

98-004

**STATE OF OHIO
BEFORE THE STATE EMPLOYMENT RELATIONS BOARD**

In the Matter of

Dayton Firefighters Local 136, IAFF,

Employee Organization,

and

City of Dayton,

Employer.

Case No. 97-REP-04-0077

OPINION

POHLER, Chairman:

This representation case comes before the State Employment Relations Board ("Board" or "SERB") upon the filing of exceptions and the response to exceptions to the Hearing Officer's Recommended Determination issued on October 8, 1997. For the reasons below, we find that the Aircraft Rescue Supervisors employed by the City of Dayton ("City") are not "members of a fire department" under Ohio Revised Code ("O.R.C.") § 4117.01(P), are "supervisors" under O.R.C. § 4117.01(F), and, as a result, are not "public employees" under O.R.C. § 4117.01(C). Thus, the Request for Recognition shall be dismissed.

I. BACKGROUND¹

One of the City's sixteen departments is the Department of Aviation. Within the Department of Aviation is the Operations and Environmental Division ("Aircraft Rescue Unit"), responsible for maintenance and operational functions, and the provision of fire, law enforcement, and other safety and life protection functions for the James M. Cox Dayton International Airport ("Airport") and other airports and facilities under the control of the

¹Finding of Fact ("F.F.") Nos. 1-9, 13-16, and 22.

Department. The Department of Fire is another of the City's departments. It consists of the Division of Emergency Medical Services, Division of Fire Suppression, and Division of Fire Administration.

The Director of Aviation manages the Department of Aviation. The positions working in the pertinent chain of command under the Director are the Deputy Director for Operations and Environments, the Aircraft Rescue Coordinator ("Coordinator"), the Aircraft Rescue Supervisors ("ARFF Supervisors"), and the Aircraft Rescue Firefighters ("ARFFs"). The Dayton Firefighters Local 136, International Association of Firefighters ("IAFF") seeks to represent a bargaining unit of ARFF Supervisors at the Airport.

The nearest Department of Fire station to the Airport has approximately a 15-20 minute response time. Although the Department of Fire has jurisdiction for non-aircraft firefighting responsibilities at the Airport, its staff does not have the specialized training necessary to meet Federal Aviation Administration ("FAA") requirements concerning aircraft incident response. The Aircraft Rescue Unit does have the required training and is primarily designed to meet the FAA's requirements concerning aircraft incident response. In addition, the Aircraft Rescue Unit provides the first response to emergency medical situations and to structural incidents at the Airport. Since it performs a specialized function, the Aircraft Rescue Unit operates fairly autonomously.

The Aircraft Rescue Unit is composed of twenty-two (22) ARFFs divided into three platoons. Three of the ARFF Supervisors supervise each platoon, with the fourth ARFF Supervisor supervising in the absence of the regularly-assigned ARFF Supervisor. One ARFF Supervisor ensures that the ARFFs meet ongoing training requirements and that minimum staffing levels are maintained while training is taking place. The ARFF Supervisors also schedule and supervise inspections of businesses that lease facilities at the airport and schedule inspections of fuel trucks and fuel facilities. After the Coordinator assigns certain facilities and trucks to each platoon to inspect, then the ARFF Supervisor schedules and assures that all inspections are completed. The ARFF Supervisor assigns the ARFFs to perform the inspections on a rotation basis. The ARFF Supervisors also have the authority to

investigate false structural alarms, to determine their falsity, and to cancel the call to the Department of Fire if it is a false alarm.

The Coordinator works a forty-hour week. When he is not present, the ARFF Supervisors assume initial Incident Command for all emergencies occurring at the Airport. The ARFF Supervisors also retain Incident Command when the Coordinator is not available or has delegated this responsibility to them. Having the Incident Command requires directing all activities related to the rescue effort. The Incident Commander decides how to respond to various incidents, which units to dispatch, what back-up is needed, and who is to perform what duty. The Incident Commander determines the strategy and tactics for dealing with the emergency in accordance with essentially predetermined incident plans. The ARFF Supervisors are specially trained for Incident Command.

