

OHPELRA Update

THE OHIO PUBLIC EMPLOYER LABOR RELATIONS ASSOCIATION NEWSLETTER, FALL, 2002

Letter From The President

Hello OHPELRA Members:

THIS WRITING FINDS ME IN A NEW PLACE WITH NEW CHALLENGES. For those of you who don't know, I am now the Executive Director for Human Resources with the Columbus Public School System. I started in this role on September 3, 2002. Enough of me...

OHPELRA has been busy this summer. We started with the Summer Brunch Symposium which featured a presentation by Jim Keating, from Trumbull County. Jim shared his experience from the strike in his jurisdiction in the Autumn of 2001. The strike was long and difficult for those who were involved. The questions were provocative and the discussion was lively! Thanks to all who attended this program.

In an effort to support you as members of OHPELRA, we sent letters to administrators to highlight the benefits to them of your participation in OHPELRA. The offer was very well received and more than 75 letters were mailed to board members, city managers and other decision makers throughout the state.

During the month of August, the OHPELRA Board met and mapped out the Annual Conference Program. Mark your calendar for February 4-6, 2003! You won't be disappointed and yes, we'll be back at Cherry Valley Lodge. Keep an eye on our website (www.ohpelra.org) for more details.

On October 29, we will present our Fall Seminar at the Fawcett Center for Tomorrow on the Ohio State University campus. The topic for this program is **Public Sector Investigations: The Five W's and More**. Marc Fischel and Lori Torriero, Esq. will be the presenters and both are OHPELRA members and sponsors! Go to the OHPELRA website for a flyer and registration information if you have not yet received it. We'll be looking for you at the fall seminar.

OHPELRA provides our members with quality training programs, valuable resources and a wealth of knowledgeable practitioners in the area of Labor Relations. Use the ohpelra.org site to ask questions, share information or register your e-mail. Contact Board members to pick our brains and or share ideas about what we can do to support you as a member of OHPELRA!

Sincerely,



Stephanie R. Echols, President

Hold The Dates For OHPELRA's 19th Annual Training Conference

THE DREARY MONTH OF FEBRUARY OFFERS ONE VERY BRIGHT SPOT—the OHPELRA Annual Training Conference at Cherry Valley Lodge in Newark, Ohio. The dates are set for **February 2-4, 2003**, so mark your calendar now to join your colleagues and friends from all over Ohio. Your Board of Directors met in early August to plan the program, and we look to have great speakers on very timely and interesting topics. As usual, we will be leading off on Sunday afternoon with an entertaining and informative program called "OHPELRA's Believe It or Not!," where some of our past presidents will lead us in our favorite educational activity—amazing labor relations and HR war stories. Plan to come up early and start the conference off right.

For our new members, the Annual Conference at Cherry Valley is always the highlight of OHPELRA's year: the finest professional training available in our field combined with networking and fellowship with colleagues in a beautiful facility, and all at a very low price for a two-day program. Please reserve the dates out on your 2003 calendar now.

Also while you have those 2003 calendars out, please note the **NPELRA 32nd Annual Training Conference in Newport Beach, California April 6-10, 2003**.



OHPELRA members form a jury for a mock trial at the 2002 Annual Training Conference

The Direct-Threat Defense Under The ADA

by Louise S. Brock, Esq.
Dinsmore & Shohl LLP
Cincinnati, Columbus, Dayton

IN BOTH THE PUBLIC AND PRIVATE SECTORS, employers may be concerned when a particular job creates a risk to an employee's health or safety. But what if that risk is caused by the employee's medical condition? Can the employer exclude that employee from the job for the employee's own good? If it does, the employee could argue that she is being discriminated against because of a disability. In *Chevron U.S.A. Inc. v. Echazabal*, decided on June 10, 2002, the U.S. Supreme Court held that an employer can defend against such a claim by proving the employee would pose a direct threat to his own health or safety.

In *Chevron*, the plaintiff worked for an independent contractor at an oil refinery owned and operated by Chevron. He applied for a job with Chevron, and the company offered to hire him if he could pass a physical examination. The examination, however, revealed that the plaintiff had a liver abnormality or liver damage, which Chevron's doctors said would be aggravated by continued exposure to toxins at the refinery. Consequently, the company withdrew the job offer and asked the contractor to reassign the plaintiff or remove him from the refinery altogether.

