

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

IN THE MATTER OF THE EMPLOYES OF :
 :
 : Case No. PF-R-13-100-E
 :
 :
EMMAUS BOROUGH :

FINAL ORDER

Emmaus Borough (Borough) filed timely exceptions and a supporting brief with the Pennsylvania Labor Relations Board (Board) on June 23, 2014, to a Nisi Order of Certification (NOC) issued on June 3, 2014. The NOC certified the Pennsylvania Professional Fire Fighters Association, affiliated with the International Association of Fire Fighters (Association) as the exclusive representative of all full-time and regular part-time fire fighters of the Emmaus Fire Department (Fire Department), pursuant to Act 111 of 1968, as read in *pari materia* with the Pennsylvania Labor Relations Act (PLRA). Following an extension of time granted by the Acting Secretary of the Board, the Association filed a brief in response to the exceptions on July 21, 2014. For purposes of the Borough's exceptions, the facts, as found by the Hearing Examiner, are summarized as follows.

The Borough is a political subdivision organized under the Borough Code, 53 P.S. § 46201, *et. seq.*, and thus is a public employer within the meaning of Act 111, as read in *pari materia* with the PLRA. (FF 1 and 4). The Borough incorporated the Fire Department as a non-profit corporation, and owns the Fire Department building and most of the equipment, such as the fire trucks/apparatus, as well as the training facility utilized by the fire fighters. (FF 5 and 8).

On July 6, 1999, Borough Council adopted Ordinance 887. Ordinance 887 codifies prior ordinances relating to the Fire Department, and effectuates the "Establishment of the Fire Department," which "shall be comprised of vehicles, equipment, and volunteers from the pre-existing Fire Department of the Borough of Emmaus and any additional equipment and manpower which may be specified by Borough Council." The Ordinance established the positions of Chief, Assistant Chief(s), Deputy Fire Chief(s), Captain(s), Lieutenant(s), and Engineer, who "shall serve as at-will employees and appointees" subject to re-appointment by Borough Council and who must take the Oath required of Borough Officials. The Ordinance also provides that fire fighters shall be under the control of the Fire Chief, "who shall be accountable to the Borough Manager and Council." (FF 6). In accordance with Ordinance 887, Fire Chief James Reiss is a Borough employe, and reports to Borough Manager Shane Pepe, who is also an employe of Borough Council. (FF 4, 6, and 13).

Ordinance 887 also reserves the right of Borough Council to establish rules, regulations, and standard operating procedures, which shall be binding on the Fire Department and the fire fighters.¹ Ordinance 887 also authorizes the Chief to issue

¹ In 2011, the fire fighters were issued the Borough of Emmaus Personnel Policy (Part-Time and Seasonal Employees), which had an effective date of April 5, 2011. The April 5, 2011 policy manual is a compilation of Borough policies ranging from hiring to drug and alcohol to personnel files, and is signed by the Borough Council President. Contained in the policy manual's preamble is a disclaimer that the policy does not alter the "at-will presumption of employment." The fire fighters were provided with the policy, required to sign an acknowledgement of its receipt, and return it to the Borough Manager. (FF 23). In addition, in July 2013, the fire fighters received the Borough of Emmaus Non-Union Employees Light Duty Policy. Again, the fire fighters were provided this policy and required to sign an acknowledgement of receipt and return the same to the Borough Manager. Significantly, the policy is directed to non-union employes of the Borough and specifically lists all of the individual fire fighters on the distribution list. (FF 24).

standing orders and a Standard Operating Procedures Manual for the purpose of directing specific firefighting activities.² Further, the Ordinance designates the Borough Council as the entity which sets salaries and compensation for fire fighters. (FF 7).

Consistent with the Borough's "establishment of the Fire Department", the Borough's budget has 38 line items for that Department, totaling \$513,016 in actual expenditures in 2012 and a 2013 budgeted amount of \$448,158. (FF 11).³ Notably, the Fire Department itself typically does not pay for anything related to its operations, equipment or personnel, aside from the occasional vacuum cleaner, as all of these items are paid directly by the Borough out of the Borough's Fire Department budget.⁴ (FF 10). Indeed, none of the budgeted monies are actually paid to the Fire Department, even as a pass through. Instead, when the Fire Department incurs an expense, the Borough Secretary enters the expense into the Borough's computer system, and the budgeted funds are thereafter expended by the Borough and paid directly to the recipient, whether that recipient is a fire fighter, vendor or other entity. Pursuant to a Borough rule, no one at the Fire Department, not even the Chief, may authorize an expenditure greater than \$500.00 without permission from the Borough. (FF 11).