When there is an EMS run, the paramedic and one ARFF go on the run, with the paramedic being in charge of the run. If additional assistance is needed, the paramedic will call in the ARFF Supervisor and another ARFF. The ARFF Supervisor will generally defer to the paramedic's medical judgment, but retains Incident Command over the overall incident.

The ARFF Supervisors determine duty assignments and overtime assignments for the ARFFs. If they make a mistake in an overtime assignment, ARFF Supervisors have the authority to add or subtract hours to correct the mistake. The ARFF Supervisors have no independent authority to hire, lay-off, transfer, recall, promote, suspend or discharge ARFFs, but can provide input about whether an ARFF will be retained upon the completion of his probationary period.

ARFF Supervisors conduct semi-annual performance appraisals of ARFFs and assign a point total and overall rating to these appraisals. These appraisals are used to determine the ARFF's eligibility for a promotional exam and to award additional credits to the passing score of ARFFs on those examinations.

ARFF Supervisors play a role in the formal disciplinary process. When damage occurs

to airport or fire equipment, an ARFF Supervisor is required to determine whether the employee was involved in a preventable accident and, if so, to request that the City's Department of Human Resources prepares Disciplinary Charges and Specifications related to the incident. That Department has granted and then forwarded more than 99% of the requests to the City's Law Department that reviews them for legal sufficiency. If sufficient, the ARFF Supervisor presents the Disciplinary Charges and Specifications to the employee, a hearing is held, and a ruling is issued as to what discipline, if any, is appropriate. More than 95% of the cases result in discipline being imposed. The ARFF Supervisors make no recommendation as to the penalty to be meted out.

II. DISCUSSION

A. Aircraft Rescue Supervisors Are Not "Members of a Fire Department" Under O.R.C. § 4117.01(P)

O.R.C. § 4117.01 provides in part as follows:

(P) "Member of a fire department" means a person who is in the employ of a *fire department of a municipal corporation* or a township as a fire cadet, full-time regular fire fighter, or promoted rank as the result of an appointment from a duly established civil service eligibility list or under section 505.38, 709.012, or 737.22 of the Revised Code. (emphasis added).

The ARFF Supervisors are part of the Aircraft Rescue Unit in the Operations and Environmental Division within the City's Department of Aviation. The Department of Aviation is one of sixteen distinct departments within the City. The Department of Aviation is responsible for maintenance and operational functions, and the provision of fire, law enforcement, and other safety and life protection functions for the James M. Cox Dayton International Airport and other airports and facilities under the control of the Department. The chain of command has the ARFFs reporting to the ARFF Supervisors, who report to the Aircraft Rescue Coordinator, who then reports to the Deputy Director for Operations and Environments, who reports to the Director of Aviation. The Aircraft Rescue Unit provides the first response to emergency medical situations and structural incidents at the Airport. The Aircraft Rescue Unit operates with autonomy because it performs a specialized function.

The Department of Fire is a separate City department. The Department of Fire provides emergency medical services, fire suppression, and inspection and fire prevention services. The Department of Fire staff does not have the specialized training necessary to meet the Federal Aviation Administration requirements at the Airport.

In determining whether employees are "members of a fire department," we must consider not only the duties being performed but the setting in which the employees render those duties. The ARFF Supervisors are part of the Department of Aviation, not the Department of Fire. The ARFF Supervisors have always been part of the Department of Aviation. The ARFF Supervisors have no reporting through the Department of Fire's chain of command. The missions of the two departments are different. While the Department of Aviation is focused on maintaining and operating the Airport, it deals with aircraft emergencies under federal guidelines and procedures. On the other hand, the Department of Fire is focused on providing emergency medical and fire suppression services using general firefighting techniques.

