

Local Government Ethics Law

Opinions of the Office of the Attorney General

Subject: Members of a Municipal Rent Leveling Board as "Local Government Officers"

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June 4, 1992

Barry Skokowski, Sr.
Deputy Commissioner
Department of Community Affairs
CN 800
Trenton, New Jersey 08625

Re: 92-0069: Members of a Municipal Rent Leveling Board as "Local Government Officers."

Dear Deputy Commissioner Skokowski:

You have requested advice as to whether the members of a municipal rent leveling board are "local government officers" pursuant to the Local Government Ethics Law, N.J.S.A. 40A:9-22.1 et seq. It is impossible in this opinion to address every municipal rent leveling board created by municipal ordinance. However, we have broadly examined the question and for the reasons stated below you are advised that generally the members of a municipal rent leveling board would be considered as "local government officers" pursuant to the Local Government Ethics Law.

The purpose of the Law is to provide a State-wide ethical code applicable to persons who serve in local government and to require "local government officers" to file annual financial disclosure statements. N.J.S.A. 40A:9-22.1. Generally, all local government agencies, except purely advisory bodies and school boards, are within the scope of the Law. N.J.S.A. 40A:9-22.3(e).

In the absence of action by the county or municipal governing body to establish a local ethics board, the Code of Ethics is enforced by the Local Finance Board in the Department of Community Affairs. N.J.S.A. 40A:9-22.4.

A rent leveling board is not created by statute. Rather, a municipality has authority to establish rent control pursuant to its police power. *Helmsley v. Boro. of Fort Lee*, supra. Many municipalities which have adopted rent control ordinances have also established, by ordinance, rent control boards to make determinations as to rent increase applications. As noted previously, it is impossible in this opinion to examine each municipal ordinance creating a rent leveling board. However, a review of relevant case law and legal treatises revealed certain general principles relating to rent leveling boards. (These principles may or may not apply in a particular municipality. It would be appropriate for the municipal attorney to examine the ordinance in question and to render a determination based upon the guidance provided by this opinion).

A rent control board once established by ordinance exercises quasi-judicial decision making authority. *Danmark, Inc. v. So. Brunswick Tp. Rent Leveling Bd.*, 184 N.J. Super. 478, 490 (Law Div. 1982). It is practically necessary that the board will understand the complexity of rent regulations and real estate finances. cf. *Helmsley v. Boro. of Fort Lee*, supra, 78 N.J. at 233. The rent leveling board is required to make detailed findings of fact and conclusions. *Danmark, Inc. v. So. Brunswick Tp. Rent Leveling Bd.*, supra, 184 N.J. Super. at 490. A decision of a rent leveling board may be appealed de novo to the governing body. *Reid v. Tp. of Hazlet*, 198 N.J. Super. 229, 234-235 (App. Div. 1985). The members of the board generally serve without compensation. Meiser, *Tenant-Landlord Law in New Jersey*, p. 150 (1978). Each municipal ordinance determines the number of board members and the qualification, if any, for the board members.

A "local government agency" includes

[A]ny agency, board, governing body, including the chief executive officer, bureau, division, office, commission or other instrumentality within a county or municipality, and any independent local authority, including any entity created by more than one county or municipality, which performs functions other than of purely advisory nature, but shall not include a school board. [N.J.S.A. 40A:9-22.3(e)]

The term "local government agency" encompasses a myriad of local government bodies. The definition is very broad and specifically excludes only purely advisory bodies and school boards. A rent leveling board is a "board" created by a municipality. Further a rent leveling board exercises independent and significant discretion in the specialized area of rent regulations. It performs more than a purely advisory function and absent an appeal to the governing body, its decisions are binding. Accordingly, a municipal rent leveling board would be a "local government agency" within the meaning of the Local Government Ethics Law. N.J.S.A. 40A:9-22.4(e).

Having concluded that a municipal rent leveling board is generally a "local government agency" subject to the Local Government Ethics Law, the next inquiry is whether the members are "local government officers." Included as "local government officers" are 1) elected officials; 2) members of local bodies that have authority to enact ordinances, approve development applications, or grant zoning variances; 3) members of independent local authorities; and 4) persons who are "managerial executives" or "confidential employees." N.J.S.A. 40A:9-22.3(g).

