

STATE OF OHIO  
STATE EMPLOYMENT RELATIONS BOARD

In the Matter of

Tallmadge Firefighters Association,

Employee Organization,

and

City of Tallmadge,

Employer.

Case Number: 94-REP-02-0022

OPINION

POTTENGER, VICE CHAIRMAN:

This representation case comes before the State Employment Relations Board ("SERB" or "Board") on exceptions to a Hearing Officer's Recommended Determination. At issue is whether the employees in the petitioned-for bargaining unit are "casual employees" as defined in *In re Ohio Turnpike Commission*, SERB 93-022 (12-21-93).<sup>1</sup> For the reasons below, we find that the Association is an "employee organization" and that these employees are not "casual employees" under the *Turnpike* standard, but are "public employees" pursuant to Ohio Revised Code ("O.R.C.") § 4117.01(C). Therefore, we certify the Tallmadge Firefighters Association as the exclusive representative of all part-time fire fighters in the City of Tallmadge Fire Department.

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<sup>1</sup>Also at issue before the hearing officer was whether the Tallmadge Firefighters Association is an "employee organization" as defined in O.R.C. § 4117.01(D). The Association was found to be an "employee organization" in Conclusion of Law No. 2 of the Hearing Officer's Recommended Determination. The City did not file any exceptions to the resolution of this issue. Since we are adopting this conclusion of law, this issue will not be addressed further within this Opinion.

## I. BACKGROUND

On February 8, 1994, the Association filed a Request for Recognition with the Board seeking to represent certain employees of the City of Tallmadge ("City"). Specifically, the Association sought to represent all part-time fire fighters of the Tallmadge Fire Department, including all part-time paramedics and emergency medical technicians. The City filed a Certificate of Posting on February 22, 1994. An investigation of the request revealed that a question existed as to the status of the employees in the proposed unit, specifically with regard to whether or not those employees were "casual employees" and therefore exempt from the definition of "public employee." On May 25, 1994, the Board directed the matter to hearing to determine whether or not the employees in question were "casual employees" as defined in *In re Ohio Turnpike Commission, supra*.

An evidentiary hearing was held on July 25, 1994. Post-hearing briefs were filed on October 3, 1994. The Hearing Officer's Recommended Determination was issued on March 24, 1995. On April 3, 1995, the City filed its exceptions. The Association filed its response to the exceptions on April 10, 1995.

## II. DISCUSSION

This matter presents the Board's first opportunity to apply the *Turnpike* standard for determining casual employee status, which was stated as follows:

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.

*Id.* at 3-127.

In the *Turnpike* decision the Board held that employees who are "regularly scheduled" are not addressed by this new standard. *Id.* Therefore, the threshold issue under the *Turnpike* standard is whether the employees in question are regularly scheduled. *Id.* If the employees are regularly scheduled, the inquiry stops and the standard is not further applied to that particular group of employees. If, however, it is determined that the employees in question are not regularly scheduled, the remainder of the standard will be applied to determine whether the employees in question are casual employees.

In determining whether a group of employees are regularly scheduled under *Turnpike*, the Board will consider such factors as whether the employment of the particular group of employees is consistent and integral to the employer's operation. *Id.* The City and the Association have negotiated a detailed schedule whereby half of the part-time fire fighters are designated to the "A" shift and half of them to the "B" shift.<sup>2</sup> This "A"/"B" shift differential begins on Tuesday evenings and lasts for approximately one week. During the daytime hours from 6:00 a.m. to 6:00 p.m., any fire fighter who is qualified may respond to a call, regardless of their "A" or "B" shift designation. However, between the hours of 6:00 p.m. and 6:00 a.m., the differential is in effect, and although fire fighters from both shifts may respond to calls, only those members of the shift on duty will be paid. The shift on duty for the week is also responsible for covering all calls that come into the Department from Friday evening to Monday morning.<sup>3</sup>

Concerning the "A"/"B" shift schedule, the Chief has instituted a departmental rule detailing the response requirements the part-time fire fighters must meet or be subject to discipline. This rule requires that each part-time fire fighter respond to a minimum of one-third of the calls on the individual's shift; or, alternatively, to seventeen percent of the calls on the

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<sup>2</sup>The Association and the City have entered into three collective bargaining agreements, spanning the years 1988 to 1996. Each of these collective bargaining agreements contains a clause in which the City recognizes the Association as the sole and exclusive bargaining agent for the part-time fire fighters. (Finding of Fact ("F.F.") No. 5.)

<sup>3</sup>F.F. No. 18.

