

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

IN THE MATTER OF THE EMPLOYEES OF

:
:
: Case No. PF-R-13-100-E
:
:

EMMAUS BOROUGH

ORDER DIRECTING SUBMISSION OF ELIGIBILITY LIST

On October 24, 2013, the Pennsylvania Professional Fire Fighters Association (Union) filed a Petition for Representation with the Pennsylvania Labor Relations Board (Board) seeking to represent a unit of all full-time and regular part-time fire fighters, including the Deputy Chief, employed by the Borough of Emmaus (Borough or Employer). On December 5, 2013, the Secretary of the Board issued an Order and Notice of Hearing in which the matter was assigned to a pre-hearing conference for the purpose of resolving the matters in dispute through mutual agreement of the parties, and designating January 9, 2014, in Harrisburg, as the time and place of hearing, if necessary.

The hearing was necessary and was held before the undersigned Hearing Examiner of the Board, at which time all parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. Both parties filed timely post-hearing briefs in support of their respective positions.

The Examiner, on the basis of the testimony and exhibits presented at the hearing, and from all of the matters and documents of record, makes the following:

FINDINGS OF FACT

1. The Borough is a public employer and political subdivision under Act 111 as read *in pari materia* with the Pennsylvania Labor Relations Act (PLRA). (N.T. 10-11)

2. The Union is a labor organization under Act 111 as read *in pari materia* with the PLRA. (N.T. 11)

3. The parties stipulated and agreed that the only issue in this case is whether the petitioned-for fire fighters are employed by the Borough; 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, including but not limited to the Deputy Chiefs, Assistant Chiefs, Lieutenants, and Captains. (N.T. 18-19)

4. The Borough is organized under the Borough Code, 53 P.S. § 46201, **et. seq.**, with a Council, which serves as the legislative body, and a mayor who serves as the chief executive officer of the police department. Shane Pepe, the Borough Manager, is an employee of the Borough Council. (N.T. 117)

5. The Emmaus Fire Department (Fire Department) is a non-profit corporation, incorporated by the Borough of Emmaus in or about 1984. Over the years, the Borough has enacted several ordinances pertaining to the Fire Department, which culminated in the passage of Borough Ordinance 887, adopted on July 6, 1999, wherein the Borough Council rewrote and codified the prior ordinances relating to the Fire Department. (N.T. 121-133, Respondent Exhibits 5-12, 17)

6. Notably, Ordinance 887 is deemed to effectuate 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." (Respondent Exhibit 12)

7. In the Ordinance, 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 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. (Respondent Exhibit 12)

8. The Borough 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. (N.T. 27-28, 209-210)

9. Shortly after its incorporation, the Fire Department applied for a loan from the Pennsylvania Emergency Management Agency (PEMA) in the amount of \$35,000, though the Borough was responsible for the repayment, which constituted an obligation on the Fire Department's budget. (Respondent Exhibit 17, 1984 Meeting Minutes)

10. As of today, 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. The fire fighters obtain the fuel for the fire trucks and apparatus from the Borough garage at no cost to the Fire Department. (N.T. 30, 208-209, 298; Respondent Exhibit 21)

11. The Borough's budget has 38 line items for the Fire Department, totaling \$513,016 in actual expenditures in 2012 and a 2013 budgeted amount of \$448,158. Significantly, none of these budgeted monies are actually paid to the Fire Department, even as a pass through. Instead, when the Fire Department incurs an expense, the 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. (N.T. 311-315; Respondent Exhibit 21)

12. 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. (N.T. 177-178, 215; Respondent Exhibit 26)

13. 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. (N.T. 34-37, 63, 96, 309; Union Exhibit 3)

14. Based on the posted schedule, fire fighters come to work and perform various services, including responding to fire calls, training, and maintenance around the fire house during their assigned shift. Fire fighters must punch in and out using a time card system, which Schadler uses to track their hours. Fire fighters are required to find a replacement if for some reason they cannot work a shift for which they are scheduled. 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. In other words, the fire fighter may not leave the firehouse to run personal errands. (N.T. 22, 31, 39-40, 251, 311; Union Exhibit 4, Respondent Exhibit 29)

