

OHPELRA Update

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

Letter From The President

SOME THINGS REALLY ARE WORTH WAITING FOR and the OHPELRA Fall Seminar, *Conducting Effective Internal Investigations* proved to be one. The law firm of Curiale, Dellaverson, Hirschfeld & Kraemer from San Francisco, California showed us step by step how to conduct an investigation-legally. The workshop was excellent from beginning to end. All that attended came away from the training with information that can be used now and in the future.

With the very hot summer and a year of successful training behind us we are now moving forward to our annual conference, *Learning Together*, February 5-7, 2006 at Cherry Valley Lodge. The Board has prepared an excellent training conference so please mark your calendar now. We will open on Sunday afternoon with *Overcoming Adversity in the Workplace* presented by Paul Hutchins from the New York City Transit Authority. Paul traveled to Ohio for the 2002 Annual Conference and shared with us his 9/11 experiences and we are pleased to bring him back for a follow up. This is a very powerful presentation that you do not want to miss. The opening reception, Super Bowl party, will follow the presentation so you can watch the game we all wait for each year with your colleagues.

Don't forget the NPELRA Annual Conference scheduled for March 26-30, 2006 in Newport Beach, California. I hope you consider this training opportunity when you prepare your annual training budget. NPELRA offers the same level of training that you experience with OHPELRA's workshops and conferences. In fact, some of the most valued speakers that you trust for your training needs in Ohio are often a part of the NPELRA annual program. The membership dues (\$185) that you pay annually is for dual membership with OHPELRA and NPELRA. One of the many benefits that both organizations offer to members is a discounted member rate to attend the annual conferences. I encourage you to take advantage of this benefit for sharing and networking with your colleagues. Information on both conferences will be available at www.npelra.org and www.ohpelra.org and by mail. Mark the dates on your calendar now and watch for information as it becomes available.

I look forward to seeing you in February at Cherry Valley Lodge in Newark, Ohio and in March at the Hyatt Newporter in Newport Beach, California.

Sincerely,



L. Joy Campbell
President



STATEHOUSE UPDATE

Much of the first six months of legislative activity this year focused on the passage of the state's biennial budget (House Bill 66), which runs from July 1, 2005 – June 30, 2007. Following that, lawmakers broke for summer recess, and limited session is scheduled for the rest of this calendar year.

The Ohio General Assembly operates on a two-year legislative cycle, which began January 1, 2005 and goes through December 31, 2006. Any legislation not enacted by the end of 2006 dies, and it must be re-introduced the following session for consideration. Following is an update on a few issues of interest to human resource professionals.

Civil Service Reform

The civil service reform legislation – House Bill 187, has received five hearings in the House Local and Municipal Government & Urban Revitalization Committee. In addition to sponsor testimony, there were three proponent hearings and one opponent hearing. Opponent testimony is expected to resume later this year.

A few provisions of the bill include the ability to temporarily reduce work-week hours and furlough employees; the elimination of the provisional category for civil service employees and allowing more pre-employment testing options; and the streamlining of the statutory layoff process to allow what some individuals call a "paper layoff." Additional provisions of HB 187 can be reviewed on the web at

http://www.legislature.state.oh.us/bills.cfm?ID=126_HB_187 .

HB 187 is sponsored by Representative Steve Buehrer (R-Delta), who also co-chaired the Civil Service Review Commission.

OPERS Legislation

Representative Michelle Schneider (R-Cincinnati) has introduced legislation in cooperation with the Ohio Public Employees Retirement System (OPERS) to make various pension system updates. House Bill 272 received sponsor testimony prior to summer recess, and hearings are expected to resume when the legislature returns from break. A few provisions in the bill include:

