

OHPELRA Update

THE OHIO PUBLIC EMPLOYER LABOR RELATIONS ASSOCIATION NEWSLETTER, WINTER, 2004

Letter From The President

Happy New Year OHPELRA Members:

HOW QUICKLY THE HOLIDAY SEASON HAS PASSED! I hope your holidays were wonderful and that we all have a great and prosperous 2004! OHPELRA turns 20 this year and board members and officers have been busy preparing to celebrate in fine form at our annual training conference. That's right, the OHPELRA 20th Annual Training Conference is scheduled for February 1-3, 2004 at Cherry Valley Lodge in Newark. If you haven't already registered please mark your calendars now and be sure to send in your registration as soon as possible. You can register online and download a copy of the conference brochure at www.ohpelra.org. Besides great speakers and camaraderie you won't want to miss all the activities commemorating this very special occasion.

OHPELRA's Fall Training Program, "Leadership in Lean Times: The Four Cs – Conflict; Communication; Coaching and Coping" was truly a success. Conference attendees commented that the timeliness of this topic couldn't have been better as nearly everyone in attendance was dealing with some sort of budget challenge. Over 100 human resources professionals attended and contributed to this quality training opportunity. Special thanks to our presenters Felicia Bernardini, of Bernardini Consulting Services; Lisa Merkle, Director, Allen County CSEA; Marc Fishel, Esq. of Downes, Hurst & Fishel; Debbie Adams, Esq. of Frost Brown Todd, LLC and Wayne Moore, EAP Trainer, City of Columbus for an outstanding job.

We continue to work on improving our website, www.ohpelra.org, and encourage you to visit frequently. The wealth of information, registration option, and bulletin board exchanges add to the value of your membership. And, speaking of membership, please keep your eyes open for potential new members. It is vital for our group to continue to grow to meet future challenges head on.

In closing, as this will be my last letter to OHPELRA as your President, I would be remiss in my duties if I did not take this opportunity to recognize the hard work and dedication of your Board of Directors. Each and every one of them has embraced their responsibilities as true professionals and have gone beyond the call of duty to make this organization something special. In addition to their already heavy workloads, they take time out of their career and personal schedules to take on their OHPELRA duties with a spirit that never ceased to amaze me. I have been very fortunate to work with such a fine group of people and I thank them all.

Sincerely,



Stephanie R. Echols
President

OHPELRA Celebrates 20th Anniversary Annual Conference

OHPELRA GATHERS FOR ITS 2004 ANNUAL TRAINING CONFERENCE at ever-popular Cherry Valley Lodge on February 1-3, 2004, and we celebrate a major milestone — our 20th Anniversary as an organization. The year 2004 also marks the 20th anniversary of Ohio's public employee collective bargaining law, so we have much upon which to reflect to help us in the work that lies ahead.

By now you should have received your brochure and registration materials, but as a reminder, we plan our usual top-flight professional program with some extra features designed to mark this important milestone. Two major state officials will address our conference: Secretary of State J. Kenneth Blackwell will deliver the keynote address on Monday, and Attorney General James Petro will speak to us at the Tuesday lunch and business meeting. Sponsor and Past President Jonathan

Downes, a charter member of OHPELRA, will offer a "founder's perspective" on where OHPELRA has been and where we are going as a profession. The program also offers a number of interactive topics, including legal issue spotting and a mock arbitration where OHPELRA members become the "jury"! Other topical programs include the amendments to the FLSA exemption rules, new approaches to controlling



Continues on page 2

Divided Appeals Court Says Sheriff's Bid to Block Sick Leave Abuse Violates Union Contract

A DIVIDED STATE APPEALS COURT RULED TUESDAY that a county sheriff's attempt to curb excessive sick leave time by some of his employees violated a collective bargaining agreement and constituted discipline without just cause.

The 11th Ohio District Court of Appeals, in a 2-1 decision, upheld the findings of an arbitrator and common pleas court in a complaint that the Ohio Patrolman's Benevolent Association brought against Ashtabula County Sheriff William Johnson.

In February 2000 the sheriff sent memos to some employees about abuse of sick time leave, and required them to present a doctor's excuse for any such future absences. The OPBA filed a class action grievance against the sheriff on behalf of its members, asserting his actions violated the union contract.

