

STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

In the Matter of

United Electrical Radio and Machine Workers of America,

Employee Organization,

and

Ohio Turnpike Commission,

Employer.

CASE NUMBER: 92-REP-09-0194

OPINION

POTTENGER, Vice Chairman:

On September 2, 1992, the United Electrical, Radio and Machine Workers of America (Employee Organization) filed a Petition for Representation Election, supported by a sufficient showing of interest, seeking to represent all part-time toll collectors employed by the Ohio Turnpike. On September 17, 1992, the Employer filed a position statement objecting to the Employee Organization's petition on the basis that the proposed bargaining unit consists of seasonal and/or casual employees.

The matter was directed to hearing with the hearing officer issuing his recommended determination May 17, 1993. With its exceptions, the Employer filed an application for oral argument. This request for oral argument was subsequently granted by the Board, and oral argument was heard by the Board on August 25th on the issue: "Whether SERB's current standards for defining casual and seasonal employees should be modified." For the reasons stated below the Board concludes that a new standard is appropriate.

I.

Ohio Revised Code (O.R.C.) Section 4117.01(C)(13), defining a public employee, excepts "seasonal and casual employees as determined by the state employment relations board." In In re Hamilton County Welfare Dept., SERB 85-008 (3-14-85), the Board

determined:

- 1) Casual employees are those employees hired at various times throughout the year for specific tasks and whose employment does not exceed thirty (30) days.
- 2) Seasonal employees are those employees who work a certain regular season or period of the year performing some work or activity limited to that season or period and whose employment does not exceed fourteen (14) weeks.

The Board has consistently applied these definitions to affected employees who seek representation or protection under Chapter 4117.

Applying this standard over the years and comparing it to those developed by other public jurisdictions, we conclude that a new standard is required to exclude those employees who engage in employment that is truly casual or seasonal. Therefore, the Board seeks to develop a new standard that better addresses the realities of the employment relationship.

Surveying the legal landscape, we are persuaded that the new standard could basically take one of two directions. It could either be a numerical standard similar to the one the Board presently utilizes, or a multi-factored test which would require that in each instance the parties and the Board examine a number of factors and balance them to determine whether the employees are casual. For a number of compelling reasons, the Board chooses to retain a numerical standard for identifying casual and seasonal employees. Our experience over the years indicates that a numerical standard is easy to apply, provides parties with the necessary guidance in identifying public employees, and limits litigation so that public employees can proceed quickly to representation elections. Because the definition we apply determines whether individuals enjoy the protections afforded public employees under the Collective Bargaining Act, it is particularly desirable for employee organizations and the individuals themselves, that their status and rights under the law be established with clarity on an objective basis. Otherwise, uncertainty as to status may chill the exercise of protected rights by individuals and create confusion among employers and employee organizations as to their

responsibility to bargain for certain employees and, in the case of employee organizations, their responsibility to represent them. Such confusion can lead unwittingly to unfair labor practices by labor and management, and should be avoided where a reasonable alternative exists.

We are convinced that as long as the numerical standard is realistic, it presents an alternative which will work as well as any non-numerical, multi-factored balancing test in determining whether employees are casual or seasonal. The vice in the current standards for casuals and seasonals is not that they are numerical but that they are simply too low to eliminate employees who do not have a regular and substantial relationship with the employer. It is not a realistic measurement of casual and seasonal employment.

Accordingly, we adopt the following standards:

Casual employees are those employees who are assigned on an on call or as needed basis to supplement the work force and either:

- 1) averaged in the aggregate less than 500 hours over the previous year; or
- 2) among whom less than 60% who worked one year returned for the following year.

Seasonal employees are those employees who work a certain regular season or period of the year performing some work or activity limited to that season and either:

- 1) averaged in the aggregate less than 500 hours over the previous year, or
- 2) among whom less than 60% who worked one year returned

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to employment the following year.¹

These standards are for job classifications. If a classification meets the requirements, then all members of the class are considered not to be casual or seasonal, even though specific individuals may or may not meet the requirements.

Based on our own experience and that of other jurisdictions whose cases we have reviewed, we are confident that this new test is a better measure of whether employees have a regular and substantial relationship with their employer and whether they have a reasonable expectation of continued employment so as to warrant granting them rights under Chapter 4117. No matter what the jurisdiction or the test, some common factors are always sought to be addressed: number of hours, number of days, regularity of employment, how integral the employees are to the employer's operation, expectancy of continued employment, whether the employees are regularly scheduled or on call, and the right of refusal of assignments. By requiring additional worktime, our new standard addresses all of these factors and concerns.