A fire fighter wishing to work for the Fire Department must fill out an application, which is reviewed by the Chief, and then must be approved by the Borough. The Borough Council regularly reviews the Chief's recommendations for the appointment of fire fighters.⁵ (FF 20).

Borough Secretary Victoria Schadler runs the day-to-day operations of the Fire Department, including the scheduling of fire fighters on a monthly calendar. She exercises discretion to assign and/or not assign fire fighters to particular shifts. (FF 13). Based on the posted schedule, fire fighters report to the Fire Department building and perform various services, including responding to fire calls, participating in training and performing maintenance around the fire house during their assigned shift. For any shift on which a fire fighter is scheduled, he or she must remain at the Fire Department or otherwise engage in activities related to his or her duties, and may not leave the firehouse to run personal errands. Fire fighters are required to find a replacement if, for some reason, they cannot work a shift for which they are scheduled or

² The Standard Operating Guidelines (SOGs) promulgated by the Fire Chief, pursuant to the authority vested by the Borough in Ordinance 887, defer to and rely on the personnel policies and regulations set forth by the Borough. For example, the first section of the SOGs has forms for an applicant to authorize the Borough to perform a background check and includes various Borough policies that are applicable to fire fighters. Article 2 identifies the department head, in this case the Chief, who is a Borough employe, as administrator of the rules and regulations as well as a member of the governing board made up of other employe department heads, who enforce the rules and regulations. (FF 26). In addition, Article 3 identifies the chain of command with the Chief at the top, while also providing that officers of the Fire Department are approved biannually by the Borough Council. Article 4, meanwhile, governs personnel, and notably, at Section 4.2.7 advises that fire fighters working as standby drivers must be approved by the Borough. (FF 27).

³ For the 2014 fiscal year, the Borough established a fire services tax, the equivalent of 0.5496 mils, in order to secure for the Borough restricted funds to cover the costs associated with the Fire Department. (FF 12).

⁴ The fire fighters obtain the fuel for the fire trucks and apparatus from the Borough garage at no cost to the Fire Department.

⁵ In April 2013, the Borough Council considered the recommendation from Chief Reiss that Charles Chiaverelli be hired as a driver of Engine 711 and 712 for the Fire Department. At that meeting, on a motion by Dr. Waddell, seconded by Mr. Barrett, both members of the Borough Council, the Council voted 7-0 to hire Chiaverelli as recommended.

need to leave during a shift. According to a March 28, 2011 notice, only the Borough, through the Chief or Assistant Chief, can authorize overtime for fire fighters. Without authorization, the fire fighters are required to punch out, though they may continue to be on shift as a volunteer and will not be paid. (FF 16). Fire fighters must punch in and out for their shift using a time card system, which Borough Secretary Schadler uses to track their hours. (FF 14). Based upon the fire fighter's time card, Borough Secretary Schadler inputs the hours into the Borough's payroll system and the Borough issues a monthly check directly to the fire fighter based upon their hourly rate. Fire fighters have taxes, including FICA, deducted from their monthly paychecks from the Borough and receive a W-2 from the Borough at the end of the year. (FF 15).

The Borough has the power to set and approve the hourly pay rates for fire fighters through Council. (FF 18). Since approximately 1995, the fire fighters' hourly pay rate has consisted of a base rate with monetary incentives for additional training. (FF 16). In fact, the rate policy in effect for almost two decades specifically states that the fire fighters' individual certifications which would entitle them to a higher hourly rate are due by November 1 each year so that they can be submitted to the Borough Manager for Council's approval. (FF 18).

The 2012 base pay rate for fire fighters was \$9.75, and a fire fighter received an extra \$0.25 for each of several defined qualifications, such as first aid or vehicle rescue. (FF 17). The Borough denied the Chief's recommendation for the 2013 rate of pay for the fire fighters, and in lieu of reducing or eliminating overnight shifts, granted the fire fighters the three (3%) percent raise granted to all other Borough employees. (FF 19).