The plaintiff filed suit against Chevron claiming disability discrimination in violation of the Americans with Disabilities Act. He argued that by requiring him to pass the physical examination, Chevron was using a qualification standard that screened him out because of his disability. It was assumed the plaintiff's liver condition was a disability, and it was assumed the company could not otherwise reasonably accommodate him. Under the ADA, an employer can defend against such a claim provided it can prove that the challenged qualification standard is job-related and consistent with business necessity (and that a reasonable accommodation would not cure the difficulty posed by employment).

Chevron defended the case based on an EEOC regulation defining "qualification standard" to include "a requirement that an individual shall not pose a direct threat to the health or safety of the individual or others in the workplace." That regulation goes beyond the ADA, which only recognizes the direct-threat defense as to others. Consequently, at issue in *Chevron* was the validity of extending the direct-threat defense to the employee's own health or safety.

Upholding the EEOC regulation, the Supreme Court unanimously held that qualification standards may include a requirement that an individual shall not pose a direct threat to the individual's own health or safety.

To support its decision, the Court considered the possibility that an employer could face liability under OSHA for hiring an individual who knowingly consented to the particular dangers the job would pose to him. OSHA policy is to ensure the safety of each and every worker, and an employer cannot further that policy if it must permit an employee to put himself in harm's way.

While the direct-threat defense may be attractive to screen out certain individuals for dangerous jobs, employers seeking to rely on the defense must present detailed evidence to support it. The employer must be able to demonstrate a particularized inquiry into the harms the employee

would probably face. According to EEOC regulations and the Supreme Court, the defense must be "based on a reasonable medical judgment that relies on the most current medical knowledge and/or the best available objective evidence." In addition, the defense must be based upon an expressly "individualized assessment of the individual's present ability to safely perform the essential functions of the job," reached after considering, among other things, the imminence of the risk and the severity of the harm portended.

In *Chevron*, the Supreme Court provided further ammunition to employers defending against disability-discrimination claims. However, only after a careful assessment of the risks in the particular case should an employer use the direct-threat defense to justify an employment decision.

Dinsmore & Shohl, LLP is a contributing sponsor of OHPELRA. For more information, please contact Ms. Brock at (513) 977-8524 or at brock@dinslaw.com.

Trumbull's Pain Is OHPELRA'S Pleasure

by Lisa deGuzman-Catlett
OHPELRA Board Member

If hindsight is 20/20, Jim Keating, Director of Personnel and Risk Management for Trumbull County, shared both an earful and an eye-ful with attendees at OHPELRA's summer brunch workshop.

Jim entranced attendees as he shared the pain and struggles that Trumbull County experienced in the 2001 strike by Child Support Enforcement Agency (CSEA) employees. The main issues in contention were of no surprise: wages and health care coverage. Despite CSEA employee wages having risen an average of 9.6% in the year 2001, the fact that other unions had agreed to cover a portion of the once 100% employer-paid health care premium, and the state of the economy, AFSCME Local 3808 wanted more.

Highlights of the strike experience included public and personal attacks on Jim and some of his fellow associates, including a song that was written specifically about Jim and an alleged association with the Grim Reaper.

The strike lasted 30 tortuous days and was resolved through Jim's steady, progressive representation of the facts and his professional demeanor. Management remained willing to discuss possible resolutions but did not waiver from the reality-based issues. Eventually, pressure from external forces (i.e., spouses) and the upcoming Thanksgiving holiday came into play in Trumbull's favor. It wasn't painless, but it represents the right way to handle the union's unprincipled strike behaviors.

Jim did an excellent job of conveying the situation, painting the hard reality of the issues, and the roller coaster-like emotional ride. Thanks, Jim, for a fine presentation and sharing some difficult times with your fellow OHPELRA members.



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!