15. Schadler inputs the fire fighters' hours, based upon the time sheets, into the Borough's payroll system, and the Borough issues a monthly check directly to the fire fighters, based upon their hourly rates. 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. (N.T. 55, 91-95, 249-251, Union Exhibits 9-11)

16. Since approximately 1995, the fire fighters' hourly pay rate has consisted of a base rate with monetary incentives for additional training. According to a March 28, 2011 notice, the Chief or Assistant Chief can authorize overtime for fire fighters, but 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. (N.T. 42-48; Union Exhibits 4-8)

17. 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. In 2012, the lowest hourly rate for a fire fighter was \$10.00 and the highest hourly rate was \$15.00. (Respondent Exhibit 28)

18. The Borough has the power to set and approve the hourly rates through Council. 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. (N.T. 47, 255; Union Exhibit 8)

19. Notably, the Borough denied the fire fighters' rate sheets for 2013 and instead granted the fire fighters the three (3%) percent raise granted to all other Borough employees in lieu of other increases. The Borough was looking to reduce Fire Department costs and had intended to reduce or eliminate overnight shifts. The Borough Council approved the monies to retain the overnight shifts and in exchange only granted to fire fighters a three (3%) percent cost of living increase. As a result, the fire fighter rates for 2013 look slightly different than from previous years, the lowest hourly rate being \$10.15 and the highest hourly rate being \$15.22. (N.T. 51-52, 94-96; Respondent Exhibit 28)

20. A fire fighter wishing to work for the Fire Department must fill out an application, which is ultimately reviewed by the Chief and then must be approved by the Borough. The Borough Council regularly reviews the Chief's recommendations for the hiring of fire fighters. In April 2013, the Borough Council took up 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. (N.T. 22-27; Union Exhibits 1-2)

21. 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. (N.T. 303-305, 326-327; Respondent Exhibits 12 & 37)

22. For example, the Chief issued a termination letter to fire fighter Robert Faustner expressly directing Faustner to the Borough Manager if he has questions about the discipline. The Borough Manager attended the termination meeting with Faustner. The Borough Manager has the power to discipline anyone in the Fire Department for violating policies issued by the Borough. (N.T. 199, 306; Respondent Exhibit 37)

23. 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, 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. (N.T. 97-98; Union Exhibit 12)

24. 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 employees of the Borough and specifically lists all of the individual fire fighters on the distribution list. (N.T. 99-100; Union Exhibit 13)

25. In December 2013, the Borough issued a memorandum regarding the local services tax exemption. The memorandum indicates that it is directed to "P/T Employees" and was included in the last monthly paycheck for all fire fighters. (N.T. 104-105; Union Exhibit 14)

26. The Standard Operating Guidelines (SOGs) promulgated by the Fire Department, pursuant to the authority vested therein 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 manual 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 employee, as administrator of the rules and regulations as well as a member of the governing board made up of other employee department heads, who enforce the rules and regulations. (N.T. 193-194; Respondent Exhibits 12 & 27, Articles 1 & 2.1.1, 2.1.2)

27. 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 bi-annually 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. (Respondent Exhibit 27, Articles 3.2.5 & 4.2.7)

28. Fire Department officers, such as the Assistant Chief, Deputy Chiefs, Lieutenants, and Captains, are each required to submit a budget for the year to the Chief and the Secretary, who in turn calculate the totals and provide the requests to the Borough. The Council tries to give deference to the Chief's budget requests, but typically rejects nearly every budget proposal as a result of deficits and other safety concerns. The budget ultimately comes to the Chief from within the Fire Department, and the Chief has changed the requests of the officers. (N.T. 218, 247, 304-305)

29. The Chief has disciplined fire fighters in the past for an offense such as insubordination. The Chief terminated Robert Faustner on February 25, 2011. He did not have to get approval from anyone before doing so. He also suspended Michael Arndt on October 29, 2011 for portraying the Fire Department in a negative light through the use of social media. (N.T. 305-307; Respondent Exhibits 37-38)