- For calendar year 2007, increases to \$450 (from \$250) the amount a PERS member must earn in a month to receive full credit for that month. In each year thereafter, raises the amount based on increases in the cost of living. It is important to note that if an individual earns less than the amount for a full month credit, the individual still receives credit; however, it is simply pro-rated.
- Provides that an OPERS "retiree" who becomes employed and can receive health care coverage through their employer is to receive primary health, medical, hospital, or surgical insurance coverage from that employer. Benefits provided under OPERS are to pay only those medical expenses, or the portion of medical expenses, not payable from coverage available through the employer.
- Currently, this is the situation when an OPERS retiree becomes

Continues on page 3

Employment Testing for Civil Servants, Law Enforcement, Fire and Others

IN THE LAST SEVERAL MONTHS there have been two interesting decisions from United States Courts of Appeals. The first case from the Seventh Circuit, addressed the issue of whether the MMPI (Minnesota Multiphasic Personality Inventory) violated the Americans with Disabilities Act. Although this case is not from the Sixth Circuit Court of Appeals, its reasoning appears pretty straight forward and we would expect that this ruling would be followed in other Appellate Districts. We reported this case in our e-newsletter earlier this month. The second item from the Sixth Circuit involved a case from the City of Memphis and is a reaffirmation of standards established for testing under the *Griggs v. Duke Power* decided by the Supreme Court in 1971. The Sixth Circuit reaffirms the standard established regarding the validation of examinations arbitrary cut-off scores, and is also instructive of standards under the ADA. This decision underscores our advice that the “essential functions” of each position or classification are the critical criteria for determining validity of examinations or selection process for positions.

The discussion regarding the Sixth Circuit decision follows this introduction. If you need the previous article call or email us, and we will send the newsletter.

We hope that you will find these discussions helpful. If you utilize outside employment testing services, I would strongly suggest that you inquire their compliance with these decisions. Please contact us if you have any questions or comments. Citations to the cases are included for your use.

Submitted by: Jonathan J. Downes of Downes, Hurst & Fishel

Isabel v. Memphis (Testing and Title VII)

THE UNITED STATES SIXTH CIRCUIT COURT OF APPEALS recently decided a case that impacts the use of testing by public employers. The use of tests to determine hiring or promotion may provoke claims of disparate impact under the Civil Rights Act of 1964 (Title VII) by minority candidates. The Sixth Circuit's decision reveals two important guidelines for compliance. First, any statistical test may be used to determine if the test has a disparate impact. That means there is not one standard for employers to determine compliance with Title VII. Second, any test an employer uses for candidate screening must have direct correlation to the position advertised for hiring or promotion. Employers should make this correlation a point of emphasis in their testing process. Compliance with this guideline will eliminate many of the concerns associated with the disparate results of the test among candidates.

In *Isabel, et al. v. City of Memphis*, 404 F.3d 404, (6th Cir. 2005), the Sixth Circuit endorsed the use of various statistical methods to establish adverse impact in employment situations. In *Isabel*, several minority police officers brought suit against the City of Memphis for the manner in which the City used a written test to determine promotions in the Police Department. *Id.* The written test was one of the required standards for promotion in the Memphis Police Department. The other three components were a practical exercise test, performance evaluations for the previous two years, and seniority points. *Id.* The court found that the written examination violated Title VII, and the officers adversely affected should be promoted, and awarded backpay as well as attorney's fees.

The Supreme Court has established a three-part burden shifting test to determine whether an unlawful disparate impact exists in any particular case under Title VII. *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975). First, the plaintiff must establish a prima facie case of discrimination in that an adverse impact has occurred. If the plaintiff succeeds, the employer must show that the protocol in question has “a manifest relationship to the employ-

ment” – the so-called business justification.” *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). If the employer succeeds, the plaintiff must then show that other tests or selection protocols would serve the employer's interest without creating the undesirable discriminatory effect. *Albermarle*, 422 U.S. at 425.