Cindy J. Baker
Clerk of Courts
Fairfield Municipal Court

Hubert L. Chatman
Executive Director for Human Resources & Labor Relations
Youngstown State University

Sue Donahue
Human Resources Training Manager
Montgomery County

Joni Erwin
Human Resources Officer
Pickaway County Department of Job & Family Services

Susan D. Gray & Cris Wildermuth
Diversity Effectiveness, LLC
Cincinnati & Cridersville
(New Sponsor)

Michael Kinter
Human Resources Administrator
Belmont County Department of Jobs & Family Services

Carol H. May
Labor and Employee Relations Specialist
Ohio University

Kerry Pedraza
Human Resources Director
Clark County Department of Job & Family Services

Kathy Rahtz
Human Resources Manager
Metropolitan Sewer District of Cincinnati

Thomas J. Wienczek, Esq.
Partner
Brouse McDowell
Akron

OHPELRA Thanks Its 2002 Contributing Sponsors

Baker & Hostetler, LLP
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CompManagement, Inc.
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Dinsmore & Shohl, LLP
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Diversity Effectiveness, LLC
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Downes, Hurst & Fishel
Columbus

Dublin Management Group Limited
Dublin

Frost Brown Todd, LLC
Cincinnati, Middletown, and Columbus

Horan Associates, Inc.
Cincinnati

McGohan Brabender, Inc.
Dayton

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!

NPELRA's Professional Certification Program Is Coming Near You!

OUR NATIONAL ORGANIZATION HAS FOR SEVERAL YEARS OFFERED a professional certification program called the NPELRA Labor Relations Academy. Participants who complete the three modules plus a paper on a topic approved by the Academy Committee are awarded the designation as a Certified Labor Relations Professional. This program offers an excellent grounding in public-sector labor relations, while also enhancing your own professional credentials. Some public employers around the country have begun to list NPELRA

Academy certification as desirable for candidates for labor-relations and human resources positions.

Most of the offerings of the Academy have been at the NPELRA Annual Training Conference, which limits the ability of some of our members to complete the program, though Jan Campbell and Marsha Jordan-Smart are two Ohioans who have completed all three segments. But now you have the chance to complete all three segments of the Academy within a period of just over six months, and without boarding a plane.

On Thursday, December 5, 2002, NPELRA will offer Academy I—The Foundation of Labor Relations at the Candlewood Suites Hotel in East Lansing, Michigan, near the campus of Michigan State University. On June 12 and 13, 2003, NPELRA will offer the Academy for the first time in Ohio, in Columbus. Academy II—The Arbitration Process will be on Thursday, June 12, and Academy III—The Negotiations Process will be on Friday, June 13.

You can register now for Academy I in Michigan in December at the NPELRA web site; see http://www.npelra.org/2002academyreg_form.asp. We will have mailings coming to all members about these programs in the weeks and months ahead. It will be a long time before the program offers so many sessions so close in time, so take advantage of this opportunity now.

Court Vacates Arbitrator's Decision, Ruling The Arbitrator Exceeded His Powers And Departed From The Essence Of Collective Bargaining Agreement When Applying Own Brand Of Justice

by Jonathan J. Downes, Esq.
Downes, Hurst & Fishel
Columbus

In November, 2001, we notified our clients and OHPELRA of Arbitrator Louis V. Imundo, Jr.'s decision to reinstate laid-off employees of the Perry County Sheriff's Office. Since that date, the County appealed the award of Arbitrator Imundo to the Perry County Court of Common Pleas. The court ruled that the County did not violate the terms of the collective bargaining agreement when it laid-off the employees. Consequently, the court vacated the award of the arbitrator. The following is a summary of the court's ruling issued on July 5, 2002.

Briefly, in July, 2001, the Perry County Sheriff's Office and Fraternal Order of Police convened for an arbitration hearing to resolve two issues. First, the arbitrator was asked to determine whether the Perry County Board of County Commissioners was a party to the collective bargaining agreement. Second, the arbitrator was asked to determine whether the Sheriff's Office violated the collective bargaining agreement when it decided to lay-off thirteen of its employees. Although taking in excess of forty-five pages to reach his decision, the arbitrator resolved both questions by answering "yes".

As noted, the Board of County Commissioners appealed the decision of the arbitrator to the Perry County Court of Common Pleas. The Court vacated the award and stated that Arbitrator Imundo exceeded the authority granted to him in the terms of the collective bargaining agreement. Additionally, the Court concluded that the arbitrator's ruling was not based upon the terms included in the parties' collective bargaining agreement. In other words, the arbitrator not only lacked the authority to render his decision, but also that his ruling was without basis.