First, employees who are regularly scheduled are not addressed by our new standard. Normally employees who are regularly scheduled are not casual employees. If employees are regularly scheduled it follows that they have a stronger employment relationship. Their employment is regular, integral to the employer's operation and accordingly they enjoy a reasonable expectation of continued employment. However, we do not rule out the possibility that in some future case a group of regularly scheduled employees will work an amount of

¹Contrary to our concurring colleague, we believe it is appropriate in this determination to adjust the standard for seasonal employees consistent with the new standard for casuals. The seasonal standard was fully argued before us both in oral argument and in the briefs. Moreover the concepts of casual and seasonal work are so intertwined that in at least one jurisdiction, New York, the casual standard simply evolved from the seasonal standard. As to rate of return, we find it relevant to seasonal employees because it is a measure of whether an individual has a reasonable expectation of continued employment and substantial connection to the workplace.

hours so insignificant that their employment will be deemed casual.

For those employees who are utilized in an on-call or as-needed fashion the employment relationship is more tenuous, so the more stringent hours and return rate requirements must be met before their employment is determined not to be casual. A total yearly hours requirement is desirable because it eliminates the confusion over hours and days. It produces a sliding scale, where if employees work more days, fewer hours per day are required and vice-versa. Working 500 hours per year requires an average of nearly 10 hours a week, which demonstrates that the employment is regular and important to the employer's operation. The right to refuse assignments will also be reflected in the total hours amassed. If employees are granted the right to refuse without any penalty, that fact will be reflected in the fact that the average number of hours for the classification will be lower. Finally, reasonable expectation of continued employment is addressed by the 60% return rate requirement.

Looking at other public sector jurisdictions, the new standard is similar to numerical standards adopted by other states. Minnesota's Public Employment Labor Relations Act Section 179A.03 Subdivision 14(e) excepts from the definition of a public employee those part-time employees whose service does not exceed the lesser of 14 hours per week or 35% of the normal work week. New Jersey has adopted a standard that employees must work at least 1/6 of the normal work week to be considered non-casual. Orange Board of Education, 18 NJPER ¶ 23165 (NJ 1992). Finally, New York has utilized a standard that employment is casual if (1) the employment is shorter than six weeks a year; or (2) the employees are required to work fewer than 20 hours a week; or (3) fewer than 60% of the employees in the title return for at least 2 successive years. State of New York, 5 PERB ¶3039 (NY 1972), Lehman College Center For the Performing Arts, Inc., 19 PERB ¶4541 (NY 1986). Therefore, the new standard is comparable to numerical standards used by other states to determine whether employees are casual.

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Looking at other public sector jurisdictions that utilize a multi-factored balancing test to determine whether employment is casual also provides support for our standard. These states utilize different approaches to reach their decisions, but their reasoning and decisions themselves are extremely similar to the reasoning and decisions that would occur under our standard.

The decisional law of Pennsylvania provides a strong example. Pennsylvania courts have determined that for employment not to be casual, "(T)he only requirement is that of a 'regularity of employment' which must exist with a fair degree of frequency as distinguished from casual employees who perform an occasional job for a temporary purpose or hired as a matter of special engagement." Community College of Philadelphia v. Commonwealth of Pennsylvania, 432 A.2d 637, 639 (Pa. Cmwlth 1981), quoting Dauphin County Commissioners, 7 PPER ¶ 2 (1976). The decision further clarifies how this non-specific standard is applied, "...The inquiry is factual, and demands examination of all the circumstances of the questioned employee relationship." Id. Despite the vast differences between the standards, decisions reached under the Pennsylvania standard are in accord with decisions that would have been reached if our new standard had been applied. In one decision a school district's cafeteria/playground aides who worked at least 7 1/2 hours per week were not casual employees. The controlling factor for the Pennsylvania board was that they were regularly scheduled. Accordingly, they did not require a substantial number of hours to be worked. Cheltenham Township School District, 12 PPER ¶ 12239 (PA 1981). This decision followed an earlier case that found employees regularly scheduled for 6 hours per week not to be casual. Albert Einstein Medical Center v. Penn Labor Relations Board 330 A.2d 264 (PA 1975). Conversely, in a case where the employees were not regularly scheduled, but on call, the Board found it appropriate for substitute custodians who worked more than 500 hours in a year not to be casual. Hopewell Area School District, 11 PPER ¶ 11299 (PA 1980). The process and results are identical despite the different approaches. And with our standard the numbers are stated up front so guidance and consistency is provided for parties in the labor management setting.