The responsibility for personnel matters in the Fire Department, including issuing discipline to fire fighters, rests with the Fire Chief, who is a Borough employee. (FF 21). The Chief has disciplined fire fighters in the past, including the termination of Robert Faustner on February 25, 2011, for insubordination, and the suspension of Michael Arndt on October 29, 2011 for portraying the Fire Department in a negative light through the use of social media. (FF 29). Notwithstanding the Borough's delegation of personnel matters in the Fire Department to the Chief, the final say on discipline rests with the Borough. A fire fighter who is not happy with the disciplinary decision of the Chief may appeal the decision to the Borough Manager. (FF 21).⁶ The Borough Manager has the power to discipline anyone in the Fire Department for violating policies issued by the Borough. (FF 22).

Based on the evidence presented, the Hearing Examiner issued an Order Directing Submission of Eligibility List, finding that the full-time and regular part-time fire fighters below the rank of Chief were not volunteers, but were employed by the Borough for purposes of Act 111. A secret ballot election was held by the Board on May 21, 2014, among the employees in the unit of fire fighters found appropriate by the Hearing Examiner. On June 3, 2014, the Board Representative issued the NOC finding that fifty percent or more of the valid votes cast in the election were in favor of representation by the Association, and certified the Association as the exclusive representative of the Borough's fire fighters.

The Borough argues on exceptions that the Hearing Examiner erred in relying on Seattle Opera v. NLRB (American Guild of Musical Artists, AFL-CIO), 292 F.3d 757 (2002) and Sweet v. PLRB, 322 A.2d 362 (Pa. 1974) to find an employee/employer relationship between the fire fighters and the Borough. With respect to the Hearing Examiner's reliance on cases under the National Labor Relations Act (NLRA) for Pennsylvania public sector employees, the Pennsylvania Supreme Court, and the Board, while recognizing that federal precedent is not binding on the Board, have "not hesitated to consider, and to follow, federal interpretation of the NLRA due to the similarity between the federal

⁶ For example, the Borough Manager attended the meeting to terminate fire fighter Robert Faustner, and the termination letter expressly directed Faustner to the Borough Manager if he had questions about the discipline. (FF 22).

labor law and our own laws dealing with labor relations." Commonwealth, Office of Administration v. PLRB, 916 A.2d 541, 550 (Pa. 2007). Here, both the NLRA and the PLRA define an employee to "include any employe[e], and shall not be limited to the employe[e]s of a particular employer." 43 P.S. §211.3(d); 29 U.S.C. §152(3). Both the federal law and the Pennsylvania law similarly protect the right of an "employee" "to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection." 43 P.S. §211.5. As the policies of the NLRA and PLRA are in accord, the Hearing Examiner did not err in considering federal case law in analyzing whether the Emmaus fire fighters were volunteers or employees of the Borough.

In discussing the definition of employee, the Court in Seattle Opera stated as follows:

While the statutory definition is somewhat unhelpful, we are not without guidance; in Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 81 L. Ed. 2d 732, 104 S. Ct. 2803 (1984), the United States Supreme Court made clear that

the breadth of § 2(3)'s definition is striking: the Act squarely applies to "any employee." The *only limitations* are specific exemptions for agricultural laborers, domestic workers, individuals employed by their spouses or parents, individuals employed as independent contractors or supervisors, and individuals employed by a person who is not an employer under the [Act].

Id. at 891 (emphasis added). Because the Opera does not claim that the auxiliaries fall within any of section 152(3)'s specific exemptions, resolution of the Opera's petition turns on the provision's opening words: "The term 'employee' shall include any employee...." See id.; see also Sunland Constr. Co., 309 N.L.R.B. 1224, 1226 (1992) ("Under the well settled principle of statutory construction--*expressio unius est exclusio alterius*--only these enumerated classifications are excluded from the definition of 'employee.'" (footnote omitted)). Although the words might appear hopelessly circular, the Court's decision in NLRB v. Town & Country Electric, Inc., 516 U.S. 85, 133 L. Ed. 2d 371, 116 S. Ct. 450 (1995), provides the necessary interpretive assistance:

The ordinary dictionary definition of "employee" includes any "person who works for another in return for financial or other compensation." American Heritage Dictionary 604 (3d ed. 1992). See also Black's Law Dictionary 525 (6th ed. 1990) (an employee is a "person in the service of another under any contract of hire, express or implied, oral or written, where the employer has the power or right to [**13] control and direct the employee in the material details of how the work is to be performed"). The phrasing of the Act ... reiterates the breadth of the ordinary dictionary definition [when] it says "the term 'employee' shall include *any* employee."