30. The Chief is in charge at a fire and gives directives to the individual fire fighters in their daily operations. If the Chief is not present at a fire, the Assistant Chief assumes authority. The Chief commits Fire Department resources in connection with an emergency services evening event at the library where he sends a crew to do public relations functions. He also sends fire fighters into the schools for fire prevention programs. Likewise, he sends the truck out for community service events when there are community days at the park. If there is a delayed call, the Chief sends the truck out to assist the police departments or the EMTs. (N.T. 304, 322-323)

DISCUSSION

The Union's petition for representation seeks an election to determine the exclusive bargaining representative of the fire fighters for the Borough. The Borough opposes the petition on the basis that the petitioned-for fire fighters are not actually employees, but rather volunteers. The Borough also contends that even if the fire fighters are employees and not volunteers, they are not employees of the Borough, but rather the Fire Department.

Section 1 of Act 111 provides in pertinent part:

Policemen or fireman employed by a political subdivision of the Commonwealth or by the Commonwealth shall, through labor organizations or other representatives designated by fifty percent or more of such policemen or firemen, have the right to bargain collectively with their public employers concerning the terms and conditions of their employment, including compensation, hours, working conditions, retirement, pensions, and other benefits, and shall have the right to an adjustment or settlement of their grievances or disputes in accordance with the terms of this act.

43 P.S. § 217.1 (emphasis added).

Unfortunately, Act 111 does not contain any definition for the terms "employe" or "volunteer." The PLRA, on the other hand, provides in Section 3(d) as follows:

The term "employe" shall include any employe, and shall not be limited to the employes of a particular employer, unless the act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute, or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any person in the home of such person, or any individual employed by his parent or spouse.

43 P.S. § 211.3(d).

It is well settled that practice under the National Labor Relations Act (NLRA), 29 U.S.C. § 152, may be looked to for guidance in interpreting similar provisions of Pennsylvania labor legislation and precedent thereunder is highly relevant to the question of employe status. **Costigan v. Philadelphia Finance Department Employees Local 696**, 341 A.2d 456 (Pa. 1975). In **Seattle Opera v. NLRB; American Guild of Musical Artists, AFL-CIO**, 292 F.3d 757 (2002), the Circuit Court of Appeals for the District of Columbia lamented that a nearly identical definition for the term "employee" in the NLRA was hopelessly circular and sanctioned the use of an ordinary dictionary, as well as Black's Law Dictionary, for interpretative assistance, and cited the United States Supreme Court's approval of the same in **NLRB v. Town & Country Electric, Inc.**, 516 U.S. 85 (1995).

The **Seattle Opera** Court noted that the ordinary dictionary definition of "employee" includes any "person who works for another in return for financial or other compensation." *Id.* at 762 citing **Town & Country Electric, supra**, and *American Heritage Dictionary*, Third Edition, 1992. Black's Law Dictionary, Sixth Edition, 1990, meanwhile, defines the term "volunteer" as "[a] person who gives his services without any express or implied promise of remuneration," while an "employee" is defined as "[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 control and direct the employee in the material details of how the work is to be performed."

Turning to the instant dispute, there is little doubt that the petitioned-for fire fighters are employes under Act 111, and not volunteers, as alleged by the Borough. First of all, the petitioned-for fire fighters are clearly employes under the ordinary dictionary definition, espoused by the **Seattle Opera** Court above. Indeed, the fire fighters work for the Borough and provide their services in return for financial compensation in the form of hourly wages. On these facts, the fire fighters certainly do not give their services without any express or implied promise of remuneration, which would classify them as volunteers pursuant to the definition contained in Black's Law Dictionary. Further, the petitioned for fire fighters perform their duties in the service of another, whether that is the Borough or the Fire Department, under a contract for hire

where they are subject to numerous rules and regulations which detail their conduct as well as how the work is to be performed. To hold that the fire fighters are volunteers would be inimical to the ordinary definitions of employe and volunteer.