We must conclude that the ARFF Supervisors are not "members of a fire department" under the facts of this case. This case does not concern an employer that is manipulating its work force to create artificial distinctions. These departments were created by City ordinances to carry out distinctly separate missions. When the legislature used the general term "fire department" without providing any definition, it intended to give the term its ordinary meaning. The Department of Aviation and its Aircraft Rescue Unit were not envisioned by the legislature as falling within this term. Thus, although the ARFF Supervisors may be fire fighters, they are not "members of a fire department" under O.R.C. § 4117.01(P).

B. Aircraft Rescue Supervisors Are "Supervisors" Under O.R.C. § 4117.01(F)

O.R.C. § 4117.01(F) provides as follows:

(F) "Supervisor" means any individual who has authority, in the interest of the public employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other public employees; to responsibly direct them; to adjust their grievances; or to effectively recommend such action, if

the exercise of that authority is not of a merely routine or clerical nature but requires the use of independent judgment[.]

An individual will be excluded from a bargaining unit as long as the record contains substantial evidence that the employee has the authority to perform one or more of the functions listed in O.R.C. § 4117.01(F), actually exercises that authority, and uses independent judgment in doing so. *In re Mahoning County Dept. of Human Services*, SERB 92-006 (6-5-92), at 3-19.

ARFF Supervisors have no independent authority to hire, lay-off, transfer, recall, promote, suspend or discharge. ARFF Supervisors have no direct input into the initial hiring of an employee, but their input may have some bearing on whether that employee will be retained upon the completion of his probationary period. ARFF Supervisors responsibly direct the ARFFs when determining duty assignments and determining and making overtime assignments.

If a mistake is made in an overtime assignment, an ARFF Supervisor has the authority to add or subtract hours to correct the mistake. Performance evaluations, whether for a probationary period or an annual review, are one vehicle for a supervisor to "responsibly direct" or to "effectively recommend" such direction.² ARFF Supervisors conduct semi-annual performance appraisals of ARFFs and assign a point total and overall rating to these appraisals. The performance appraisals are used to determine both the ARFF's eligibility for a promotional exam and to award additional credits to the passing score of ARFFs on promotional examinations; promotions to tested positions are made on the basis of the highest score.³ Even though the performance appraisals are used for promotional purposes, in this case we need not reach whether the ARFF supervisors "effectively recommend" promotions when they complete the performance appraisals.

²See, e.g., *In re State of Ohio, Office of the Public Defender*, SERB 97-015 (11-13-97), at 3-100.

³F.F. Nos. 14 and 20 - 21.

ARFF Supervisors have initiated the formal disciplinary process. More than 99% of the requests for discipline result in Disciplinary Charges and Specifications being issued by the Department of Human Resources. More than 95% of the Disciplinary Charges and Specifications result in discipline being imposed. Thus, the ARFF Supervisors effectively recommend discipline. ARFF Supervisors also have the authority to adjust grievances and have adjusted grievances.⁴ The record supports a finding that an ARFF Supervisor has the authority to perform one or more of the functions listed in O.R.C. § 4117.01(F), actually exercises that authority, and uses independent judgment in doing so. Thus, an ARFF Supervisor is a "supervisor" under O.R.C. § 4117.01(F) and is excluded from the definition of a "public employee" under O.R.C. § 4117.01(C).

III. CONCLUSION

For the reasons above, we find that the Aircraft Rescue Supervisors employed by the City of Dayton ("City") are not "members of a fire department" under O.R.C. § 4117.01(P), are "supervisors" under O.R.C. § 4117.01(F), and, as a result, are excluded from the definition of "public employees" under O.R.C. § 4117.01(C). Thus, the Request for Recognition shall be dismissed.

Gillmor, Vice Chairman, concurs; Mason, Board Member, dissents in a separate opinion.

⁴F.F. Nos. 16 and 22.