An arbitrator determined the memos constituted discipline without a just cause finding, and with disregard for the grievance process. He ordered the sheriff to rescind the memos. A common pleas judge subsequently upheld the arbitrator's decision in favor of the OPBA, and the sheriff appealed to the 11th District.

Judge Cynthia Rice, writing for the appeals panel, said Sheriff Johnson claimed only that the arbitrator exceeded his authority when he determined that the memo constituted discipline. The sheriff said a section of the contract granted him unilateral authority to determine who had abused their sick leave and to require a physician's statement for use of even one day of sick time. As a result, he contends the memos did not constitute disciplinary action.

"The arbitrator concluded that this discipline violated the CBA because it eliminated the employee's ability to challenge the finding of abuse of sick leave," Judge Rice said. "In reaching his decision, the arbitrator did not add to, subtract from, or alter the meaning of the terms of the contract. He interpreted the language presented. Therefore, we cannot say that he exceeded his authority because his decision draws its essence from the terms of the contract." Judge William O'Neill concurred in the opinion.

Judge Diane Grendell dissented from the panel's decision to uphold the arbitrator's award. "Despite the clear language in the agreement, the arbitrator ruled that (the sheriff's) memo constituted discipline, which violated the agreement because it eliminated the employee's ability to challenge the finding of abuse of sick leave," she said. "The majority concludes that...the award draws its essence from the agreement. It is on this point that I part ways with the majority in this case."

Judge Grendell said the sheriff conducted extensive research into the use of sick leave by his employees and determined that, in some cases, it was being abused. She said the arbitrator's award openly conflicts with express terms of the collective bargaining agreement. "In fact, the arbitrator's decision expressly denies (the sheriff) any type of effective remedy with which to counter the abuse of sick leave expressly granted" to him under the contract, she said.

With your OHPELRA membership you can:

SATISFY YOUR EDUCATIONAL NEEDS WITH THE BEST TRAINING available for public sector labor relations and human resource professionals. Training may count toward continuing education requirements.

- Receive our quarterly state newsletters and the monthly national newsletters with updates on public sector labor relations and human resource issues and topics.
- Access the best networking opportunities available to public sector labor relations and human resources professionals in Ohio and across the country.
- Take advantage of the many resources available on our web site <http://www.ohpelra.org>.
- Receive frequent legislative updates of interest to the labor relations, human resources, and legal professionals.
- Have access to scholarship opportunities.
- Receive a member directory which provides a nation-wide roster of labor relations and human resources professionals.
- Enjoy the social aspects of our meetings and conferences.
- Attend several seminars held throughout the state created just for public sector labor relations and human resources professionals.
- Be recognized by your colleagues for achievements in the professional field of labor relations and human resources.

Be sure to mention these benefits when talking to fellow public sector HR professionals about joining OHPELRA. For more information, contact Lisa deGuzman-Catlett, Human Resources Director, Miami Township, lcattlett@miamitownship.com.

20th Conference from page 1

health care costs, and managing media relations in times of budgetary crisis. Our closing speaker **Steve Siemens** will share an unforgettable message on "Staying Up in an Upside-Down World" – truly a topic for the times.

What sets OHPELRA apart from other professional organizations is our sense of friendship and support. OHPELRA is truly a professional family. In that spirit, we have some other fun planned for our 20th Anniversary celebration, including a photographic retrospective, special entertainment at the Annual Banquet, and the first annual Pat Webster Memorial Euchre Tournament, celebrating our late and beloved past Treasurer's love of the game. We'll also have plenty of the informal networking that is our hallmark. Please plan now to come join us at Cherry Valley February 1-3, and if you have not registered yet, do so on line at www.ohpelra.org or return the registration form contained in this newsletter.

We Welcome New Members To OHPELRA!

Since the last issue of *OHPELRA Update*, the following new members have joined OHPELRA and NPELRA. Welcome to our organization, and we hope to see you at our next event!

