

# OHPELRA Update

THE OHIO PUBLIC EMPLOYER LABOR RELATIONS ASSOCIATION NEWSLETTER, WINTER, 2005

## Join OHPELRA For the 21st Annual Training Conference

THE PREMIER EVENT OF THE OHPELRA PROGRAM YEAR is always our Annual Training Conference, held at the beautiful Cherry Valley Lodge in Newark, Ohio. The 2005 Annual Conference will be on February 6-8, and it promises to be one of our best programs ever. If you've not already registered, please do so today to make sure you're not closed out. While you should have already received your conference brochure, we have included another registration form with this issue, or you can register on line at [www.ohpelra.org](http://www.ohpelra.org). OHPELRA will bill you for the fee, so don't delay.

The Conference will open on Sunday afternoon with an update from the State Employment Relations Board. We are excited and honored to host SERB Chairman Carol Nolan Drake and the new Executive Director, Patricia Snyder, plus Mary Robertson of the Bureau of Mediation, on whom we all rely. We will follow that up with the opening reception and a Super Bowl party. At OHPELRA, we work hard but also enjoy our evening time together, so don't miss the fun.

On Monday, you will hear two past presidents speak on how issues of power and politics affect our work. Frank Hotze and Tom Payne are both retired, so they can share some frank observations and advice with us! Other topics on Monday will include dealing with health insurance costs in bargaining, whistleblower litigation, addressing intolerance in the workplace, and a look at union politics. On Tuesday, workshops will consider dealing with employee mental health problems, sunshine law and public records issues, dealing with difficult adversaries, managing change, minimizing supervisory snafus, and collective bargaining tips. We will close with attorney Susan Love, one of NPELRA's most popular speakers, talking about absenteeism and leave issues, and an inspirational closing talk from professional speaker Charles Dygert, Ph.D.

The OHPELRA Annual Conference is a bargain at \$220 for members and \$320 for non-members. This is far less than most of our competitors charge for two-day programs, and when you consider that all meals are provided at no extra charge, the savings are even more substantial. There is no training program in this state that offers as much on-point, practical information for the public-sector human resources or labor-relations professional. For that matter, this training

## Letter From The President

HAPPY NEW YEAR TO ALL. I hope your holidays were wonderful.

*The Anatomy of a Termination*, OHPELRA's Fall workshop, held on October 7 at the Grand Host East in Reynoldsburg was a great success. In OHPELRA tradition, the talented and informative speakers provided attendees with valuable, up to date information on the entire termination process. Thanks to all who made it possible.

Our Annual Conference is scheduled for February 6-8, 2005. We are back at beautiful Cherry Valley Lodge in Newark, OH. The conference will open on Sunday with a workshop and a Super Bowl reception. The Board has put together a very informative and fun program that you will not want to miss. Program brochures have been mailed with registration information. You can also register online at [www.ohpelra.org](http://www.ohpelra.org). Please mark your calendar and register as soon as possible as our programs tend to fill quickly.

A Pacesetter and Excellence awards will be presented to qualifying members for the first time this year at the Annual Conference. Nominations are being sought by Kevin Williams (740/833-2125) and Kathy Weisgarber (937/847-6465). For more information log on to our website or give Kevin or Kathy a call. Recipients of each award will be nominated for the same award at the NPELRA Annual Conference in Fort Lauderdale, FL, April 10-14, 2005. Please help us recognize members that have made notable contributions to the labor relations field. Your participation in this endeavor will be much appreciated.

I look forward to seeing you on February 6 at Cherry Valley.

Joy Campbell, President



## Building Bridges Over Troubled Waters

benefits any manager who oversees public employees.

Register today and bring some colleagues with you! If you've never been to an OHPELRA Annual Training Conference, here is your chance to experience what everyone has been talking about. See you at Cherry Valley!

# New FLSA Regulations

ARE YOUR ASSISTANT FIRE AND POLICE CHIEFS EXEMPT from the Fair Labor Standards Act under the new regulations? If you are not sure, you might take some comfort in knowing that you are not alone. You have just joined an increasing number of public employers who have the same question. Now that you understand you may have an unanswered question, you should take steps to find an answer. It is likely that many, if not most, assistant chiefs will remain exempt. But as the Fair Labor Standards Act (“FLSA”) makes clear, an employee’s title does not matter, it is his or her duties that are important.