Id. at 90 (emphasis in original). Given that the Court has assigned such weight to the plain meaning of the term "employee," it is clear that--where he is not specifically excluded from coverage by one of section 152(3)'s enumerated exemptions--the person asserting statutory employee status *does* have such status if (1) he works for a statutory employer in return for financial or other compensation, see id.; see also WBAI Pacifica Found., 1999 NLRB LEXIS 586, 1999 WL 676522, at *3 (N.L.R.B. Aug. 26, 1999) (requiring "presence of some form of economic relationship between the employer and the individual held to have statutory employee status"); and (2) the statutory employer has the power or right to control and direct the person in the

material details of how such work is to be performed, see Town & Country Elec., 516 U.S. at 90.

Seattle Opera, 292 F.3d at 762.

The test discussed in Seattle Opera is not inconsistent with that laid out by the Pennsylvania Supreme Court in Sweet, *supra*. In Sweet the Pennsylvania Supreme Court stated as follows:

The relation of employer and employe exists when a party has the right to select the employe, the power to discharge him, and the right to direct both the work to be done and the manner in which such work shall be done. McCulligan v. Pennsylvania Railroad Co., 214 Pa. 229, 63 A. 792 (1906). See, also Smalich v. Westfall, 440 Pa. 409, 269 A.2d 476 (1970); Ragano v. Socony Vacuum Oil Co., 376 Pa. 271, 101 A.2d 686 (1954). The duty to pay an employe's salary is often coincident with the status of employer, but not solely determinative of that status. Rodgers v. Washington County Institution District, 349 Pa. 357, 37 A.2d 610 (1944).

Sweet, 322 A.2d at 365.⁷ Upon review, and in accordance with the purposes and policies of Act 111 and the PLRA, the Hearing Examiner, did not err in utilizing the cases of Seattle Opera and Sweet in analyzing whether the fire fighters in this case were employes of the Borough.⁸

On exceptions, the Borough challenges Findings of Fact 1, 20 through 26, 29, and 31 through 33. The Borough argues that these findings are in error because the fire fighters cannot be employes of the Borough where the Borough Council used the term "appoint" as opposed to "hire" when voting to approve the Chief's recommendation for a fire fighter in the Fire Department. The Borough Council would, with one exception,⁹ vote to "appoint" fire fighters, but the Borough argues that when it hired an employe it would use the word "hired" at a specified rate of pay. The Borough's argument that the fire fighters cannot be employes of the Borough because Council did not use the term "hire" in appointing them is without merit. See Drummond v. Hilton Hotel Corporation, 501 F. Supp. 29, 31 (E.D. Pa. 1980) ("the mere fact that there is express denial of the existence of an agency relationship is not in itself determinative of the matter"); Krause v. Cherry Hill Fire District 13, 969 F. Supp. 270, 275 (N.J. 1997) (noting that "[i]t is not clear how the absence of an employment application demonstrates the absence of an employment relationship" and citing the holding of Haavistola v. Community Fire Co., 6 F.3d 211, 222 (4th Cir. 1993), that the "district court erred in concluding that because the plaintiff was not conscripted into service with the Fire Company she should not be its employee");

⁷ The Borough argues on exceptions that the Hearing Examiner erred in applying Sweet. However, before the Hearing Examiner, the Borough argued that the Commonwealth Court decision in Tyrone Fire Patrol Company No. 1 v. Tyrone Borough, 92 A.3d 79 (Pa. Cmwlth. 2014), was controlling. The Hearing Examiner distinguished Tyrone Borough, noting that in that case there was no evidence that the fire police were paid by the borough for their services. The Borough has since abandoned its reliance on Tyrone Borough in the exceptions. Nonetheless, we note that the court in Tyrone Borough quoted from Coleman v. Board of Education of the School District of Philadelphia, 382 A.2d 1275, 1279 (Pa. 1978), which in turn had quoted the test for employe status from Sweet, *supra*. that is quoted above.