Unfortunately, there are no Pennsylvania cases addressing the distinction between volunteers and employes in the public sector labor arena. However, **Seattle Opera** is sufficiently akin to the instant dispute to provide substantial guidance. In **Seattle Opera**, the parties' dispute turned on whether auxiliary choristers who received a flat fee of \$214 for their work in a particular production were employes or volunteers. In rejecting the Opera's contention that the auxiliary choristers were volunteers, the Court noted that there was no evidence the flat fee of \$214 was intended to be a reimbursement for out of pocket expenses an auxiliary was likely to incur in connection with attending rehearsals and performances. Indeed, the Court pointed out that the auxiliaries received \$214, no more and no less, regardless of the amount of any transportation, parking and other miscellaneous expenses they incurred. Plus, the auxiliaries were entitled to the fee even if they incurred no expenses at all. What is more, the Opera did not require the auxiliaries to submit expense reimbursement forms or receipts to receive the full sum. Thus, the Court concluded that the remuneration qualified as compensation for the auxiliaries' work. *Id.* at 763.

In this case, the Borough does not even contend that the hourly wages are intended as some sort of reimbursement for expenses incurred in connection with the fire fighters' services. In fact, it is undisputed that the fire fighters fill out time cards and their compensation is directly dependent on the hours they have worked in a particular period. (N.T. 40, 250-251, Respondent Exhibit 29). Borough Manager Pepe readily conceded that the longer a particular fire fighter works, the more money he or she gets. (N.T. 207). This factor weighs even more heavily in favor of employe status than the \$214 flat fee received by the auxiliary choristers in **Seattle Opera**. As such, it cannot be seriously contested that the petitioned-for fire fighters are employes under Act 111, and not volunteers. To be sure, the **Seattle Opera** Court decreed that true volunteers receive no fee at all regardless of the amount of expenses they incur. *Id.* at 763.

Significantly, the **Seattle Opera** Court did not end its analysis of the auxiliary choristers simply because they were paid a flat fee in connection with their production work. Instead, the Court also found that the record demonstrated the Opera possessed the right to control the auxiliary choristers in the material details of their performance. *Id.* at 765. As a result, the Court concluded that the National Board did not exceed its authority in finding that the auxiliary choristers were employees within the meaning and reach of the NLRA. *Id.* at 765. This analysis is consistent with the Pennsylvania cases addressing the question of whether there is an employer-employe relationship.

In **Sweet v. PLRB**, 322 A.2d 362, 365 (Pa. 1974), the Pennsylvania Supreme Court found that "[t]he 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." The Court also indicated that the duty to pay an employe's salary is often coincident with the status of employer, but not solely determinative of that status. *Id.* at 365. Later, in **Coleman v. Board of Education of the School District of Philadelphia**, 383 A.2d 1275 (Pa. 1978), the Supreme Court expanded on this principle and stated that the test is thus 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. *Id.* at 1279 (emphasis in original).

In **Costigan, supra**, the Supreme Court recognized that a joint employer situation may exist despite the fact that no single entity controls all of the terms of the employment relationship. In fact, the Court found a joint employer relationship where the Register of Wills had the exclusive power to hire, fire, promote, and direct the work of the employes, while the City of Philadelphia paid most of the employe salaries and other compensation costs of the office, and exercised considerable control over the fringe benefits accorded the employes, which included enrollment under the City's group life and health insurance plans, and coverage by the City's pension plan. **Costigan**, at 461. The

Court noted that the Register and the City each exercised independent control over important conditions of the relation, which were such that the process of collective bargaining may appropriately be utilized as contemplated by the Act. *Id.* at 461.

Meanwhile, in **Lower Merion Township Fire Department**, 14 PPER ¶ 14035 (Final Order, 1983), this Board stated and the Commonwealth Court affirmed in **International Ass'n of Fire Fighters, Local 2844 v. PLRB**, 504 A.2d 422 (Pa. Cmwlth. 1986), that the correct standard for determining an employment relationship is whether the alleged employer possesses and exercises the right to hire, fire, and control the conditions of employment.