The Sixth Circuit has refined step one of the test by providing standards for the plaintiff to meet his/her burden. The Sixth Circuit has held that “[a] prima facie case is established when: (1) plaintiff identifies a specific employment practice to be challenged; and (2) through relevant statistical analysis proves that the challenged practice has an adverse impact on a protected group. *Johnson v. U.S. Dept. of Health and Human Services*, 30 F.3d 45, 48 (6th Cir. 1994); citing *Scales v. J.C. Bradford & Co.*, 925 F.2d 901, 907 (6th Cir. 1991). The Sixth Circuit also interpreted a Supreme Court decision that establishes a case-by case approach, recognizing that statistics “come in infinite variety and...their usefulness depends upon all of the surrounding facts and circumstances.” *Teamsters v. United States*, 431 U.S. 324, 339 (1977).

The court's decision affects the use of the EEOC's four-fifths rule codified in 29 C.F.R. § 1607.4(D) that provides:

A selection rate of any race, sex, or ethnic group which is less than four-fifths (or eighty percent) of the rate of the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact.

The passing rate of African-Americans in this case was less than four-fifths of the passing rate of nonminorities. To avoid adverse impact, the City lowered the cut-off score for the written exam from 70% to 66%. *Isabel*, at 409. The results of this change satisfied the four-fifths rule. *Id.*

The Sixth Circuit, though, approved the use of other statistical data, including the T-test and the Z-test, to show an adverse impact. *Id.* The mean score for minority candidates on the written test was 69.17, while nonminorities averaged 75.59 under the T-test, and the Z-test showed that white candidates passed at a 90% rate, and minority candidates at a rate of 74.6%. *Id.* The plaintiff's expert was able to show that the 6.42 and 15.4% differences were statistically significant. *Id.* The Sixth Circuit held that the EEOC regulations make explicit “that compliance with the four-fifths rule establishes only that the four-fifths statistical analysis will not serve as evidence of adverse impact.” *Id.* The court stated that when the “Supreme Court stated that a plaintiff may rely solely on statistical evidence to establish a prima facie case of disparate impact, it did not say what kind of statistical evidence should be relied on.” *Id.* at 413.

The court then switched the burden to the employer to prove that there was a legitimate business reason for the written examination. The Sixth Circuit held that the district court did not abuse its discretion in concluding that the “written test did not approximate a candidate's potential job performance.” *Id.* At trial, the City's expert, who designed the written examination, was unable to show the correlation between exam results and officer performance. He also testified that the written test was designed to assess “job knowledge, and [that he] sought to measure the other major elements of the job in the remaining components of the promotion process.” *Id.* Furthermore, upon lowering the cutoff score, some candidates who were previously excluded, were rated higher than candidates who passed the initial cutoff score. *Id.* Thus, the rankings for promotion based on the written test could “not be trusted to be related to actual job performance.” *Id.* Thus, the court held that the district court correctly ruled that the written test and the use of the cutoff score violated Title VII. *Id.* at 414.

The Sixth Circuit's holding is a warning to employers that their policies may be subject to various statistical challenges to determine if they adversely impact minorities. Employers must realize that the four-fifths rule may only establish a case for adverse impact. It cannot establish that adverse impact does not exist. More importantly, there must be a legitimate business reason for using a written examination for promotional requirements. Employers must be prepared to justify that the written examination determines how an employee will perform in the new position. Tailoring examinations to meet these criteria will assist employers in establishing precise standards that do not violate Title VII.

The Benefits and Limitations of No-Fault Absenteeism Policies

By Donald L. Crain, Esq. & Jennifer R. Fuller, Esq.

NO-FAULT ABSENTEEISM POLICIES CAN BE EFFECTIVE TOOLS for minimizing sick leave abuse by implementing scheduled progressive discipline beyond a certain number of absences. But chronic sick leave abusers may cleverly evade the termination step of the progressive discipline schedule through devious planning. Surprisingly, no-fault absenteeism policies may hinder more than they help in long-term sick leave abuse situations. Based on the arbitral tendency to provide employees—but not employers—with the benefit of the doubt, employers usually may not deviate from scheduled progressive discipline to terminate employees who consistently abuse sick leave over several years. Employers should therefore understand the benefits and limitations of no-fault absenteeism policies, so they may exercise some managerial discretion in extreme sick leave abuse cases.