Dan Arnold
Director of Human Services
Warren County

Sara E. Mills, Esq.
Assistant Law Director
City of Middletown

Linda Guyton
Human Resources Specialist
City of Columbus, Division of Police

Cheryl Richards
Employee & Labor Relations
Coordinator
University of Cincinnati

Eric Hansen
Assistant City Manager
City of Mason

Mark T. Wendling
City Manager
City of Silverton

Barb Hering
Human Resources Technician
City of Mason

Gloria Woods
Human Resources Generalist
University of Cincinnati

Angela Howard
Training Coordinator
Butler County Department of
Environmental Services

Barbara K. Wylie
Human Resources Generalist
Greene County Department
of Job & Family Services

William T. Johnson
Director of Employee
& Labor Relations
University of Cincinnati

Dan Evers
Township Administrator
Sugarcreek Township

David Miller
Coordinator
Eric County Department of
Environmental Services

OHPELRA THANKS ITS 2003 CONTRIBUTING SPONSORS

See the links on our web site at ohpelra.org for links to these sponsors and more information. Please consider our sponsors when seeking professional services, and thank them for supporting OHPELRA!

Baker & Hostetter, LLP
Columbus, Cincinnati,
and Cleveland

Downes, Hurst & Fishel
Columbus

Bernardini Consulting Services
Columbus

Dublin Management Group
Dublin

CareWorks
Dublin

Frost Brown Todd, LLC
Cincinnati, Middletown, and
Columbus

CompManagement, Inc.
Dublin

McGohan Brabender, Inc.
Dayton

Coolidge, Wall, Womsley & Lombard
Dayton and Xenia

Pepple & Waggoner, Ltd.
Cleveland

Diversity Effectiveness, LLC
Cincinnati and Cridersville

Personnel Profiles, Inc.
Covington, KY

OHPELRA 2004 Annual Training Conference Registration Form

Register on line at www.ohpelra.org or complete form below.

Name: Title:

Agency:

Address:

City: State: Zip:

Telephone: (.....)..... Facsimile: (.....)

E-mail

Fees

Total Enclosed:

Member Rate \$220.00 \$

Non-Member Rate \$320.00 \$

Single Day Registration **Only**: Monday or Tuesday (Check Day Desired)

Member Rate (one-day) \$ 130.00 \$

Non-Member Rate (one-day) \$ 170.00 \$

Please bill my organization: (PUT TOTAL FEES) \$

If non-member, would you like to JOIN to take advantage of lower member rate? Yes No

Is this your first OHPELRA Conference? Yes No

NOTE: All checks payable to "OHPELRA."
Taxpayer ID# is 31-1614788.

Will you be attending the banquet on Monday, February 2, 2004?
 Yes No

Vegetarian Entree Needed?

Please Note: Dress is business casual for banquet; casual for all other receptions, programs, and meetings.

Registration fees, minus a \$40.00 administrative fee, will be refunded if the **written cancellation is received no later than January 28, 2004.**

Substitutions may be made at any time.

No refunds will be offered after that time.

Hotel reservations must be made **directly** with Cherry Valley Lodge. Please mention this conference to take advantage of our reserved block of rooms. **Note that the room block guarantee expires several weeks before the Conference, so reserve your room early!**

Contact Cherry Valley Lodge for directions and information at
(740) 788-1200

Please mail or fax completed form to:

Douglas E. Duckett, *OHPELRA Treasurer*
Butler County Department of Personnel
315 High Street, 6th Floor
Hamilton, Ohio 45011

Phone: (513) 887-3257, FAX: (513) 785-5199

All checks payable to "OHPELRA"

Ohio Supreme Court Provides Job Protection for Employees on TTD

(Prepared by the labor and employment attorneys at Coolidge, Wall, Womsley & Lombard)

November 13, 2003

THE OHIO SUPREME COURT RECENTLY DECIDED a case that will have a significant impact on the way Ohio employers handle employees who are receiving temporary total disability (“TTD”) compensation. In *Coolidge v. Riverdale Local School District*, the Court held that an employer may not discharge an employee solely on the basis of absenteeism or inability to work, when the absence or inability to work is directly related to an allowed workers’ compensation condition, *i.e.*, an employer must continue to employ an employee for the duration of an employee’s TTD leave, as long as the leave is medically necessary. The court has fashioned this prohibition out of the tort of “wrongful discharge in violation of public policy.” According to Justice Resnick, who drafted the opinion, public policy, as codified in the Workers’ Compensation Act, mandates that employees be protected from job loss when such absenteeism is directly related to a work-related injury.