The record here clearly shows that the Borough possesses the right to control the fire fighters in their terms and conditions of employment. Indeed, Borough Ordinance 887 provides that the fire fighters shall be under the control of the Fire Chief, who shall be accountable to the Borough Manager and Council. In addition, the Borough reserved the right in Ordinance 887 to establish rules, regulations, and standard operating procedures, which shall be binding on the Fire Department and the fire fighters. The Borough Manager has the power to discipline anyone in the Fire Department for violating the policies issued by the Borough. Further, Ordinance 887 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. Notwithstanding the Chief's authority over the fire fighters, 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.

The record also shows that the Borough exercises control over the fire fighters in their terms and conditions of employment. The Borough 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. Likewise, 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. The fire fighters even obtain the fuel for the fire trucks and apparatus from the Borough garage at no cost to the Fire Department. The Borough's budget has 38 line items for the Fire Department, totaling \$513,016 in actual expenditures in 2012 and a 2013 budgeted amount of \$448,158. Significantly, none of these budgeted monies are actually paid to the Fire Department, even as a pass through. Instead, when the Fire Department incurs an expense, the 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.

The Borough is so involved in the finances of the Fire Department that, for fiscal year 2014, it 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. What is more, the Chief's budget can and has been adjusted by the Borough Manager and Borough Council thereafter must approve the budgets. (N.T. 218, 304-305; Respondent Exhibit 21). These factors weigh heavily in favor of a determination that the Borough is at least a joint employer. See **Pottstown Borough**, 26 PPER ¶ 26108 (Final Order, 1995) (recognizing joint employer status for borough where fire companies were funded exclusively by the borough and the borough manager adjusted line item budget requests submitted by volunteer fire companies).

Furthermore, the Fire Department is actually run by two Borough employees, Chief Reiss and Secretary 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. Fire fighters must punch in and out using a time card system, which Schadler uses to track their hours. Schadler inputs the fire fighters' hours, based upon the time sheets, into the Borough's payroll system, and the Borough issues a monthly check directly to the fire fighters, based upon

their hourly rates. The Borough deducts taxes, including FICA from the monthly paychecks, and fire fighters receive a W-2 from the Borough at the end of the year. The Borough's 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. Notably, the Borough denied the fire fighters' rate sheets for 2013 and instead granted the fire fighters a three (3%) percent raise. The Borough was looking to reduce Fire Department costs and had intended to reduce or eliminate overnight shifts. The Borough Council approved the monies to retain the overnight shifts and in exchange only granted to fire fighters a three (3%) percent cost of living increase.

Additionally, a fire fighter wishing to work for the Fire Department must fill out an application, which is ultimately reviewed by the Chief and then must be approved by the Borough. The Borough Council regularly reviews the Chief's recommendations for the hiring of fire fighters. In April 2013, the Borough Council took up 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.

The Borough has even issued a number of policies it has deemed applicable to the petitioned-for fire fighters. 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, 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. 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 employees of the Borough and specifically lists all of the individual fire fighters on the distribution list. As was the case with the Borough's funding and budgeting practices pertaining to the fire fighters, the issuance of these policies to the petitioned-for fire fighters weighs heavily in favor of a determination that the Borough is an employer. See **Seattle Opera, supra** (holding that requirement of signed letters of understanding and intent agreeing to adhere to the Opera's attendance and decorum requirements spelled out in a handbook provided by the Opera was a critical factor in establishing the requisite control for employer status under NLRA).

Despite all these factors, the Borough contends that the petitioned-for fire fighters cannot be employees under Act 111 because they have been certified as volunteers in connection with the Emmaus Fireman's Relief Association (EFRA), and the EFRA's receipt of public funds from the Commonwealth pursuant to the Foreign Fire Insurance Tax Distribution Law (FFITDL), 53 P.S. § 895.701, **et. seq.**, should serve to estop the fire fighters from asserting employee status here. In the same vein, the Borough maintains that the fire fighters have also been certified as volunteers to the State Workers' Insurance Fund (SWIF) for purposes of workers' compensation, which also precludes a finding of employee status. This argument, however, lacks merit.