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Case No. 97-REP-04-0077

DISSENTING OPINION

MASON, Board Member:

I do not agree with the majority opinion that the Aircraft Rescue Supervisors employed by the City of Dayton ("City") are not "members of a fire department" under Ohio Revised Code ("O.R.C.") § 4117.01(P). For the reasons below, I find that the Aircraft Rescue Supervisors employed by the City of Dayton are "members of a fire department" under O.R.C. § 4117.01(P), and thus, the hearing officer's conclusions of law and recommendations should be adopted.

At the outset it must be pointed out that the background section of the majority opinion does not adequately reflect the Findings of Fact of the Hearing Officer as adopted by the Board. Hence, it is necessary to supplement the background with a summary of the Hearing Officer's Findings of Fact 5, 6, 12, 25, 26, 27, and 30 to ensure that the background in this Board Opinion fairly includes all the pertinent facts of this case.

The Department of Fire has jurisdiction for the normal firefighting responsibilities at the airport, but the current Department of Fire staff does not have the specialized training necessary to meet Federal Aviation Administration ["FAA"] requirements. The Aircraft Rescue Unit is primarily designed to meet the FAA's requirements concerning aircraft incident response, but because of the proximity and additional specified training of the ARFFs, the Aircraft Rescue Unit

provides the first response, both to emergency medical situations and to structural incidents at the Airport. The City of Dayton has a contractual arrangement with Butler Township, Ohio, for emergency transport services (ambulance) when needed at the Airport. EMS transport within the City is otherwise provided by the Dayton Fire Department or through mutual aid with surrounding communities. The Aircraft Rescue Unit does not go to the aid of the Department of Fire, unless the Department of Fire is dealing with an incident at the Airport. The Aircraft Rescue Unit operates fairly autonomously since it performs a specialized function.

There are twenty-two (22) ARFF positions. The ARFFs are divided into three platoons, and, like employees of the Department of Fire, they work twenty-four (24) hours on and forty-eight (48) hours off. Similar to the Department of Fire, approximately two-thirds of the incidents responded to by ARFFs and ARFF Supervisors annually are EMS incidents, and the remaining third are fire suppression incidents. Of the fire suppression incidents at the airport, approximately 20% are related to structures and the remainder are related to aircraft.

The ARFFs and ARFF Supervisors receive training at the Dayton Fire Academy (as do firefighters employed by the Department of Fire) and receive state certification in firefighting and fire inspection. In addition, the Aircraft Rescue Unit receives aircraft specific training through audio-visual materials and training sessions at other airports. ARFFs and ARFF Supervisors wear uniforms with a patch on the sleeve which identifies them as a member of the "Dayton Airport Fire Department." Moreover, the ARFF Supervisors' uniforms have a single bugle, essentially designating a Lieutenant's rank. At one point in time, the ARFF Supervisors' title was that of Airport Fire Lieutenant.

Fire apparatus operated by the Aircraft Rescue Unit consists of three tanker trucks, a one-hundred foot aerial truck, and an EMS van. The equipment used by the Aircraft Rescue Unit and the equipment used by the Department of Fire are similar in function and capabilities. The ARFFs and ARFF Supervisors work out of a building alternatively referred to as the "Aircraft Rescue Building," the "Fire Rescue Building," or the "Firehouse." The Director of Aviation considers the ARFFs to be public safety employees.

The thrust of the majority opinion's finding that the ARFF Supervisors are not "members of a fire department" is that the Aircraft Rescue Unit, where the ARFF Supervisors work, is within the City's Department of Aviation, which is separate from the Department of Fire. While the majority discusses at length the fact that the ARFF Supervisors have a different chain of command from the employees who work in the Department of Fire, this is an extraneous issue. Obviously, employees of different departments have different chains of command.¹ However, there is no limit on the number of Fire Departments a city can operate.