⁸ In the exceptions, the Borough argues that the Hearing Examiner erred in finding a joint employer relationship between the Borough (a public employer) and the Fire Department (a private employer). The Hearing Examiner however, cited Costigan v. Philadelphia Finance Department Employees Local 696, 341 A.2d 456 (Pa. 1975), for purposes of elaborating the test for determining the employer's exercise of control of the hours and working conditions of the employes. Neither in the ODSEL nor the NOC did the Board find or conclude that there was a joint employer relationship in this case.

⁹ See Footnote 5, *supra*.

and Mendl v. City of Gibraltar, 727 F.3d 565, 569 (6th Cir. 2013) (recognizing that the determination of an employment relationship does not depend on isolated factors but rather the circumstances of the whole activity).

It is undisputed that the Chief, a Borough employe, makes a recommendation to the Borough Council for the "appointment" of a person as a fire fighter in the Fire Department. Indeed, the mere fact that the Chief must seek Council's appointment of a fire fighter implies that the Borough may deny the appointment. Thus, it is the Borough Council, not the Chief or Fire Department, which ultimately decides whether a person becomes a fire fighter in the Borough of Emmaus. The Borough Council's "appointment" of a fire fighter, carries with it the understanding that the fire fighter will perform services for the Borough within the Fire Department, including fire suppression and maintenance of Borough property, and in exchange for those services the fire fighter will receive from the Borough an hourly wage. Indeed, it is the same relationship created when the Borough indisputably "hires" a person for an hourly wage in the Borough office, streets department, police department, or anywhere else within the Borough. That the Borough typically "appointed" fire fighters does not change the fact that they were appointed to work in the Fire Department for an hourly wage. As noted by the Hearing Examiner in this case, and similarly held in Seattle Opera and Sweet, this symbiotic relationship, of providing services for hourly wages, is one of the elements of an employer-employe relationship.

Upon review of the record, there is substantial evidence that the Borough exercised control over the fire fighters "appointment", wages, hours, working conditions and discipline, establishing an employer/employe relationship between the fire fighters and the Borough for purposes of Act 111. Notably, the Borough has not filed exceptions to the Hearing Examiner's Findings of Fact that the Borough controls the fire fighters' wages (FF 15 - 19), hours (FF 13 and 14) and working conditions (FF 6 and 7). Indeed, uncontested Finding of Fact 18 establishes Borough control over the fire fighters' wages, finding that "[t]he Borough has the power to set and approve the hourly rates through Council." Finding of Fact 13, also not excepted to, finds Borough control over hours, stating as follows:

The Fire Department is run by two Borough employes, Chief James Reiss and Secretary Victoria Schadler. Schadler runs the day-to-day operations, including the scheduling of fire fighters on a monthly calendar. Schadler also exercises discretion to assign and/or not assign fire fighters to particular shifts.

Finally, uncontested Finding of Fact 7, conclusively finds the Borough's authority to control working conditions, stating as follows:

In [Ordinance 887] the Borough also reserved the right to establish rules, regulations, and standard operating procedures, which shall be binding on the Fire Department and the fire fighters, though the Ordinance also authorizes the Chief [a Borough employe] to issue standing orders and a Standard Operating Procedures Manual for the purpose of directing specific firefighting activities. Further, the Ordinance designates the Borough Council as the entity which sets salaries and compensation for fire fighters, after consideration of any recommendation which the Fire Chief may provide.

On exceptions, instead of contesting the Borough's authority over wages, hours and working conditions, the Borough tries to distance itself from the discipline of fire fighters in an attempt to obscure the existence of an employment relationship. With regard to the Borough's control of disciplinary matters in the Fire Department, as recognized in Coleman, 382 A.2d at 1279, "[t]he test is ... framed in terms of the *right* and *power* to exercise such control, not in terms of whether the right and power were *actually* exercised or whether they were delegated to another." Indeed, the definition of an employer under the PLRA recognizes such delegation by including "any person acting, directly or indirectly, in the interests of an employer..." 34 P.S. §211.3(c). The Borough readily concedes that the Fire Chief has the authority to issue discipline within

the Fire Department. However, it is also undisputed that the Fire Chief is a Borough employe "who shall be accountable to the Borough Manager and Council." (FF 6), see 34 P.S. §211.3(c). Thus, as a matter of law, the Chief acts in the interests of the Borough with respect to disciplinary matters in the Fire Department.