In ruling to vacate the award of the arbitrator, the judge made the following findings:

- An arbitrator's duty is to interpret and apply the language of the collective bargaining agreement to the grievance at issue;
- An arbitrator's award will be vacated if it does not draw its essence from the terms of the collective bargaining agreement;
- An arbitrator's award will be upheld so long as it does not conflict with the express terms of the agreement; is with rational support; or can be rationally derived from the terms of the agreement;
- In evaluating the entire Perry County budgetary process, Arbitrator Imundo acted outside the scope of the collective bargaining agreement and administered "his own brand of justice";
- The parties intended to be governed by the strict terms of the collective bargaining agreement, not civil service law governing layoffs;
- Pursuant to the terms of the collective bargaining agreement, the decision to lay-off employees was within the sole discretion of the Employer;

- The Employer did not have to establish the necessity for the layoffs pursuant to the terms of the agreement, thus there is no rational nexus between the arbitrator's decision and the collective bargaining agreement;
- An arbitrator cannot replace the judgment of elected county officials with his own; and the County did not violate the collective bargaining agreement when it laid-off thirteen employees, therefore, the Union's grievance was without merit and must be dismissed.

In summary, the court found that the arbitrator "ignored" the language of the written agreement and considered factors outside the parties' collective bargaining agreement in order to issue "his own brand of justice." A collective bargaining agreement did not grant an arbitrator the authority to issue such a ruling. Consequently, the court vacated the award of the arbitrator. A copy of both the arbitrator's and the judge's decisions will be mailed or faxed upon request to Downes, Hurst & Fishel.

Employers Must Remember the Following:

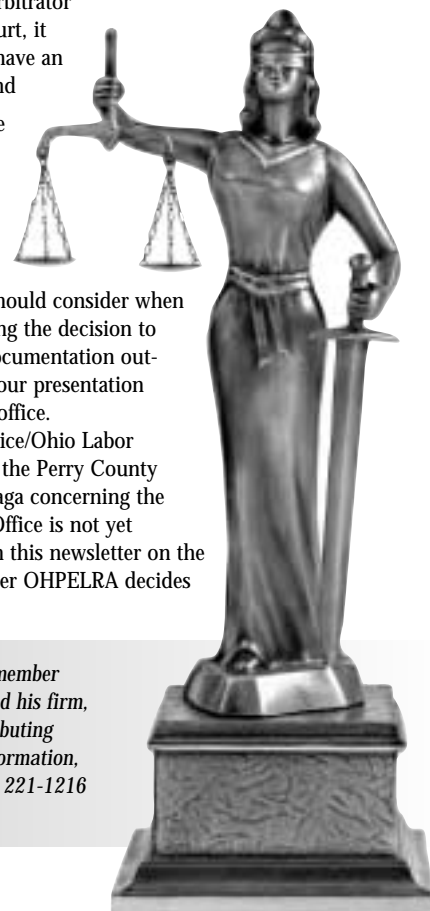
Well in advance of any arbitration hearing, employers must obtain any necessary documentation and statistical information, as well as prepare witnesses to provide accurate, truthful testimony during the hearing:

- Even though the decision of Arbitrator Imundo was vacated by the court, it remains extremely difficult to have an arbitrator's decision vacated; and
- Always, always, always exercise caution, conduct research and consider prior decisions of potential arbitrators prior to selecting an arbitrator.

The arbitrator's decision sets forth the various criteria an agency should consider when preparing for an arbitration concerning the decision to lay-off employees. The factors and documentation outlined in the summary should make your presentation much easier. For a copy, contact our office.

Finally, the Fraternal Order of Police/Ohio Labor Council has appealed the decision of the Perry County Court of Common Pleas. Thus, the saga concerning the layoffs at the Perry County Sheriff's Office is not yet complete. We will keep you posted in this newsletter on the progress of the case, including whether OHPELRA decides to participate as an *amicus curiae*.

Jonathan Downes was a founding member and past president of OHPELRA, and his firm, Downes, Hurst & Fishel, is a contributing sponsor of OHPELRA. For more information, please contact Mr. Downes at (614) 221-1216 or at jdownes@dhflaw.com.



OHPELRA'S Arbitration Reports

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. In this issue, we look at two cases:



Miamisburg Independent Employees Association v. City of Miamisburg

Arbitrator: Langdon D. Bell

Issue: Did the employer have the requisite just cause for the five-day suspension it imposed upon the grievant after the grievant became angry at work and allegedly threw shovels and rakes from his city-assigned truck?