Arbitrators have widely-differing opinions about no-fault absenteeism policies in general. Some arbitrators find that these policies violate principles of just cause by allowing employees to be disciplined or discharged based on excusable absences. The majority of arbitrators seem to find, however, that these policies are consistent with principles of just cause if they (1) allow a specific number of absences before imposing discipline; (2) impose progressive discipline; (3) exempt certain types of absences from the policy (i.e., FMLA, worker's compensation, jury leave); and (4) allow employees to cleanse their records periodically. See, e.g., *Interlake Conveyers Inc.*, 113 LA 1120, 1123 (Lalka, 2000).

It is well-settled that excessive absenteeism may constitute grounds for termination even when the absences are for acceptable reasons. See, e.g., *Missouri*, 110 LA at 167 (citing cases); *Worcester Quality Foods*, 90 LA 1305, 1309 (Rocha Jr., 1988); *Plastomer Corp.*, 81 LA 700 (Roumell, 1984); *Westinghouse Elec. Corp.*, 39 LA 187 (McCoy, 1963). If just cause exists, then employers may discipline and/or discharge employees for chronic absenteeism even without a formal absenteeism policy. In fact, employers may be better off without formal absenteeism policies, so they have more discretion to discipline employees on a case-by-case basis. See, e.g., *County of Yolo*, 97 LA 759 (Riker, 1991) (allowing employer to deny overtime to employee with 41 absences in 15 months).

On the other hand, "where an employer chooses to institute an attendance policy, the employer must scrupulously adhere to the terms of that policy in administering discipline, and progressing through the steps of the policy." See, e.g., *Armstrong*, 109 LA at 69 (requiring adherence to policy for employee with 12-15 absences per year for several years). Arbitrators therefore require employers to abide by the progressive discipline set forth in their policies, even when a particular employee has a history of abusing sick leave over a long period of time. See, e.g., *Worcester*, 90 LA at 1309.

To comport with fairness and due process, absenteeism policies must provide a rolling expiration period that allows "stale" absences to be removed from employees' records after a certain period of good attendance. Employees therefore start with a "clean slate" every time their good attendance re-sets the period. Cooper, 94 LA at 834; *Chanute Mfg. Co.*, 101 LA 765, 770-71 (Berger, 1993); *Troy Dept. of Public Works*, 77 LA 153, 160 (Lewis, 1981). Employers may not skip disciplinary steps based on chronic and repeated absenteeism in previous rolling periods. Otherwise, employers would, in effect, punish an "improving problem" more harshly. *Missouri*, 110 LA 168; *Worcester*, 90 LA at 1309-10.

Arbitrators recognize the frustration associated with employees who

Statehouse Update from page 1

employed by a "public" employer. This provision would extend that treatment to OPERS retirees who are employed in the "private" sector.

- Changes the remittance schedule for employer contributions and penalties. This provision will require monthly, as opposed to quarterly, remittance of employer contributions to OPERS, just like employers already are required to do with employee contributions.

OPERS notified employers sometime ago of a change in the employer's remittance schedule, and as a result, most public employers already have been complying voluntarily.

- Other provisions in the bill can be reviewed on the web at http://www.legislature.state.oh.us/bills.cfm?ID=126_HB_272.

Workers Compensation Reform

Earlier this year the Bureau of Workers Compensation rolled legislative reforms designed to update and streamline the workers' comp statutes, some of which haven't been amended in decades. The bill, as proposed by the Administration and as negotiated by the legislature and stakeholders, incorporates the interests of business, labor, and other stakeholders. The package was introduced by Senator Gary Cates as Senate Bill 7 and by Representative Steve Buehrer as House Bill 72.

Many, many interested parties meetings were held by lawmakers and changes were made to Senate Bill 7. The legislation passed the Senate on June 1 by a vote of 21-11. The legislation moved to the Ohio House of Representatives for consideration. In June, the House held hearings on SB 7, which dovetailed earlier hearings on HB 72.