The fourth and last category of "local government officer" is a person "who is a managerial executive or confidential employee of a local government agency, as defined in section 3 of the 'New Jersey Employer-Employee Relations Act.' . . . , but shall not mean any employee of a school district or member of a school board." N.J.S.A. 40A:9-22.3(g)(4). As the Local Government Ethics Law makes specific reference to the definitions contained in the Employer-Employee Relations Act, it is necessary to examine the latter Act. The Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., provides a mechanism for the resolution of labor disputes in the private and public sectors. N.J.S.A. 34:13A-2. The Act is administered by the State's Public Employment Relations Commission (PERC). N.J.S.A. 34:13A-5.2.

The Act defines "managerial executives" of a public employer as

persons who formulate management policies and practices, and persons who are charged with the responsibility of directing the effectuation of such management policies and practices [N.J.S.A. 34:13A-3(f)]

"Confidential employees" of a public employer are defined as

employees whose functional responsibilities or knowledge in connection with the issues involved in the collective negotiations process would make their membership in any appropriate negotiating unit incompatible with their official duties. [N.J.S.A. 34:13A-3(g)]

The significance of "managerial executives" and "confidential employees" under the Employer-Employee Relations Act is that these individuals are excluded from membership in the local collective bargaining unit comprising of local public employees. N.J.S.A. 34:13A-5.3.

PERC has established guidelines for determining whether a person formulates management policy and direct its effectuation and is accordingly a "management executive."

A person formulates policies when he develops a particular set of objectives designed to further the mission of the governmental unit and when he selects a course of action from among available alternatives. A person directs the effectuation of policy when he is charged with developing the methods, means, and extent of reaching a policy objective and thus oversees or coordinates policy implementation by line supervisors. Simply put, a managerial executive must possess and exercise a level of authority and independent judgment sufficient to affect broadly the organization's purposes or its means of effectuation of these purposes. Whether or not an employee possesses this level of authority may generally be determined by focusing on the interplay of three factors: (1) the relative position of that employee in his employer's hierarchy; (2) his functions and responsibilities; and (3) the extent of discretion he exercises. [Boro. of Montvale, 6 NJPER 507, 508-09 (1980)]

Thus, the determination as to whether a person is a "managerial

executive" requires an examination of the person's position in the local agency's hierarchy, his job function and responsibilities, and the amount of individual discretion exercised by the individual. The analysis of these three factors is very often a position-by-position determination.

The determination as to whether a person is a "confidential employee" also requires an individualized determination. PERC has narrowly construed the term "confidential employee." County of Essex, 17 NJPER 256, 257 (1991). The "key" to status as a confidential employee "is an employee's access to, and knowledge of, material used in labor relations processes including contract negotiations, contract administration, grievance handling and preparation of these processes." Ibid. Specifically, PERC makes this case-by-case analysis as follows:

We (PERC) scrutinize the facts of each case to find for whom each employee works, what he does, and what he knows about collective negotiations issues. Finally, we determine whether the responsibilities or knowledge of each employee would compromise the employer's right to confidentiality concerning the collective negotiations process if the employee was included in a negotiating unit. [State of New Jersey, 11 NJPER 507, 510 (1985)]

Thus, a "confidential employee" has access to confidential information of the employer which is relevant to the labor relations of the local government agency.

In Attorney General Opinion No. 91-0093 (September 20, 1991), we examined in detail the terms "managerial executives" and "confidential employees" in the context of the Local Government Ethics Law. We noted in the Opinion that the Legislature in using these terms to define "local government officer" was attempting to adopt an approach that would identify persons of a high level with policy-making responsibilities. We determined in Opinion No. 91-0093 and in other related Opinions that certain persons serving in government were necessarily "managerial executives" or "confidential employee," and therefore "local government officers," because their statutory duties mandated that they exercise significant policy-making responsibilities. In examining the duties of the members of a municipal rent leveling board discussed above, the members exercise significant policy-making responsibilities and independent judgment in the specialized area

of rent regulations and their quasi-judicial decisions have a significant financial impact upon the local residents and property owners. In general the members of a rent leveling board would be considered "managerial executives" and therefore "local officers" for purposes of that Local Government Ethics Law.

Accordingly, the members of a municipal rent leveling board would generally be considered "local government officers" for purposes of the Local Government Ethics Law, N.J.S.A. 40A:9-22.1 et seq., and subject to the terms of the Law including the financial disclosure requirements. As noted previously, this opinion provides only general guidance and it is not intended to establish per se that every municipal rent leveling board operates in the manner discussed above. In these circumstances, the appropriate municipal attorney should examine the municipal ordinance in question with the guidance provided by this opinion and provide his or her legal advice to the municipality. This office is available to consult with counsel in this regard.

Very truly yours,

ROBERT J. DEL TUFO
ATTORNEY GENERAL

By: _____
John J. Chernoski
Senior Deputy Attorney General