The new FLSA regulations provide more guidance for public employers because they provide more detail regarding the duties that non-exempt employees perform. However, the FLSA regulations do not specifically address whether assistant chiefs and other high level public safety officials are exempt employees. Fortunately, the Preamble to the new regulations describes the duties that high-level exempt public safety officials typically perform, which will provide guidance to employers regarding the exempt status of high level public safety officials. Before addressing the Preamble, it is important to generally understand the new regulations.

There are primarily three classes of public sector safety employees who are exempt from the requirements of the FLSA under both the old and new regulations: Executive, Administrative, and Professional. There are other exemptions, but those rarely apply to public sector safety employees. If a public sector safety employee is exempt, he or she must qualify for one or more of these exemptions. For illustrative purposes, I have described the requirements of the executive exemption below:

## Executive Exemption

Before the adoption of the new regulations, many assistant chiefs were exempt from the overtime requirements under the executive test. To qualify for the executive exemption under the new rules, an employee must meet all of the following requirements:

- 1) be paid a salary of at least \$455 per week;
- 2) have as his or her primary duty managing the enterprise or managing a customarily recognized department or subdivision of the enterprise;
- 3) customarily and regularly direct the work of at least two other full-time employees or their equivalent;
- 4) have the authority to hire or fire other employees, or have his or her suggestions and recommendations regarding the hiring, firing, advancement, promotion or any other change of status of other employees be given particular weight.

## 29 C.F.R. § 541.100(a).

Essential to this analysis are the definitions of two phrases: (1) “primary duty” and (2) “customarily and regularly” as it relates to the frequency that one supervises the work of others. Those terms are defined in the Code of Federal Regulations at 29 C.F.R. §§ 541.700 and 541.701.

These are the specific requirements that must be satisfied before an employee will qualify for the executive exemption. There are similar requirements for the administrative, professional and other exemptions. Now that we have generally discussed the exemptions, we can discuss the Department of Labor’s specific references to public sector employees.

## The New Regulations Specifically Address The Non-Exempt Status of Lower-Level Public Safety Employees.

The new regulations specifically address the exempt status of lower-level public safety employees. New section 29 C.F.R. § 541.3(b) specifically provides that the exemptions to the FLSA do not apply to . . .

patrol officers, detectives, deputy sheriffs, state troopers, highway patrol officers, investigators, inspectors, correctional officers, parole or probation officers, park rangers, fire fighters, paramedics, emergency medical technicians, ambulance personnel, rescue workers, hazardous materials workers and similar employees, regardless of rank or pay level, who perform work such as preventing, controlling or extinguishing fires of any type; rescuing fire, crime or accident victims; preventing or detecting crimes; conducting investigations or inspections for violations of law; performing surveillance; pursuing, restraining, and apprehending suspects; detaining or supervising suspected and convicted criminals, including those on probation or parole; interviewing witnesses; interrogating and fingerprinting suspects; preparing investigative reports; or other similar work.

## 29 C.F.R. § 541.3(b)(1) (emphasis added).

“Such employees do not qualify as exempt executive employees because their primary duty is not management of the enterprise in which the employee is employed . . . for example, a police officer or fire fighter whose primary duty is to investigate crimes or fight fires is not exempt under section 13(a)(1) of the Act merely because the police officer or fire fighter also directs the work of other employees in the conduct of an investigation or fighting a fire.” 29 C.F.R. § 541.3(b)(2). Further, “such employees do not qualify as exempt administrative employees because their primary duty is not the performance of work directly related to the management of general business operations of the employer or the employer’s customers . . .” 29 C.F.R. § 541.3(b)(3). Accordingly, the regulations make clear that lower-level public safety officials are not exempt from the requirements of the FLSA.