Nonetheless, work on SB 7 did not finish prior to summer recess. While there was early talk of getting the bill done before lawmakers went home for the summer, that didn't happen. To review provisions of SB 7, go to the web at http://www.legislature.state.oh.us/bills.cfm?ID=126_SB_7.

Meanwhile, lawmakers included some BWC management and ethics reforms in the state budget bill, House Bill 66, which was enacted in June. These provisions were in response to concerning developments at the Bureau. In that regard, it is expected that the General Assembly, through a joint legislative committee, will conduct hearings on the various investment/management matters surrounding the Bureau once authorities have finished their investigation.

In addition, Governor Taft appointed an external management review team to make recommendations on management matters and to conduct a thorough review of the BWC's investment portfolio. Their report was submitted late-August for consideration.

chronically abuse sick leave within each rolling period yet always avoid the discharge step. This sympathy, however, has little effect on arbitral insistence that "[a]n employee, although obligated to be as regular in attendance and punctuality as possible, is entitled to know with reasonable specificity what the consequences of missing work will be." *Missouri*, 110 LA at 168. Employers are therefore required to follow the progressive discipline set forth in their absenteeism policies even when, for example, an employee has a "deplorable attendance record," is absent 40% of the time for three years, or misses over 15 days for several years. See *Worcester*, 90 LA at 1309; *Missouri*, 110 LA at 169; *Armstrong World Indus.*, 109 LA at 69.

If an absenteeism policy contains an "unusual circumstances" provision or other discretionary provision, employers may sometimes deviate from their discipline schedules in chronic absenteeism situations. See, e.g., *Interlake*, 113 LA at 1122; *Reynolds Metals*, 99 LA 239, 245 (Kahn, 1992). Before deviating from their discipline schedules, employers must provide proper notice to employees that the "unusual circumstances" provision applies. *Id.* Employers must also notify

Continues on page 4

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!

Matthew L. Boaz Assistant to the Director Miami University Office of Equity and Equal Opportunity	Glenn Goodrich Fire Chief City of Fairlawn	Tracy Roda Employee Relations Specialist Cuyahoga Metropolitan Housing Authority
Bernie Becker Fire Chief Clearcreek Township	Richard Gortz President Gortz & Associates, Inc.	Kevyn R. Shaw Employee Relations Assistant Cuyahoga Metropolitan Housing Authority
John Brands Major Montgomery County Sheriff's Office	Russ Hose Fire Captain City of Fairlawn	Susan A. Spencer Personnel Officer Warren County Board of Commissioners
Vickie Bryant Personnel Manager City of Sidney	Annette Lolli Court Administrator Butler County Domestic Relations Court	Crystal Weghorst Administrative Assistant to the Mayor City of Portsmouth
Teresa Clegg Human Resources Coordinator Miami County	Anna Loney Human Resources Supervisor Trumbull County Department of Job & Family Services	Ronald Wilhelm Assistant Administrator/Safety Director Clearcreek Township
Kenneth Couch Assistant Deputy Director State of Ohio, Office of Collective Bargaining	Linda D. Lovelace Court Administrator Butler County Area Courts	Ted Williams Administrator Washington County Home
Stephanie Echols Human Resources Director Montgomery County Children Services	Christopher Murphy Service Director City of Portsmouth	Vickie Wortman Manager, Employee and Labor Relations Ohio University
Cheryl Farver Director of Personnel & Administrative Services City of North Olmstead	Connie Nicholson Human Resources Specialist City of Sandusky	Michele York Human Resources Manager City of Centerville
William Flaherty Director of Human Resources Franklin County Board of Commissioners	Jeffrey Piper Chief of Police Clearcreek Township	
	Sue Reasoner Business Manager Marion County Children Services	
	Michele Roberts Chief Deputy Auditor Montgomery County Auditor	

No-Fault Absenteeism Policies from page 3

employees that further absences may warrant more severe discipline than provided in the policy. *Id.* When employers have not provided for discretionary deviations, they have been bound by their policies. This is especially true where an absenteeism policy is part of a collective bargaining agreement. See, e.g., *Interlake*, 113 LA at 1123; *Oxboro Clinic*, 108 LA 11, 14 (Jacobowski, 1997); *Troy*, 77 LA at 160; *Worcester*, 90 LA at 1311. Employers may attempt to unilaterally implement different absenteeism rules, but such rules will likely be invalidated if they are contrary to express contract language. *Armstrong Cty.*, 116 LA at 195.