In the case, decided in late October, the employee, a teacher, was terminated after she had used her available leave, which consisted of both “assault leave” (she was injured after a confrontation with a student), and a year-long unpaid leave, both provided for by a collective bargaining agreement. After the teacher exhausted her leave, and after she failed to return to work, the school district terminated her employment pursuant to the school district’s attendance policy. The school district reasoned that because the teacher was unavailable to work, the teacher should be terminated, like any other employee who failed to come to work.

In the past, Ohio employers have been relatively free to engage in such behavior. As the Court notes in the *Coolidge* case, the prevailing view in Ohio was that injured workers may be discharged pursuant to a neutral leave of absence policy or practice that is applied evenhandedly to all employees. Taking the contrary view, the Court sided with the small minority of Ohio courts, and several courts from other states, in holding that such behavior was impermissible.

The Court further expanded its holding, in response to a perceived argument by the school district that the school district nevertheless had independent grounds to discharge the teacher. In the decision of the Court of Appeals, that court noted that the teacher never applied for uncompensated leave as required by the school district’s policies and failed to respond to phone calls made by the superintendent, who was attempting to determine what the teacher’s plans were for the upcoming school year. In response to these concerns, the Court held that an employee who is receiving TTD compensation may not be discharged for failing to complete forms for a leave of absence, or for failing to notify his or her employer as to the length of the absence, where the employer is otherwise on notice (even constructive notice) of the employee’s condition and

status. While the Court makes a point to state that it does not “condone” blatant refusals to cooperate by the employee, given the Court’s ruling, any decision to discipline due to a perceived failure to cooperate would carry great risk.

As a direct result of this decision, employers should immediately review their leave of absence policies. Employers should make certain that their policies provide for extended leaves of absence “when otherwise provided by law.” Additionally, we would note that:

- 1 The employer’s reinstatement obligation is not addressed by the decision. It would seem implicit that if employees cannot be discharged, they must be re-employed. Whether that means a preferential hiring list or an actual reinstatement, as in the Veterans Re-Employment statute, is debatable.
- 2 The decision seems to give workers’ compensation claimants greater protection than those employees who are disabled due to non-work related medical conditions.
- 3 The decision, on its face, only applies to those injured workers receiving TTD compensation and not other forms of compensation such as wage loss or permanent total disability.
- 4 Employment policies should be changed immediately. The decision makes clear that dismissing an injured worker currently receiving TTD compensation would be actionable.
- 5 The decision also prohibits termination of an employee receiving TTD compensation for failure to complete forms for a leave of absence, or for failure to notify the employer of the length of absence, where the employer is otherwise on notice of the injured worker’s condition and status.
- 6 The decision does not require that an employer continue health insurance for the entire period an injured worker receives TTD compensation, although it does not directly address this topic, either. At present, nothing prohibits an employer from discontinuing health insurance for injured workers receiving TTD, but the issue bears watching as the decision is interpreted by the lower courts.
- 7 The decision does not prohibit termination of an injured worker receiving TTD for another valid reason, so long as the basis is not absenteeism or inability to work directly related to the workplace injury.
- 8 Employers should move aggressively for the termination of temporary total compensation for those injured workers on extended leaves of absences.

The decision is undeniably negative for employers. It should be noted, however, that although the impact of the decision will be significant in cases where it applies, the practical effect of the decision may be somewhat limited. Most employees who are willing to return to work in a relatively short period are reinstated. Many employees who are allegedly disabled for long periods never wish to return and, therefore, never apply for reinstatement. Consequently, the impact of the decision may be only occasional. Nevertheless, the impact must be understood. As this decision is interpreted and implemented, we will provide continuing guidance. In the interim, we suggest that legal counsel be consulted prior to any action to terminate the employment of an injured worker receiving TTD compensation.

For more information regarding this decision, contact the attorneys at Coolidge, Wall, Womsley & Lombard. (This firm is an OHPELRA sponsor. More on this issue at page 6.)

Arbitration Decisions

We continue our series of reports and summaries on arbitration decisions submitted by members. The views expressed herein are those of the member and do not necessarily represent any evaluation or opinion of OHPELRA or its Board of Directors.