It is well settled that status of alleged employees under other statutory provisions, such as the Civil Service Act or the Police Tenure Act, is not dispositive of their coverage under Act 111. **Borough of Whitaker**, 14 PPER § 14273 (Final Order, 1983). Similarly, the Board has long held that titles, such as volunteer certification in the instant matter, in and of themselves, do not satisfy the statutory criteria necessary to make a finding regarding employee status. **Borough of Whitaker**, 14 PPER § 14200 (Order Directing Submission of Eligibility List, 1983) citing **Scranton Housing Authority**, 12 PPER § 12069 (Nisi Order of Unit Clarification, 1981). Moreover, as the Union points out, the Borough has overlooked the fact that the FFITDL expressly contemplates a municipality having both paid fire employees and utilizing the services of volunteers. 53 P.S. §

706(b) (3) provides for the apportionment of funds where a municipality is served by both paid fire fighters and volunteer fire fighters. As the Union further points out, the Borough itself here is a perfect example of the fact that a public employer may be served by both volunteer and paid fire fighters, as Borough witness Schadler admitted that beginning in or around 1994 the Borough has paid employes of the Fire Department who were also volunteer members of the EFRA, and that arrangement did not jeopardize the status of the Relief Fund. (N.T. 299-300). Even today, the Borough admittedly has two paid Fire Department employes, the Chief and the Secretary, and their paid employe status is not affected by, and does not impact, the existence of the EFRA, to which both are members and officers. (N.T. 279; Respondent Exhibits 19 & 35). In any event, the Borough is the party which has repeatedly certified that the petitioned-for fire fighters are volunteers pursuant to the FFITDL, not the actual fire fighters themselves. (N.T. 156; Respondent Exhibit 20). As a result, the Borough's argument in this regard is not persuasive.

The Borough also contends that the petitioned-for fire fighters are not employes, but rather volunteers, based on the recent March 21, 2014 Commonwealth Court decision in **Tyrone Fire Patrol Co., et. al v. Tyrone Borough**, No. 287 C.D. 2013 (Pa. Cmwlth. 2013), in which the Court held that fire police members were volunteers and not employes. However, **Tyrone Borough** is wholly inapplicable to the instant dispute, as that case involved whether the borough could terminate the fire police members without providing a hearing under the Local Agency Law and Administrative Law and Procedure Act. In addition, there is no indication in **Tyrone Borough** that the fire police members were paid any sort of wages, much less hourly wages like the fire fighters in the case at bar. The **Tyrone Borough** panel specifically noted in footnote 14, page 21, that the Borough Ordinance in that case provided that the fire police members *may be compensated* by the Borough as the Borough Council *may determine from time to time*, but not that the fire police members were actually being paid. (emphasis in original). This stands in stark contrast to the instant matter where the petitioned-for fire fighters are paid hourly wages and controlled in the material details of their work by the Borough. As such, the Commonwealth Court's decision in **Tyrone Borough** is simply not controlling.

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 based on fiscal and policy concerns. 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. By ordering an election in this matter, the Board is not creating any employment relationship, nor is the Board forcing the Borough to hire anyone. To the contrary, the 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. As a result, the Borough's constitutional argument is rejected.

On this record, the Borough has clearly been vested with the authority to control the terms and conditions of employment for the petitioned-for fire fighters and has undeniably exercised such authority on many levels. See **Pottstown Borough**, 26 PPER ¶ 26108 (Order Directing Submission of Eligibility List, 1995). Thus, it is clear that effective bargaining cannot take place without the participation of the Borough. *Id.* Accordingly, the Borough is deemed to have Act 111 employer status in this case.