Consistent therewith, Finding of Fact 21 states as follows:

The Chief is responsible for the issuance of discipline and other personnel matters. Notwithstanding the Chief's authority, as granted by the Borough, the final say on discipline rests with the Borough. A fire fighter who is not happy with the disciplinary decision of the Chief or the Fire Department may appeal the decision to the Borough Manager.

Finding of Fact 22, further states that "[t]he Borough Manager has the power to discipline anyone in the Fire Department for violating policies issued by the Borough."

Findings of Fact 21 and 22 are supported by substantial evidence of record. See PLRB v. Kaufman Department Stores, 29 A.2d 90 (Pa. 1942) (holding that substantial evidence is that which a reasonable person would accept as adequate to support the Board's finding). Borough Secretary Schadler, who is also the Secretary of the Fire Department, testified concerning the termination letter sent to fire fighter Robert Faustner as follows:

Q. Why would the Borough manager be included in that letter.

A. Because I believe if they have a major problem they can go above the department head, the fire chief, and go to the Borough ... to see if we can do anything about it.

* * *

A. If they don't like that, their final recourse would be going to the Borough to find out, you know, why they can't ... get a response.

Q. And can the Borough manager overrule the fire chief?

A. I never have had that problem.

Q. Well, if he couldn't, why would he be in this letter?

A. I guess he would be able to.

(N.T. 325-327).

Further, Borough Manager Pepet testified as follows:

Q. Now, what happens if the fire department, the Emmaus Fire Department, doesn't want to follow those [Borough] policies?

A. I have the power as a member to discipline anyone. It's my function for those violating policy in that department.

(N.T. 199).¹⁰ Accordingly, there is substantial record evidence to support the Hearing Examiner's finding that the Borough also exercised control over disciplinary matters within the Fire Department.

¹⁰ In addition, equally telling of the Borough Manager's control over discipline within the Fire Department are his responses to questions regarding how he obtained copies of the Fire Department's Standard Operating Guidelines. To be consistent and true to the Borough's arguments, when Borough Manager Pepe asked the Fire Chief, Assistant Fire Chief and Secretary to give him a copy of a record of the Fire Department, he should have been

Before the Hearing Examiner, the parties stipulated and agreed that the only issue in this case is whether the petitioned-for fire fighters are employed by the Borough.¹¹ (FF 3).¹² Despite that stipulation, on exceptions the Borough argues that the Board lacks jurisdiction to find that the fire fighters are employees of the Borough because to do so would mean that the Borough violated other statutes, including civil service laws; would violate the Borough's constitutional rights to choose its employees; and because the fire fighters should be estopped by prior claims of benefits available to volunteers. Initially, we note that the Board's jurisdiction under Act 111, as read in *pari materia* with the PLRA, is not dependent on whether or not the public employer has declared itself to be in an employee/employer relationship, but is based instead on whether the parties before the Board are an employee or labor organization as defined by the PLRA and the Commonwealth or a political subdivision thereof under Act 111. Neither can be disputed in this case.

With regard to the Borough's claims of estoppel, the Hearing Examiner rejected those claims noting that the volunteer benefits under the Emmaus Fireman's Relief Association (EFRA) were also available to employees, and thus could not estop the fire fighters from asserting employee status. Furthermore, the Hearing Examiner rejected the Borough's argument that the fire fighters should be estopped from asserting employee status because the Fire Department received state funding under the Foreign Fire Insurance Tax Distribution Law (FFITDL), 53 P.S. § 895.701, *et. seq.*, where it was the Borough, not the fire fighters, who had repeatedly certified to the state that the fire fighters were volunteers in order to obtain the state funding. Nevertheless, we note as held by the Hearing Examiner, citing to Borough of Whitaker, 14 PPER § 14273 (Final Order, 1983), that "[i]t is well settled that the status of alleged employees under other statutory provisions, such as the Civil Service Act ... or [FFITDL] is not dispositive of their coverage under Act 111. (ODSEL at 10).