The majority emphasizes the different "missions" of the two departments. Comparing the missions of the Department of Fire with the much broader mission of the Department of Aviation is meaningless. The Legislature in enacting O.R.C. §§ 4117.01(P) and (M), clearly did not intend to use the word "department" only in the formal way it might appear on a municipal table of organization, but rather as a group of employees who work together on a regular basis as an identifiable unit of full-time firefighters. Thus, for example, employees of the "Division of Fire Rescue" within the "Department of Public Safety" of a municipality would unquestionably qualify as a "fire department" within the meaning of O.R.C. § 4117.01(P). Hence, the correct comparison in this case is between the Department of Fire and the Aircraft Rescue Unit ("Unit").

¹Even in a city where there are two fire departments, each group of employees in each department would obviously report to different people through a different chain of command, and still each group, under this scenario, will be "members of a fire department" under the statute, the difference in the chain of command notwithstanding.

Comparing the missions of the Department of Fire and the Unit clearly shows that while the Unit has additional specialized responsibilities, the missions of the Aircraft Rescue Unit and the Fire Department are extremely similar. Both Departments are required to deal with structural fire response and EMS, both Departments spend about two-thirds of their time on EMS runs and both Departments have three major functions: (1) suppression of fire, (2) EMS services, and (3) inspection and fire prevention services. The fact that the City may be operating one fire department under the auspices of the Department of Fire does not necessarily negate the fact that it is also operating a fire department under the Department of Aviation. The specialized training and skill the ARFFs have in airport fires does not in any way detract from their being firefighters operating in a fire department called "Aircraft Rescue Unit." Police Departments, quite often, consist of different sections and variety of specializations but all their members are "members of a police department."² The fact that some policemen have a specialty is not a reason to determine that they are not "members of a police department."

The majority states in its opinion: "In determining whether employees are "members of a fire department" we must consider *not only the duties being performed* but the setting in which the employees render those duties." (emphasis added). However, the majority inexplicably fails to consider any performed duties. Moreover, the majority conspicuously omitted any reference to the firefighter duties the ARFF Supervisors perform as documented at length in the Findings of Fact of the hearing officer. Considering the performance of duties, the facts clearly show that the employees at the Department of Fire and the ARFFs are performing very similar duties under similar working conditions. The facts show that the ARFFs, like employees of the Department of Fire, work 24 hours on and 48 hours off. Similar to the Department of Fire, the Aircraft Rescue Unit spends about two-thirds of its time on EMS runs. The facts also show that the ARFFs and ARFF Supervisors attend the Dayton Fire Academy like the firefighters in the Department of Fire, and are similarly required to receive the training and certification required by

²Financial Crime Investigation policemen are trained in Federal Investigation Centers and are specialized in different areas than Homicide policemen. Those in the Canine Unit are not only trained differently but have different manual of procedures than other sections in the Police Department. However, all these groups with their different specialties are all members of a police department.

the Ohio Revised Code. The ARFFs and ARFF Supervisors are assigned to the "Airport Firehouse," work on platoon shifts, operate equipment similar to that of the Department of Fire, and wear uniforms with insignia designating them as members of the "Dayton Airport Fire Department." They also are statutory members of the Ohio Police and Firefighters Disability and Pension Fund. In sum, it is absolutely clear that the functions and services being provided by certified firefighters at the airport are those of a fire department.

In the final analysis, the only reason the majority opinion gives for the finding that the ARFF Supervisors are not "members of a fire department" is that since the Department of Fire and the Department of Aviation are separate legislatively created departments, and since the ARFF Supervisors work within the Department of Aviation, they cannot be "members of a fire department." This is a pure case of elevating form over substance, since the majority's case stands on how one names a department. O.R.C. § 4117.01(P) defines "Member of a fire department" as:

a person who is in the employ of a fire department of a municipal corporation or a township as a fire cadet, full-time regular fire fighter, or promoted rank as the result of an appointment from a duly established civil service eligibility list or under section 505.38, 709.012, or 737.22 of the Revised Code.