## The Preamble To The Regulations Addresses the Exempt Status of High-Level Public Safety Officials.

Although the regulations address the exempt status of lower-level employees, they do not draw a clear distinction between lower and high level public safety officials. However, the Preamble to the new regulations does provide some guidance to employers. The Preamble implies that the new regulations are intended to be consistent with federal cases interpreting the old regulations regarding high-level public safety officials. This is important because the language in the regulations referring to employees who are not exempt is very broad and includes the phrase “regardless of rank or pay level.” The Preamble explains:

Federal courts have found high-level police and fire officials to be exempt executive or administrative employees only if, in addition to satisfying the other pertinent requirements, such as directing the work of two or more other full-time employees as required for the executive exemption, their primary duty is performing managerial tasks such as evaluating personnel performance; enforcing and imposing penalties for violations of the rules and regulations; making recommendations as to hiring, promotion, discipline or termination; coordinating and implementing training programs; maintaining company payroll and personnel records; handling community complaints, including determining whether to refer such complaints to internal affairs for further investigation; preparing budgets and controlling expenditures; ensuring operations readiness through supervision and inspection of personnel, equipment and quarters; deciding how and where to allocate personnel; managing the distribution of equipment; maintaining inventory of property and supplies; and directing operations at crime, fire, or accident scenes, including deciding whether additional personnel or equipment is needed.

See Preamble to Regulations, Subpart A, General Regulations (federal case citations omitted) (emphasis added).

Another important fact that was considered in at least one case is that exempt fire executives generally are not dispatched to calls; rather, they have

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

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Chicago, IL

*New FLSA Regulations, from page 2*

discretion to determine whether and where assistance is needed.

As a result of the foregoing, most public employers are comfortable that their chiefs are exempt and that their lower-level officers are not exempt. However, public sector employers have had difficulty determining whether their assistant chiefs and other similar high-level officials are exempt or non-exempt. That question can only be answered by carefully analyzing the duties of the assistant chiefs.

Assistant Chiefs will likely continue to qualify for the executive exemption under the new regulations only if the following three conditions are met: (1) their primary duties meet the description of the duties typically performed by "high level officials" rather than the those duties typically performed by employees in the jobs listed in 29 C.F.R. § 541.3(b) outlined above; (2) those positions supervise at least the equivalent of two full-time employees; and (3) those positions have the authority to make recommendations regarding the hiring, firing, advancement, promotion or other change of status of employees. Moreover, it is important to stress that it is the actual duties performed by the employees that are important to the analysis of whether an employee is exempt and not necessarily those duties described in the job description. Ideally, the duties in the job description and those actually performed are the same. But if the employer's job descriptions have not been recently updated, that may not be true.

If you are uncertain about whether your assistant chiefs are exempt under the new FLSA regulations, you should request your attorney to perform an audit of those positions.

*W. Joseph Scholler is an associate with Frost Brown Todd LLC who regularly counsels public sector employers on labor, employment and a variety of other issues. He has significant experience counseling public sector employers on FLSA issues.*

OHPELRA 2005 Annual Training Conference

# Registration Form

Register on line at [www.ohpelra.org](http://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)

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 Sunday night Opening Reception & Super Bowl Party?**  Yes  No

**Will you be attending the banquet on Monday, February 2, 2005?**  
 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 February 1 2005.**

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 or [www.cherryvalleylodge.com](http://www.cherryvalleylodge.com)

*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"*



## Negotiations in Difficult Times and Newspapers and Negative Inferences

By Jonathan J. Downes  
DOWNES, HURST & FISHEL

DURING THE RECENT RECESSION AND IN THE PERIOD FOLLOWING, many jurisdictions have faced the impasse proceedings under the Collective Bargaining Act, fact-finding, and conciliation. Because public employees were accustomed to receiving large raises and major increases to benefits during the boom times, those employees generally expect that they would continue to receive generous increases in negotiations and impasse proceedings.

The recession has affected nearly every jurisdiction in Ohio and most notably, State government. The State budget difficulties, and impact of entitlement costs, produced the most difficult economic conditions the State government has faced in nearly 70 years. Last year, the State conciliator awarded a 0%, 0%, and 4% wage increase with increased insurance premium contribution and co-pays in the current 3-year contract, reversing the trend of steady wage and benefit increases.

The purpose of this article is to identify key factors that employers should consider when making presentations during negotiations, fact-finding, and conciliation on economic issues in order to demonstrate the current and projected lack of funds. Although the recession appears to be over, and the economy is gaining strength, a trickle down to local governments will not be seen for another six (6) to twelve (12) months. Local governments will need to catch up from the previous revenue losses.

