2d 1033 (Pa. Commw. 1977).

Consequently, even though the exact duties of code enforcement personnel vary from one municipality to another, the Labor Board has made clear that "normal" code enforcement duties are inconsistent with membership in rank-and-file bargaining units. Code enforcement officers who enforce building codes and zoning ordinances are managerial employees, as are those who issue building and zoning permits, issue citations for non-compliance with codes, issue occupancy permits, and/or inspect new construction. Indiana Twp., 28 PPER 28074 (Proposed Order of Dismissal, 1997). A code enforcement officer that exercises his own discretion to enforce municipal codes is a managerial employee and the fact that some work he performs is not managerial in nature, or that his discretion is limited at times by elected municipal officials, does not change his managerial status under the law. City of Aliquippa, 25 PPER 25053 (Proposed Order of Unit Clarification, 1994). Nor is the analysis limited to building and zoning codes. Boroughs and other municipalities pass codes and ordinances of many different kinds, regulating rental properties in college towns, limiting the length grass can grow before it must be cut, and numerous other things. The employees who interpret and enforce these codes generally come under the same analysis. Even the fact that a municipality may use an outside entity to meet some part of its code enforcement needs does not change the fact that a code enforcement officer is a managerial employee under the Act where he performs ordinary code enforcement duties with regard to municipal codes and ordinances not performed by the outside entity. Derry Twp., 36 PPER 166 (Final Order, 2005).

There is a procedure to have the Labor Board remove code enforcement personnel from rank-and-file bargaining units. A Petition for Unit Clarification can be filed with the Labor Board, alleging that the code enforcement personnel are managerial positions and that they should be excluded from the bargaining unit as a matter of law. The Labor Board will hold a hearing to examine the duties performed by the employees occupying those positions. If it agrees that they perform normal code enforcement duties, it will issue a new certification for the rank-and-file bargaining unit that does not include the code enforcement position, effectively removing it from the unit.

There will be an initial investment of both time and money in that process, but in the long run it is a move that can help a struggling municipality control its personnel management costs more effectively. Having code enforcement personnel in labor unions restricts a municipality's ability to react quickly to changes in the public's need for services, to change working hours or other rules, to require attendance at meetings, or to add or change job duties. Collective bargaining agreements also hinder management's ability to respond to performance and

disciplinary issues, and even restrict the right to consider outsourcing parts of the code enforcement work, whether that is intended to save money or gain access to greater technical expertise. Municipalities who have code enforcement personnel in their rank-and-file bargaining units should review the situation with their solicitor or other legal counsel to determine whether action should be taken to remove them from those bargaining units.