Similarly, the Borough's claims that the Hearing Examiner's order directs the Borough to employ fire fighters in violation of other laws, such as civil service, veteran's preference or any number of other employment statutes is without foundation in law or fact. Notably, the Borough has not pointed to a single fire fighter whose appointment violated any laws of the Commonwealth or United States. The crux of the matter here is that because fire fighters were appointed by the Borough to provide services for an hourly wage, the Borough hired them as employees under the PLRA and Act 111. If laws were violated by the Borough's appointment of a fire fighter, it was not caused by the Board's decision in this case.

making the request to them not in their capacity as Borough employees but as alleged volunteer members of the Fire Department (over which he would allegedly have no authority to discipline). Instead, Borough Manager Pepe testified as follows:

- Q. So they had an obligation to give this to you as employees; is that correct?
- A. Yes. They could have said no, but as an employee, I would say yes. If the manager asks an employee to provide information they have an obligation to provide it.

(N.T. 145).

¹¹ The parties stipulated and agreed that if the Borough is found to be the employer of the petitioned-for fire fighters, the unit deemed appropriate for the purpose of collective bargaining is a subdivision of the employer unit comprised of all full-time and regular part-time fire fighters up to the rank of Chief.

¹² The Borough has not filed an exception to Finding of Fact 3, and thus it is conclusive. 34 Pa. Code §95.98(a)(3) ("[a]n exception not specifically raised shall be waived").

Indeed, as the Hearing Examiner aptly stated in rejecting the Borough's argument that finding an employer/employee relationship between the Borough and the fire fighters would violate Article III, Section 31 of the Pennsylvania Constitution:¹³

Finally, the Borough raises a constitutional argument that it never intended the fire fighters to be public employes and that such a determination now, would in essence, force the Borough to hire several dozen employes it had no intention to hire ... The Borough posits that the Board is being asked to create an employment relationship where one does not, in fact, exist, which violates Article III, § 31 of the Pennsylvania Constitution. However, the Borough's argument is untenable... [T]he Board is simply assessing the current state of affairs, as it exists in the Borough. In essence, the Borough has already hired the fire fighters, and despite any alleged intent on behalf of the Borough that the fire fighters not be public employes, the Borough has already made them public employes by paying them hourly wages and possessing and exercising significant control over their terms and conditions of employment.

(ODSEL at 11).

After a thorough review of the exceptions and all matters of record, the Hearing Examiner did not err in finding that the Borough exercises control over the fire fighters' appointment, wages, hours, working conditions, discipline and direction of personnel.¹⁴ As such, the Hearing Examiner did not err in concluding that the Borough was the employer of the petitioned-for fire fighters for purposes of Act 111, as read in *pari materia*, with the PLRA. Accordingly, the Borough's exceptions shall be dismissed, and the Nisi Order of Certification made final and absolute.

ORDER

In view of the foregoing and in order to effectuate the policies of Act 111 and the Pennsylvania Labor Relations Act, the Board

HEREBY ORDERS AND DIRECTS

that the exceptions filed by the Borough of Emmaus are hereby dismissed, and the June 23, 2014 Nisi Order of Certification, 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, L. Dennis Martire, Chairman, Robert H. Shoop, Jr, Member, and Albert Mezzaroba, Member this sixteenth day of September, 2014. 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.

¹³ We note that the parties do not dispute that the fire fighters at issue here are fire fighters for purposes of Act 111 and Article III, Section 31 of the Constitution.

¹⁴ The Borough has requested oral argument on its exceptions. In support of its request, the Borough argues that the Board's order will have far-reaching effects over the relationship between volunteer fire companies and municipalities. The arguments raised in the exceptions have been thoroughly briefed by the parties. Further, the facts here, set forth at length by the Hearing Examiner, are unique to this case, such that it does not necessarily affect other circumstances outside the relationship between the Borough and its fire fighters. Indeed, as with any representational matter brought before the Board, each case must be addressed on its own facts. Accordingly, the Borough's request for oral argument is denied.