Health insurance is the issue neutrals appear most sympathetic with employers. In order to establish a strong position, comparisons to like jurisdictions (counties to counties, cities to cities), and within the local health insurance market or region (within the 50-mile radius for health insurance providers or compared to like-size employer, public and private), employers should also be presenting economic costs and health insurance to other local employers. While this information is sometimes difficult to gather, a local chamber of commerce, insurance brokers, and

## OHPELRA Welcomes New Members

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!

**Peggy Bartow**, *Personnel Officer*  
*Franklin County Board of Health*

**Keith Chamberlin**, *City Manager*  
*City of Columbiana*

**Aundrea Cordle**,  
*Director of Human Resources*  
*Fairfield County*

**Pamela Hartung Kellum**,  
*Township Clerk*  
*Perkins Township*

**Elisabeth Krugh**,  
*HR/Benefits Coordinator*  
*Genoa Township*

**Eric Kuhn**, *Executive Director*  
*Southeast Ohio EMS District*

**Kim Lapensee**, *Assistant City Manager*  
*City of Madeira*

**Lori B. Lamer, Esq.**, *Law Director*  
*City of Conneaut*

**Douglas L. Lewis**, *City Manager*  
*City of Conneaut*

**Michelle Matthews**,  
*Director of Human Resources*  
*Montgomery County Clerk of Courts*

**Carol Mayhall**,  
*Human Resources Assistant*  
*City of Fairfield*

**Gregory J. Merrill, P.E.**, *Director*  
*Montgomery County Sanitary Engineering*

**Peter K. Newman, Esq.**, *Member*  
*Greenbaum, Doll and McDonald, PLLC*

**Steven W. Schierholt**,  
*Deputy Superintendent*  
*Ohio Attorney General,*  
*Bureau of Criminal Investigation*

**Patty Van Arsdale**,  
*Support Services Manager*  
*Montgomery County Department of Sanitary Engineering*

**Kirk Wall, Esq.**, *Attorney*  
*Dinsmore & Shohl, LLP*

**Andrew D. White**,  
*Assistant City Manager*  
*City of Huron*

**David Williams**,  
*Executive Director for Human Resources*  
*Lorain City Schools*

**Robert E. Sander, SPHR**,  
*County Human Resources Administrator*  
*Clermont County*

the network in the local business community should provide a reasonable sampling of insurance premium costs, co-pays, and other employee direct expense. The total monthly and annual cost to the employer and employee should be demonstrated, as well as the increases over the past three (3) to six (6) years. A comparison of the cost of health insurance as a percentage of the total of personnel costs and of total expenditures should also be considered. Employers should also explain efforts that have been made to maintain a certain level of benefits and the manner in which it has considered input from employees. Don't forget that arbitrators may sometimes be sympathetic

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## OHPELRA Website Changes

Be sure to check out the OHPELRA web site at [www.ohpelra.org](http://www.ohpelra.org) for new information online. If you are a member and have forgotten the user name and password for the member-only portions of the website, please e-mail webmaster Steve Barker at [barkes@odjfs.state.oh.us](mailto:barkes@odjfs.state.oh.us).

on this issue, but grant economic relief in other areas.

Budget and economic data are critical in making an economic presentation. Unions will argue that the only instance where the employees should have a wage freeze is when the jurisdiction is facing layoffs. Currently, there are many jurisdictions which have been required to grant an increase through a conciliation or negotiations such that are in a layoff situation. This sends an extremely bad message to the public. The message sent is that the administration is not competent; otherwise, why would it have granted the wage increase and then lay off employees.

Economic data should include the local Standard Metropolitan Area data on wages and increases, as well as income tax return averages, available from the Department of Taxation by school district designation (available from the Ohio Department of Taxation). Wage increases of public employees and average wages can be compared to those in the local community and most always demonstrate that public employees have garnered larger wage increases and have salaries greater than the local average wage. Additionally, a comparison of the net increase of wages over inflation for the past seven (7) to twelve (12) years should be shown so that neutrals will understand that employees have had net gains against inflation. Be careful to clearly explain this as some arbitrators hold the position that, because employees have gotten steady increases in the past, even in difficult times they should still receive an increase. Unions will always argue that wage increases are necessary to keep those who are employed at a reasonable wage increase regardless of the need to lay off other employees to pay for those wage increases. This is the Union logic, but it is contrary to the stream of income for most jurisdictions.