While it is clear that the ARFF Supervisors do not work within the Department of Fire, there is nothing in the statutory definition which limits a municipal corporation or a township to having only one fire department or to give a fire department a different name. The ARFF Supervisors are employed by a municipal corporation (the City of Dayton), as required by the definition, are full-time certified firefighters, as required by the definition, and are appointed from a duly established civil service eligibility list, as required by the definition.

The majority's extraordinarily narrow and technical interpretation of this statutory section is contrary to public policy. Determining whether or not a group of public safety employees are "members of a fire department" under O.R.C. § 4117.01(P)³, has serious public policy implications. The legislature provided both "members of a fire department" and "members of a

³or for that matter "members of a police department" under O.R.C. § 4117.01(M).

police department” the right to conciliation (*i.e.*, binding interest arbitration) as the final step in their dispute resolution procedure as a quid pro quo for not allowing these employees to strike.⁴ Apparently, the majority is prepared to concede that these public safety employees, whose “mission” according to the majority is “emergency crash response,” can strike. This concession is unacceptable.

While there is no case law interpreting “members of a fire department,” an analogous case involving O.R.C. § 4117.01(M), which defines “member of a police department,” explains the importance of interpreting such sections broadly. In this case, the City of Columbus argued that the public safety officers were not “members of a police department.” SERB found them to be “members of a police department,” and the City of Columbus appealed. Various issues were involved in that case, and the definition of “members of a police department” was one of them. On this specific issue Judge Crawford said the following:

On page 6 of this opinion, this Court set forth the applicable provisions of Rev. Code Sections 4117.14(D)(1) and 4117.01(M) which deal with “members of a police department.” It is this Court’s belief that the legislature did not attempt to define with specificity all conceivable police functions when it exempted members of a police department from the permissible strike provisions of the Act. Considering the Act must be liberally construed to effectuate its purpose (Rev. Code 4117.22) the legislature determined that traditional safety forces should not be permitted to strike. It is stipulated by the parties that the public safety officers (PSO’s) of the City of Columbus enforce state and municipal laws within their limited assigned areas. (Airports, waterways, zoo and parks). It is also undisputed that PSO’s wear police uniforms, carry weapons on duty, are certified by the Ohio Peace Officers Training Council, are under the direct command of the Chief of the City of Columbus, Department of Public Safety, and are appointed from a duly established civil service eligibility list.

The obvious intent of the legislature is to prohibit strikes which could disturb vital safety services affecting the life and property of the citizens of Ohio. PSO’s in Columbus perform regular police functions within the territorial jurisdiction to which they are assigned. The life and property of the state’s citizens and visitors are equally as important at the airport, the rivers, the zoo, and in the parks as they are on the streets of our state.

⁴O.R.C. § 4117.14(D)(1)

Thus, this Court holds that Public Safety Officers of the City of Columbus are "members of a police department" under Rev. Code Section 4117.14(D)(1), and the finding of the hearing officer in this regard is supported by substantial evidence.⁵

Clearly Judge Crawford's thoughtful words fit our case like a glove. The definition of "members of a police department" is parallel to the definition of "members of a fire department," both are mentioned in O.R.C. § 4117.14(D)(1) in the same context, and the same policy considerations apply to both in the same way. Thus, the ruling of the Franklin Court of Common Pleas that the law calls for a broad interpretation of "members of a police department" under O.R.C. § 4117.01(M) is clearly applicable to "members of a fire department" under O.R.C. § 4117.01(P). In this vein the extremely narrow interpretation of the majority is clearly wrong. The determinative factor is not how a certain department is named, as the majority seems to believe. The real issue is whether the employees at issue are performing essential public safety duties similar to police or to firefighters and whether they are working in a separate identifiable organized unit of a municipal corporation or a township, etc. Utilizing the Court's rationale, the ARFF Supervisors are "members of a fire department."

⁵*City of Columbus v. SERB*, 1984-86 SERB 420 (CP, Franklin, 3-8-85).