OCSEA/AFSCME Local 11 v. The Ohio Department of Health

Arbitrator: John J. Murphy

Issue: The Grievant conducted lead-based paint inspections in the field, but also worked every Friday in the Ocasek Building in Akron. In the past, grievant claimed his fiancée had an adverse reaction to chemical residues or substances that Grievant allegedly picked up from the Ocasek Building. Some time later, Grievant claimed he began to have adverse health reactions to pesticide exposure from the work site. Citing the Americans with Disabilities Act (ADA), as referenced in the CBA's non-discrimination article, the grievant requested permission to work at an alternative work site.

The agency's denial of grievant's request for an alternate work site led to the grievance.

Outcome: The Grievance was DENIED on procedural grounds. The Arbitrator found that the ADA claim was not cognizable under the arbitration procedure of the contract. Following a pattern of reluctance among arbitrators to grant remedies based upon external law, Arbitrator Murphy also noted the admonition contained in the contract warning arbitrators "not to add to the terms of [the] Contract," and not to impose an obligation "not specifically required by the express language of [the] Agreement."

While the State was confident of its case on the merits, winning on the threshold question of arbitrability set a very good precedent.

Rating of the Arbitrator:

- a) Conduct of hearing: 5
- b) Grasp of issues: 5
- c) Soundness of the overall decision: 5
- d) Avoidance of bias: 5
- e) Willingness to decide: 5
- f) Willingness to use arbitrator again: 5

[Footnote: Surprisingly, OCSEA filed in the Franklin County Court of Common Appeals to have Murphy's decision vacated, claiming he erred by determining he lacked the authority to decide the issue. That case is now pending]

*For more information, please contact:
Chris Kepler, Labor Relations Officer
The Ohio Department of Health
246 N. High St., 1st floor
Columbus, OH 43215
614.466.8413 (direct)*

Have a case you want us to summarize? Please send the information in this format to Jim Sennish at JSennish@erie-county-ohio.net

OHPELRA Website Changes

BE SURE TO CHECK OUT THE OHPELRA WEB SITE at www.ohpelra.org for new information online. If you don't know the user name and password, please e-mail Steve Barker at barkes@odjfs.state.oh.us.

Other Thoughts on Ohio Supreme Court Decision on Workers' Compensation

By Allison L. Hiltz, Esq.,
Hilla M. Zerbst, Esq. and
Frost Brown Todd LLC

WHAT DOES THE *COOLIDGE* DECISION MEAN for public employers? An employee still will be subject to termination if a workers' compensation absence extends beyond an employer's sunset policy and the employee fails to return to work once temporary total disability compensation ends. However, such terminations likely will be carefully scrutinized and may subject employers to yet another poten-

tial liability.

The *Coolidge* decision leaves many questions unanswered. Will the injured employee be entitled to return to the former position at the former rate of pay? Will seniority and benefits be affected? Will the decision have retroactive application? If so, how far back will it extend? It remains unclear what effect *Coolidge* will have on terminations pursuant to a consistently enforced sunset policy prior to the *Coolidge* decision. Although the Court recognized it was adopting the "minority view" on

this issue, that fact may or may not allow employers to rely on the "majority view" in support of pre-*Coolidge* terminations under sunset policies. If *Coolidge* is interpreted to be retroactive, former employees terminated up to four years ago could bring suit for wrongful discharge or for violation of public policy.

The Ohio Supreme Court's decision was unanimous, leaving little hope for change other than through legislative intervention. And, while the decision may open the door for employ-

ees to take advantage of the system, public employers can protect themselves. When considering terminations consistent with a sunset policy, be sure the affected employee is not receiving temporary total disability compensation.

For more information regarding the *Coolidge* decision, contact Allison L. Hiltz, Esq. or Hilla M. Zerbst, Esq. at Frost Brown Todd LLC. This firm is an OHPELRA sponsor.

PAGE 6

The logo features the text "OHPELRA Update" in a bold, sans-serif font. The "O" is stylized with a white outline and a dark fill, and the "H" is also stylized with a white outline and a dark fill. The "PELRA" is in a solid dark font, and "Update" is in a larger, bold, dark font. The background of the logo is a dark, textured grey.

c/o Erie County Department of Human Resources
2900 Columbus Avenue
Sandusky, OH 44870