Sources of economic data include the local chamber of commerce, local business reviews (generally, banks), local university economics departments, State Department of Taxation reports, and the U.S. Census Bureau. Some larger jurisdictions maintain this data on an on-going basis. At the same time, public officials need to be aware that there are consequences of these types of statements.

Generally, Unions provide little or no data regarding budget, economic trends or projections. Instead, Unions will present newspaper articles of local elected officials indicating that there is no budget crisis or that the economy is okay. Arbitrators must understand that administrators and elected officials must maintain a good face with the public to maintain a positive attitude, yet at the same time the budget reality differs. Union and bargaining teams do not understand this distinction. It is our job as negotiators to explain this to fact-finders and conciliators.

Unions will also use dated information such as the health insurance report from the State Employment Relations Board (SERB), which is already four or five months old when it is issued. Current data is critical. Also, specific contractual provisions from the various agreements being compared should be included in your resource materials. These contracts generally are available from SERB. Otherwise, collecting the copies from other jurisdictions is essential.

In presenting budget information, employers must demonstrate the trends of revenues and expenses over the past three (3) to eight (8) years, as well as other major changes in revenues or expenses. Also consider the one-time revenues or expenses which have occurred, reductions in capital expenditures, reduction in general expenses, discontinuation or a reduction of programs, and other one time events or changes in revenues or expenses. A compelling comparison is the rise of the personnel costs as a percentage of the general fund budget, or like comparison.

This information and a thorough presentation are necessary when presenting either an inability to pay or a limited ability to pay. The guidelines for neutrals in O.R.C. § 4117.14 require the neutral to review the "ability to pay" of the employer. Unions frequently misstate the law, arguing that it's the employer's burden to prove an "inability" to pay.

When presenting economic information, many times it is important to distinguish your jurisdiction from other jurisdictions which have granted



wage increases. For instance, does the jurisdiction have a higher tax base, different sources of revenue or other identifiable reasons for a difference in economic health. Comparison factors can include different tax rates, different tax base, different revenue streams, and other factors.

Finally, when selecting the fact-finder or conciliator, the background of each proposed neutral should be reviewed. SERB maintains a list of previous decisions issued by its neutrals. Contacting the affected jurisdictions or securing copies of previous reports of candidates should be conducted. Once a selection is made, previous reports of the neutrals should be studied, including contacts to representatives to other jurisdictions which utilized the neutral.

In responding to positions stated by employers, Union representatives commonly use negative inference or innuendo. Remember, it is their job to secure as much as they can for their members and it is management's responsibility to establish a reasonable, a limited or inability to pay economic increases. Instead of engaging the Union representative in the game of negative inference or innuendo, remain positive and utilize hard facts.

This is but a short list of thoughts and items utilized in impasse proceedings. Review of other presentations by other jurisdictions is helpful, as well as publications such as the NPELRA publication on fact-finding and impasse proceedings. Preparation for negotiations, such as the gathering of information, should begin between three (3) to six (6) months prior to commencement of negotiations so that most of the data will be collected prior to the beginning of negotiations to be effectively utilized during negotiations.



# OHPELRA Is Seeking Nominations!!



Do you know someone within the OHPELRA organization who should be recognized for his or her outstanding contributions to our profession in public sector human resources and/or labor relations?

*Please make nominations for the:*

## Award of Excellence and Pacesetter Award

An OHPELRA member will be honored for each award at the State Conference at the Cherry Valley Lodge in February 2005. The OHPELRA award recipients will also be nominated for awards at the national level at the NPELRA Conference in Ft. Lauderdale in April 2005. Request and then return nomination forms (returning no later than January 14, 2005) to OHPELRA Board Member: Kevin Williams ([kwilliams@co.delaware.oh.us](mailto:kwilliams@co.delaware.oh.us)) (fax: 740-833-2119) or Kathy Weisgarber ([kathy.weisgarber@cityofmiamisburg.org](mailto:kathy.weisgarber@cityofmiamisburg.org)) (fax: 937-866-0891)



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## OHPELRA Update

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