Outcome of the Case: The five-day suspension was upheld.

Rating of the Arbitrator (with 5 as the highest):

- (a) Conduct of the Hearing: 5
- (b) Grasp of the Issues: 5
- (c) Soundness of the Overall Decision: 5
- (d) Avoidance of Bias: 5
- (e) Willingness to decide case rather than split decision: 5
- (f) Willingness to use this arbitrator again: 5

Comments: The city's representatives were very impressed. The case presented difficult issue of credibility, witness intimidation, and veiled aggressive to threatening behavior.

For more information, please contact W. Joseph Scholler or Donald L. Crain of the Middletown office of Frost Brown Todd at (513) 422-2001.

Fraternal Order of Police, Ohio Labor Council, Inc. v. Butler County Sheriff

Arbitrator: Susan Grody Ruben, Esq.

Issue: Male Corrections Sergeant demoted to Corrections Officer and suspended for 20 days for brushing his pelvic area against the buttocks of a female corrections officer twice within a few minutes while attempting to get by her as she leaned over a desk writing. The quarters were somewhat tight, but not so much that the sergeant could not have passed without making contact. He claimed that the contact was either accidental or that the employee "moved into him" (the account varied); there was no other evidence of sexual harassment.

Outcome of the Case: The Arbitrator upheld the demotion and suspension, and noted that the employee was lucky to have a job at all.

Rating of the Arbitrator (with 5 as the highest):

- (a) Conduct of the Hearing: 5—very courteous to the parties and patient with the grievant and witnesses alike, while still running a tight hearing.
- (b) Grasp of the Issues: 5. We had argued another pattern of overly harsh treatment of subordinates, but Arbitrator Ruben correctly narrowed the issue to sexual harassment, where the discipline would clearly stand or fall.
- (c) Soundness of the Overall Decision: 5—at least from management's perspective. It was a home run. My only concern is that the opinion was a month late (though we did agree to her request for an extension).
- (d) Avoidance of Bias: 5
- (e) Willingness to decide case rather than split decision: 5. The Arbitrator decided the case cleanly, and while expressing regret for the damage to the grievant's career, laid the responsibility directly at his feet. She tossed no bone to the Union, and even made clear that she would have upheld a discharge in this case.
- (f) Willingness to use this arbitrator again: 5—a professional, no-nonsense arbitrator.

For more information, please contact **Douglas E. Duckett**, Butler County Personnel Director & Labor Counsel, at (513) 887-3257.

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

Are You And Your Key Supervisors Registered For OHPELRA'S Fall Seminar On Public Sector Investigations?



AS STEPHANIE NOTED, TIME IS RUNNING OUT for you to register for OHPELRA'S 2002 Fall Seminar on **Public-Sector Investigations: The Five W's and More**. The program is offered on **Tuesday, October 29** in Columbus at the Fawcett Center on the Ohio State campus; registration starts at 8:30 a.m. and the program begins promptly at 9:30. Our seminar features popular speakers **Marc Fishel and Lori Torriero** from the law firm of **Downes, Hurst & Fishel** in Columbus, a long-time OHPELRA sponsor. Marc and Lori will lead you through the steps of conducting an internal investigation and proceeding with disciplinary action that will stick. Most of us find more and more that we must play the investigator, often with little or no training on how to do so.

This program is designed to be useful far beyond the ranks of OHPELRA's members or even specialists in human resources or labor relations. Managers everywhere face the need to investigate allegations of employee misconduct, whether in a police or fire department, a public utility, a finance office, or a parks department. Did he sexually harass the new clerical employee? Did she steal money when the cash drawer came up short three times this week? Did

the employee fraudulently work a second job while on sick leave? **We know that public budgets are particularly tight this year, but OHPELRA has set the price for this program (\$125 for members, \$150 for nonmembers) at a rate of less than half of what is charged for comparable programs offered in this state and elsewhere. Register today together with key managers and supervisors from your jurisdiction—this is practical training that you and your managers can use right away!**

Registration forms have been mailed out to all members; you can also register on-line on our web site, www.ohpelra.org. Fax your registration form to OHPELRA Treasurer Doug Duckett at (513) 785-5199, or register at the web site today. • *See you in Columbus on October 29!*

PAGE 6

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