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individual's shift plus seventeen percent of the calls that go out during the daytime hours between 6:00 a.m. and 6:00 p.m. In addition to the "A"/"B" shift schedule, the parties most recent collective bargaining agreement requires that one part-time fire fighter be on duty at the station at all times, using six-hour shifts. Each part-time fire fighter must sign up for at least four of these six-hour shifts every month or be subject to discipline, unless all of the six-hour shifts have already been filled by other part-time fire fighters.<sup>4</sup>

The part-time fire fighters are also integral to the City's ability to respond to emergencies. At the time of the hearing, there were five full-time and thirty-four part-time fire fighters in the Fire Department. The City is authorized to have up to forty-five part-time fire fighters. The full-time fire fighters are scheduled so that there is always a full-time fire fighter available to respond to any call that comes into the Department. However, the part-time fire fighters may and do fill in the regular shifts of the full-time fire fighters when the full-time fire fighters are unavailable for various reasons. According to the Chief of the Department, the part-time fire fighters perform the same duties as the full-time fire fighters, they just work fewer hours. Without the work of the part-time fire fighters, the City would be in obvious danger of not being able to respond to fires or other emergencies.<sup>5</sup> Thus, we conclude that the part-time fire fighters are not merely a supplement to the City's work force, but constitute the majority of the work force that typically responds to a fire.

Having decided these part-time fire fighters are regularly scheduled and, consequently, do not meet the threshold question for a casual employee, further review under the *Turnpike* standard is not necessary.

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<sup>4</sup>F.F. Nos. 18, 19, 20, and 22.

<sup>5</sup>F.F. Nos. 8, 10, 15, and 17; Transcript 114 and 115.

### III. CONCLUSION

For the reasons above, we find the part-time fire fighters of the City of Tallmadge are not "casual employees" under *In re Ohio Turnpike Commission, supra*. These part-time fire fighters are "public employees" pursuant to Ohio Revised Code § 4117.01(C). No Petition for Representation Election was filed by the City, the Association filed evidence of majority support, and at no time did the City bring forth evidence supporting a good faith doubt as to the employee organization's majority status. Therefore, we grant the Request for Recognition and certify the Tallmadge Firefighters Association as the exclusive representative of all part-time fire fighters in the City of Tallmadge Fire Department.

Pohler, Chairman, concurs in the foregoing opinion. Mason, Board Member, concurs in a separate opinion.

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CONCURRING OPINION

MASON, Board Member:

While I concur with the majority that part-time fire fighters employed by the City of Tallmadge Fire Department are not casual employees,<sup>1</sup> I do not agree with its analysis. I believe the Board should completely abandon the arbitrary numerical test in favor of a case-by-case qualitative analysis that weighs several factors to assess the employer-employee relationship.

Under strict application of the numerical test, the part-time fire fighters are casual employees since they averaged less than the required 500 hours over the previous year.<sup>2</sup> However, weighing other important factors indicates that these are not casual employees and to hold them as such would simply be unjust.

To circumvent this unjust result, the majority abandons its numerical test through a loophole by finding the employees are "regularly scheduled," and thus public employees. However, the part-time fire fighters are not "regularly scheduled" in any meaningful way. The

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<sup>1</sup>Under the qualitative analysis test in my concurring opinion in *In re Ohio Turnpike Commission*, SERB 93-022 (12-21-93).

<sup>2</sup>The part-time fire fighters averaged 364.24 hours worked the previous year. Finding of Fact ("F.F.") No. 30.

part-time employees on call can choose to not respond to a particular call, and any part-time fire fighter from either shift can respond to a call. Furthermore, while the part-time fire fighters must sign up for four six-hour shifts a month, there will be no discipline for those employees who do not sign up for the required amount if the part-time fire fighters as a group fill in all the shifts for the month.<sup>3</sup> Thus, the amount of time the employees are required to volunteer is minimal, and they can choose when they want to work. Consequently, this does not meet the usual definition of a regular schedule.

The majority also determined that the part-time fire fighters' employment is integral to the employer's operation. While I agree with this finding, I disagree with the conclusion that the part-time fire fighters do not supplement the workforce. The fact that the employees at issue outnumber the regular public employees does not necessarily mean that they do not supplement them. Also, whether the part-time fire fighters perform the same duties as the regular fire fighters is not determinative. The record shows that while one of the five full-time fire fighters is scheduled to be at the station to respond to calls, the remaining members of a call response group come from the pool of 34 part-time fire fighters who can choose to respond or not to respond to the call. Part-time fire fighters also fill in for the full-time fire fighters when they are on vacation, sick, or for whatever reason absent from work.<sup>4</sup> Thus, these part-time fire fighters do supplement the full-time fire fighters.

The *Ohio Turnpike* test has also proven ineffective in that it has failed at its stated purpose - judicial efficiency. There has been considerable dispute in this case as to how many hours the part-time fire fighters did work on average, in the aggregate, in the previous year. Thus, the *Ohio Turnpike* numerical test has seemed to give rise to a new area of litigation, how to count hours, how to average, and how to aggregate, rather than keeping the focus strictly on whether the employees are casual.

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<sup>3</sup>F.F. Nos. 18, 19, and 20.

<sup>4</sup>F.F. Nos. 8, 10, 15, and 17.

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In conclusion, in just the first application of the *Ohio Turnpike* standard, the numerical test has proven ineffective. The Board should take this opportunity to abandon this test in favor of a multi-factored qualitative determination.