Next, although the parties stipulated at the outset that the sole issue in this case is whether the petitioned-for fire fighters are employed by the Borough, there remains an issue regarding the status of the Fire Chief. As a result, the issue depends on the test set forth in **Fraternal Order of Police Star Lodge No. 20 v. Pennsylvania Labor Relations Board**, 522 A.2d 697 (Pa. Cmwlth, 1987), **aff'd** 522 Pa. 149, 560 A.2d 145 (1989). Under **Star Lodge**, the burden of proving that a position is managerial is on the party seeking to exclude the position. The party must prove that the position meets one of the six criteria of managerial status, which the Court identified as follows:

Policy Formulation - authority to initiate departmental policies, including the power to issue general directives and regulations;

Policy Implementation - authority to develop and change programs of the department;

Overall Personnel Administration Responsibility - as evidenced by effective involvement in hiring, serious disciplinary actions and dismissals;

Budget Making - demonstrated effectiveness in the preparation of proposed budgets, as distinguished from merely making suggestions with respect to particular items;

Purchasing Role - effective role in the purchasing process, as distinguished from merely making suggestions;

Independence in Public Relations - as evidenced by authority to commit departmental resources in dealing with public groups.

522 A.2d 697, at 705. Significantly, the test for managerial status under Act 111 is disjunctive and not conjunctive, such that performance of any one of these functions results in a finding of managerial status. **In the Matter of the Employes of Elizabeth Township**, 37 PPER ¶ 90 (Final Order, 2006).

In the present case, the record shows that the Fire Chief's duties meet at least one of the criteria for managerial status. In fact, the Chief position meets two of the six criteria, namely, overall personnel administration responsibility and independence in public relations. Therefore, the Chief position must be excluded from the bargaining unit.

As previously set forth above, the Chief position satisfies the independence in public relations criteria for managerial status under Act 111. The record shows that the Chief commits Fire Department resources in connection with an emergency services evening event at the library where he sends a crew to do public relations functions. He also sends fire fighters into the schools for fire prevention programs. Likewise, he sends the truck out for community service events when there are community days at the park. If there is a delayed call, the Chief sends the truck out to assist the police departments or the EMTs. These duties clearly evidence the Chief's authority to commit departmental resources in dealing with public groups.

Similarly, the Chief position also meets the overall personnel administration responsibility criteria for managerial status. The Chief reviews applications submitted by fire fighters and makes a recommendation to the Borough Council as to whether that individual should be hired and appointed as a fire fighter. In addition, the Borough Council defers to the Chief's recommendations in this regard. Also, the Chief clearly has effective involvement in serious disciplinary actions and dismissals, as seen by the termination of Faustner and suspension of Arndt. Thus, the Chief position exhibits effective involvement in hiring, serious disciplinary actions and dismissals.

In light of these facts, the Fire Chief clearly meets a number of the factors deemed indicative of managerial status under Act 111. Accordingly, the Chief is not eligible to vote in an election for the exclusive bargaining representative.

CONCLUSIONS

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

1. The Borough is a public employer and political subdivision within the meaning of Act 111 as read *in pari materia* with the PLRA.

2. The Union is a labor organization within the meaning of Act 111 as read *in pari materia* with the PLRA.

3. The Board has jurisdiction over the parties.

4. 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, including but not limited to the Deputy Chiefs, Assistant Chiefs, Lieutenants, and Captains; and excluding managerial employes.

5. The position of Fire Chief is a managerial employe and is properly excluded from the unit.

ORDER

In view of the foregoing and in order to effectuate the policies of the Act, the Examiner

HEREBY ORDERS AND DIRECTS

that the Borough shall within ten (10) days from the date hereof submit to the Board a current alphabetized list of the names and addresses of the employes in the employer unit described in Conclusion number 4 above.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

that any exceptions to this decision and order may be filed to the order of the Board's Representative to be issued pursuant to 34 Pa. Code § 95.96(b).

SIGNED, DATED and MAILED at Harrisburg, Pennsylvania this eleventh day of April, 2014.

PENNSYLVANIA LABOR RELATION BOARD

John Pozniak, Hearing Examiner