It is also possible that arbitrators may recognize deviations from scheduled discipline if the absenteeism policy's rolling expiration period is shorter than the contract's prior discipline expiration period. See, e.g., *Armstrong Cty.*, 116 LA at 195; *County of Yolo*, 97 LA at 762. For example, if the policy holds that an attendance record is "cleansed" every 12 months but the contract allows the employer to keep discipline records for 24 months, then perhaps arbitrators would allow employers to consider absenteeism over a 24-month period. This argument is not likely to be successful because it would render the absenteeism rolling period meaningless. In addition, arbitrators seem to favor 12-month rolling periods. *Chanute*, 101 LA at 770.

Arbitrators are not completely unsympathetic to employers' concerns regarding chronic sick leave abusers, despite their insistence on scheduled progressive discipline. Indeed, arbitrators often address the seriousness of the grievant's absenteeism through a minimal arbitration award. It is quite common in absentee-discharge cases, for example, that arbitrators will award grievants reinstatement without backpay. See, e.g., *Missouri*, 110 LA at 169; *Armstrong*, 109 LA at 70; *Worcester*, 90 LA at 1312. Arbitrators additionally require that grievants return to the appropriate stage of progressive discipline in the absenteeism policy. *Id.*

If employers wish to deviate from the progressive discipline in their no-fault absenteeism policies, they should follow a few steps to ensure a credible argument at future arbitrations. First, the employer should base the absentee's discharge on the policy or contract provision that allows prior discipline to be considered for the longest period of time. Second, before the final absence leading to discharge, the employer should give the employee written notice that it intends to depart from the policy's discipline schedule in the future. Third, the employer should conduct an impartial investigation into the employee's final absence before making the discharge determination. If a majority of the absences, including the last absence, may reasonably be viewed as "excuseable," then the employer should seriously reconsider its position. Arbitrators normally do not allow "mechanical application" of absenteeism policies, especially in discharge cases when the "discharge absence" was excuseable.

City of Monroe, Ohio v. Fraternal Order of Police Ohio Labor Council Inc.

(Submitted by Thomas Allen and Jennifer Fuller of FROST BROWN TODD LLC)

Fact-finder: Daniel G. Zeiser, Esq.

Issue at Arbitration:

Whether Grievant, a police officer, was terminated for just cause based on the following facts: (1) Grievant engaged in emotionally-charged family feuds, despite orders to stay out of them; (2) Grievant acted unprofessionally by using vulgar gestures and language toward police officers from other jurisdictions; (3) Grievant fled the scene of an accident after she crashed her

boyfriend's truck into a telephone pole; (4) Grievant left her vehicle blocking a major State Route in complete darkness and contacted no one; and (5) the Grievant gave inconsistent and outlandish explanations for her actions surrounding the accident.

The City's Argument:

The Grievant was discharged for just cause because (1) she was insubordinate in failing to obey orders, (2) she acted unprofessionally toward other law enforcement officers, and (3) she breached her legal and ethical duties as a police officer by engaging in dishonest, illegal, and unprofessional conduct, as explained above. Because police officers are held to higher standards for off-duty conduct, and the Grievant's behavior resulted in embarrassment for the City, the Grievant was discharged for just cause.