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Other states with these multi-factored balancing test approaches also have decisional law similar to that of Pennsylvania. If employees are regularly scheduled they only have to work a small number of hours to avoid being deemed casual. In Wisconsin, for example, an individual who worked 4 hours every Wednesday was found not casual. Monticello Employees Association, 3 NPER 51-12085 (WI 1981). In New York, library employees who worked less than 10 hours a week, but were regularly scheduled, were not casual. Plainview-Old Bethpage Public Library, 15 PERB ¶ 4035 (NY 1982)). But for employees utilized on a sporadic or on-call, as-needed basis it is much more difficult for them to avoid being deemed casual. For example, in Florida, a city's auxiliary officers were casual because they worked on an irregular basis and worked a small fraction of the total hours worked by full time employees. City of Quincy, 7 FPER ¶ 12260 (FL 1981).

In sum, our new standard simply quantifies the decisional law that has developed involving casual employees. Even those jurisdictions that utilize the multi-factored balancing test approach are reaching results similar to those which would be mandated by our new numerical standard. Since the same result will generally be reached, we believe that it is best to adopt a numerical standard that provides guidance to both labor and management, reduces cost and litigation, and provides for consistency in labor relations.

. II.

As in In re Mahoning County Dept of Human Services, SERB 92-006 (6-5-92) this new standard will be applied prospectively. If the status of a class of employees' has previously been determined through stipulation or litigation, we decline to re-examine that status under the new standard. If it is contended that the employees' situation has changed to justify a change of status, then the party advocating the change must demonstrate a change of status under the standard existing at the time of the original stipulation or litigation.² What standard

²With regards to casuals, the only way this issue would arise is if the Employer contended that presently certified employees have had a change in status to become casual. For the Board to investigate the matter the Employer would have to prove that the employees in question would be casual under the thirty (30) day standard.

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is utilized to decide the instant controversy is immaterial since the part-time toll collectors under either the old or new standard are not seasonal or casual employees.

The hearing officer in his recommended determination, applying the old standards, determined that the part-time toll collectors are neither "seasonal" nor "casual" employees, and thus are "public employees" within the meaning of O.R.C. §4117.01(C).³ The Board has reviewed the record and agrees with his conclusion. The part-time toll collectors also meet the new standard. Since they are not regularly scheduled and are utilized in an on-call, as-needed basis, they would be required to meet the total hour and return rate requirements. The part-time toll collectors as a classification averaged 781.81 hours⁴ in 1992, and the turnover rate was only 12%.⁵

Therefore, since the part-time toll collectors are determined not to be casual employees, the Board directs that a representation election be held in the appropriate unit of all part-time toll collectors.

Owens, Chairman, concurs.

MASON, Board Member, concurring:

While I concur with the majority opinion that the part-time toll collectors employed by the Ohio Turnpike Commission are not casual employees, I differ with the means by which they reach this conclusion. This case presented SERB with the opportunity to rethink its prior numerical standard for determining casual employee status. However, in their abandonment

³Hearing Officer's Recommended Determination Conclusion of Law 3.

⁴Stipulations of Fact 37.

⁵Hearing Officer's Recommended Determination page 9. This figure was derived from the record of termination dates incorporated in attachment 13 to the Employer's brief.

of one numerical approach for another, I believe my colleagues failed to seize the opportunity to join the majority of other public sector jurisdictions and the National Labor Relations Board (NLRB) by utilizing a qualitative analysis for doing so.

The proper identification of casual employee status is a qualitative determination which does not readily lend itself to quantitative analysis, but instead requires in each instance careful examination of various distinguishing factors that otherwise are automatically ignored when bright line numerical standards are utilized. Inherent in the pitfalls of a numerical approach is the inability to evaluate by record evidence several critical factors which are essential for properly assessing the employer-employee work relationship, and thus the employment status of the employee(s) in question. Among others, these essential considerations include:

- 1) Whether the employees work "on call" as opposed to a regular schedule;
- 2) Whether the employees have a right to refuse assignments without penalty;
- 3) Whether the employer guarantees the employees a minimum number of hours or days of work; and
- 4) Whether there is a reasonable expectation of continued employment.⁶