The Union's Argument:

The Grievant did not engage in insubordination because she did not directly interfere in a family feud. The Grievant acted unprofessionally toward other law

Continues to page 5

Ohio Supreme Court Holds That State-Employee Home Addresses Are Not Public Records

IN A SIGNIFICANT SEPTEMBER 7, 2005 DECISION, the Ohio Supreme Court announced that the home addresses of state employees are not public records pursuant to O.R.C. § 149.011(G). *State ex rel. Dispatch Printing Company v. Johnson*, 106 Ohio St.3d 160 (2005). The court held that because state-employee home addresses do not document the “organization, functions, policies, decisions, procedures, operations, or other activities of the state or its agencies,” the addresses were not subject to disclosure under the Ohio Public Records Act.

In *Dispatch Printing*, the Ohio Department of Administrative Services had provided *The Columbus Dispatch* with copies of a computerized file of state-employee payroll records. These records included state employee home addresses, which were not redacted. However, in April of 2003, *The Dispatch* requested a list of payroll records for all state employees, including names, addresses, job and agency titles, and pay fields. *The Dispatch* later requested copies of electronic files used to distribute year-end W-2 forms to state employees. *The Dispatch* stated it had no objection to the redaction of other information besides names, addresses, job and agency titles, and pay fields, but DAS refused the Dispatch’s request for payroll and W-2 records. Later, other state agencies also refused to provide the information requested. The state argued that the state-employee home addresses were not records under the Ohio Public Records Act, and that alternatively, some of the information should be exempted from disclosure based upon the peace officer, firefighter, or emergency medical technicians “residential and familial information” exception to the Act. *The Dispatch* sought a writ of mandamus against DAS and its director. The Dispatch later amended its complaint for mandamus and added various state agencies.

The Ohio Supreme Court, in finding that *The Dispatch* was not entitled to its writ of mandamus, held that *The Dispatch* was unable to show that the home addresses were documents, devices, or items created or received by a state agency which served to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office. The Court noted that the home addresses “generally document the places to which state employees return after they have performed the work of the state agency.” The Court held that “simply because an item is received and kept by a public office does not transform it into a record under O.R.C. § 149.011(G).” The Court also overruled *State ex rel. Public Emp. Retirees, Inc v. Public Emp. Retirement Sys.* (1979), 60 Ohio St.2d 93, which held that the Public Employees Retirement System of Ohio was required to provide access to a list of names and home addresses of member retirees. The Court overruled the *Public Employees* case (and its progeny) to the extent that it held that home addresses of state employees were public records. It also made no difference to the Dispatch Court whether the information had been released to *The Dispatch* in the past, or whether the information was released to state-employee unions and nongovernmental vendors. According to the Ohio Supreme Court, the home addresses were not public records and could not be transformed into such merely by previous release.

This decision presents several issues of which public employers must be aware. First, this decision does not appear to be limited to state employees only. O.R.C. § 149.011(G) defines “records” as “any document, device, or item, regarding of physical form or characteristic, including an electronic record ... , created or received by or coming under the jurisdiction of any public office of the state or its political subdivisions, which serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office.” Therefore, all public agencies are necessarily affected by the decision, and may not disclose home addresses of their employ-

ees without running afoul of this decision. A second question arises as to those jurisdictions whose employees are currently represented by unions, or where a union seeks to represent an agency’s employees, or where a rival union seeks to obtain the home addresses of the public employees in an attempt to gain recognition. It seems clear that a union may not invoke the Public Records Act to receive this information, though the home addresses may be obtained by the union through alternative means. Third, this decision may extend to other documents that do not fall within O.R.C. § 149.011(G).

Finally, the Ohio Supreme Court made a clear attempt to limit its decision to the narrow issue of public-employee home addresses. However, the implication of this decision is that other information related to an employee’s personal information may or may not be considered a public record, including the names and addresses of an employee’s spouse or dependents, job and/or work-related experience that an employee held prior to public employment, or other personal information. If the information does not shed light on government activities, it is arguably not a public record and a public employer would have no duty under O.R.C. § 149.43 to disclose this information. Public administrators and governmental officials should contact legal counsel prior to making a determination regarding whether public employee personal information is a public record.

For questions or additional information regarding this decision, please contact Jonathan J. Downes of Downes, Hurst & Fishel at (614) 221-1216.

City of Monroe v. FOP from page 4

enforcement officers only because she was provoked. The Grievant did not breach her legal and ethical duties, because she had 24 hours to report an accident. Finally, the City engaged in disparate treatment by terminating Grievant and thus treating her differently than another police officer who was not terminated after being accused of sexual harassment.

Outcome of the Case:

Arbitrator Zeiser ruled in favor of the City, finding just cause for the police officer’s discharge. He found that Grievant was not insubordinate because the Grievant did not directly involve herself in an ongoing feud. He also found that the other police officers antagonized the Grievant and encouraged her to act inappropriately. Arbitrator Zeiser did agree, however, that Grievant had a higher ethical and legal duty to comply with the law than ordinary citizens. Arbitrator Zeiser therefore held that the City had just cause for termination based on the facts that: (1) Grievant fled the scene of an accident; (2) Grievant actively hid from authorities; and (3) Grievant gave less than credible explanations for her actions. Finally, Arbitrator Zeiser found that Grievant’s conduct was significantly different than the conduct of a police officer accused of sexual harassment. Thus, no disparate treatment was found.

Rating of the Fact-finder (with 5 as the best score):

(a) Conduct of the hearing: 5 — Arbitrator Zeiser was fair and reasonable with both parties. He remained patient despite the 8-9 hour arbitration. He minimized irrelevant testimony, and he considered hearsay testimony for its relative worth. He maintained a calm demeanor when testimony became frustrated, and he kept the hearing moving along.

(b) Grasp of the issues: 4 — Arbitrator Zeiser seemed to understand all of the legal issues and demonstrated a sincere desire to hear both sides of the story. He often redirected the testimony when he felt it became irrelevant. He seemed to discount much of the history leading up to the main events, however, which was important to a thorough understanding of Grievant’s insubordination and unprofessionalism.

(c) Soundness of the decision: 4 — Arbitrator Zeiser delivered a well-reasoned and well-supported decision that was fair to both parties. Again, he discounted

Continues on page 6

City of Monroe v. FOP from page 5

much of the specific history between the parties, which led to a finding that Grievant was not insubordinate.

(d) Avoidance of bias: 5 — Arbitrator Zeiser treated both parties the same with regard to testimony and exhibits that would be considered.

(e) Willingness to decide the case rather than split decision: 5 — Despite finding in favor of the Union on a couple of factual points, Arbitrator Zeiser properly considered the “big picture” when he ruled in favor of the City on the ultimate issue of just cause.

(f) Willingness to use this arbitrator again: 5 — Arbitrator Zeiser was professional and patient at the hearing, and his decision was fair and reasonable.

For more information, please contact Thomas Allen or Don Crain, at Frost Brown Todd LLC, at (513) 422-2001.

OHPELRA Website Changes

Be sure to check out the OHPELRA web site at 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.

OHPELRA Thanks Its 2005 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 & Hostetler, LLP
Columbus, Cincinnati, and Cleveland

Bernardini Consulting Services
Columbus

CareWorks
Dublin

Clemans, Nelson & Associates
Dublin

CompManagement, Inc.
Dublin

Coolidge, Wall, Womsley & Lombard
Dayton and Xenia

Downes, Hurst & Fishel
Columbus

Dublin Management Group
Dublin

Express Scripts
Reynoldsburg

Frost Brown Todd, LLC
Cincinnati, Middletown, and Columbus

McGohan Brabender, Inc.
Dayton

Pepple & Waggoner, Ltd.
Cleveland

Personnel Profiles, Inc.
Covington, KY

PARS— Public Agency Retirement
Dublin

The Segal Company
Chicago, IL

PAGE 6

The logo features the word "OHPELRA" in a bold, sans-serif font, with the "O" containing a stylized outline of the state of Ohio. To the right of "OHPELRA" is the word "Update" in a larger, bold, sans-serif font. The entire logo is set against a dark, textured background.

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