Another qualitative factor even more important, but left unconsidered under a strictly numerical bright line test, is the nature of work performed for the employer by the employee(s) in question and whether that work is an integral part of the employer's business. My decision that the toll workers in this case were not casual employees was not premised upon the number of hours or days they worked, or even upon their rate of return. Instead, the most persuasive indicator for me was that the record supported the conclusion that the work relationship between the Ohio Turnpike Commission and the part-time toll workers was such

⁶Taylor Federation of Teachers v. Taylor Board of Education, 10 NPER MI-19053 (2-10-88).

that the latter were not merely individuals hired to occasionally or temporarily "fill-in" for planned or unplanned absences by regular workers, but were in fact a substantial, integral and continuous part of the workforce. Clearly, without the service of these employees, the Turnpike Commission would be forced to hire additional full-time workers.⁷ The part-time toll workers actually *supplemented* the employer's workforce and their regular and continued use was *essential* to the Turnpike's day to day operation, thus making them more than a casual part of the workforce.

Pursuant to the new standard adopted in the majority opinion, the relatively low number of days and/or hours worked (i.e., 500 hours or 62.5 standard work days) and a relatively high rate of turnover (i.e., 40%) are solely conclusive of whether employees are casual. I disagree. More compelling in this determination is careful consideration of the qualitative factors enumerated above, which are automatically excluded from consideration once the numerical threshold is met. In the case before us, utilization of a numerical standard prevented the Board majority from thoroughly assessing all the variables that together are determinative of casual status. Once it was determined that the part-time toll workers had worked the threshold amount of days and/or hours and met the rate of return set by the new standard, the majority's decision completely ignored other pertinent information.

The other persuasive indicators in this case include: the fact that these employees were required to successfully complete a probationary period; the fact that they received uniforms which had to be returned when the employment relationship was severed; the fact that personnel files were maintained for each employee documenting their performance and status of employment; and that although they had the right to refuse assignments, if this option were too frequently exercised, they could be penalized. These facts do not require any consideration under a quantitative analysis, but were pivotal for me in my determination that these workers

⁷Turnpike Commission response to question by Board Member at the hearing: "They'll (part-time toll workers) fill in holes in the schedule....Because it's a 365-day, 24 hour operation, the schedule is not necessarily completely covered by full-time (employees)." Transcript, pgs. 55-56.

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were not casually employed.

The inflexibility of a numerical standard impedes taking into consideration such relevant factors as noted above, and thus results in only a superficial analysis of an important issue. Although as it happens, these particular employees met the numerical prerequisites under SERB's new standard and accordingly were not deemed casual, there is no likelihood that future situations with employees similarly situated will yield the same result should the numerical factors not be met. Indeed, in this very case, even though several non-numerical factors indicated that the part-time toll workers were more than casually employed with the Turnpike Commission, under the Board's new rigid numerical standard, their status would have been determined casual had they been short by even one half an hour or day of the required time. Undoubtedly, clear bright line numerical standards facilitate SERB's administrative efficiency; however, fast and expedient results do not necessarily translate into just and equitable ones. Since numbers alone fail to bring into perspective the uniqueness of each work place environment and the relationship between the employer and employees, I believe SERB is erring in adopting a numerical standard to distinguish casual employees from other regularly employed public employees for the purpose of collective bargaining.

Finally, I would be remiss if before concluding I did not state for the record my objections to the new standard adopted by the majority for determining "seasonal" employee status and the timing of such announcement. Although the parties were invited to argue before the Board whether the current standard for defining casual and seasonal employees in Ohio should be modified, announcement at this time of a new standard for determining seasonal employee status is premature. In the present matter, no actual case or controversy exists regarding seasonal employee status, and therefore we lack sufficient information to depart from our present standard in favor of one arbitrarily selected. Since clearly the issue here was whether or not the employees involved were "casual", the record is devoid of any persuasive arguments or evidence in support of modifying the seasonal standard at this time.

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Aside from the timing of this modification, I am further opposed to the new standard for seasonal employees because it practically mirrors the requirements for that of casual employees. These are two entirely distinct exemptions and the standards for determining each should reflect this. Reducing the number of hours worked, i.e., from fourteen (14) weeks, and adding consideration of the rate of return are in my opinion completely irrelevant in determining whether or not employees are "seasonal". Instead, what is important is that which was better reflected in the previous standard: whether the employees in question work a certain regular season or period of the year performing some work or activity limited to that season or period and whether that employment does or does not exceed a specified number of days or weeks reasonably comparable to the average number of days in a season.

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