

# OHPELRA Update

THE OHIO PUBLIC EMPLOYER LABOR RELATIONS ASSOCIATION NEWSLETTER, FALL 2006

## Letter From The President



AS I WRITE THIS LETTER AND REFLECT ON OUR GOALS for 2006, I can't help but think what a great year it has been for OHPELRA and it's not over yet! Your board of directors has been very busy this year starting with a tremendous annual training conference in February that set an all-time attendance record of 190 participants! This was followed by a retreat in May where the budget for 2006-2007 was developed and approved by the board. In June we hosted NPELRA Academies I & III followed by "The Arbitration Seminar." Most recently, in August, the board conducted our annual planning retreat to finalize our plans for the fall "Absenteeism and Discipline" seminar to be held on October 6 in Columbus at The Midwest Hotel and Conference Center. The group then drew up the blue print for our 2007 annual training conference scheduled for February 4-6, 2007 at Cherry Valley Lodge, in Newark, featuring Ohio State football great Archie Griffin as our keynote speaker. Mission accomplished!

Let me again thank the members of OHPELRA for electing me as your President. In the last issue of this newsletter I reported that I am now the Vice President of Human Resources at Firelands Regional Medical Center in Sandusky, Ohio. The hospital is a not-for-profit organization rather than a public entity, so I had to phase out my duties as President. Unfortunately, the six months my new employer and the OHPELRA board of directors allowed to carry out my presidential duties has come to an end. It is with great pride and some sadness that I turn the office of president over to Marsha Jordan-Smart of Greene County. I have offered Marsha any assistance I can give and she will do an excellent job. I know she can count on all of our members for their support!

I would be remiss in my duties if I didn't offer personal thanks to immediate past president and treasurer Joy Campbell for her inspired leadership and friendship — we were a great team for a

long time and I'll miss that very much. To former vice president and now president Marsha Jordan-Smart thanks for always being there for OHPELRA (and me) and for your gift of taking complex labor issues and making them understandable for the rest of us! To my good friend Kevin Williams for his work as bulletin editor and for stepping up to fill Marsha's position of vice president, your positive attitude and willingness to help is contagious!

To Kathy Weisgarber who served as board secretary with a charm and good-nature that helped every meeting go smoother, I thank you. To Mr. OHPELRA, Doug Duckett, who had every reason in the world to not accept the duties of secretary, but did so without batting an eyelash and proved once again that he'll do anything for this great organization, you motivate us all. To conference coordinator, Brooke Carnevale, who is so truly skilled at what she does that she makes it look easy, but we all know better, you always make us look so good.

To Jan Campbell who represents us so masterfully on the NPELRA board and yet manages to participate in every aspect of OHPELRA, I tip my hat. To my good friends and OHPELRA up-and-comers, Todd Hunter, Maurice Evans and David Miller, thanks for your willingness to join a long and distinguished line of OHPELRA board members. To Jon Downes and Marc Fishel who asked me to join OHPELRA back in the late 1980s and all the great times we've had since then, again, thanks for asking me to join. And, last but not least, to all of you for your support and encouragement over the years, here's the good news, I'm happy to report that I have rejoined the ranks of OHPELRA by becoming an individual member! The private sector may have claimed me, but my heart still lies with OHPELRA.

Jim Sennish, *President*



## Register Now For OHPELRA'S Fall Seminar

ON OCTOBER 6, OHPELRA WILL BE OFFERING its Fall Seminar, entitled "ABSENTEEISM AND DISCIPLINE: MOVING FROM PROBLEMS TO SOLUTIONS." **The program will be held at The Midwest Hotel and Conference Center** in Columbus. This program has often sold out quickly, so be sure to register early.

The Fall Seminar will feature two outstanding speakers: Kenneth S. Weinstock, Esq., a Connecticut attorney, who has

presented the Legal Update at the last two NPELRA Conferences to rave reviews and a frequent speaker at NPELRA Labor Relations Academies, and OHPELRA and NPELRA past president Douglas E. Duckett, Esq., who has presented his program "Dealing with Problem Employees" all over Ohio and to three other state PELRA conferences.

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# Academies I & III And “The Arbitration Seminar” Huge Success

WOW!!! THE DESCRIPTION OF THE TWO NPELRA Labor Relations Academies (Academy I and III) and the OHPELRA sponsored, “The Arbitration Seminar,” held June 21, 22, and 23 respectively, can be summed up in that one three-letter word with three exclamation marks, “Wow!!!”



**Academy presenters and attendees enjoy themselves at the reception that followed Academy I that was co-sponsored by OHPELRA and Downes, Hurst & Fishel.**

Academies I & III, held in Columbus, had the second largest turn-out of all NPELRA labor relations academies ever. Those who attended were treated to two of the best presented practical training programs on collective bargaining that they may ever attend. Then, on the third day, OHPELRA, brought attendees of “The Arbitration Seminar,” a sampling of the actual arbitrators that decide the disputes in collective bargaining to describe the information for which they are seeking and how they would like it presented.

From the onset, Academy I presented the academics of collective bargaining in layman’s terms while mixing in the knowledge and experiences of veteran labor relations professionals. Attendees were provided with the skeleton to which the basis of labor negotiations and relations is maintained. We were then given strategy insights from the veterans on the differing bargaining processes and the “stuff” it takes to be a successful negotiator. Academy I certainly provided the training for a solid basis for the labor relations professional.

Academy III continued the practical approach of Academy I, but then inserted the dynamic negotiations simulation that cannot be described, but must be experienced. It is an event that most who attended were apprehensive to begin, but once it was done, the consensus was that it was one of the most enjoyable, enlightening, and informative events in which they participated.

On Friday, June 23, OHPELRA took over from where NPELRA left off, with “The Arbitration Seminar.” It was everything it was billed to be. Arbitrators that make the decisions that impact our work provided insights into what they are looking for when we come to the table. The arbitrators shared with us the perspectives that draw each of them to make a decision on differing matters

“Ohpelra’s Fall Seminar” from page 1

The seminar topics will include:

- Navigating the Bermuda Triangle: FMLA, ADA, and Workers’ Compensation.
- Disciplining for Absenteeism: Can You Ever Win These Cases in Arbitration?
- Dealing with Problem Employees — including both dysfunctional employees who are toxic in the workplace, and those who simply can’t do the job.

With this program, our presenters tackle some of the most difficult problems faced by any public employer — absenteeism and discipline — and they’ll do more than describe those problems. They’ll offer solutions to help you improve your workplace.

As usual, the OHPELRA Fall Seminar is designed not only for our members and other full time human resources or labor relations managers, but also general supervisors and managers who face issues of absenteeism and discipline. And that is everyone!

The program is priced very reasonably to allow you to send as many managers as you can — \$145 for OHPELRA members, and \$245 for non-members. Remember that all OHPELRA memberships are individual and not by jurisdiction, but membership in both OHPELRA and NPELRA only costs \$185 per year. Come to this program and our annual conference February 4-6, 2007, and you will more than pay for the dues in the members’ discount.

Registration materials have been sent to members or for quicker and easier registration go on-line to [www.ohpelra.org](http://www.ohpelra.org).

## We Need Those 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? If so, please make a nomination for the **AWARD OF EXCELLENCE AND/OR PACESETTER AWARD.**

An OHPELRA member will be honored for each award at the Annual Training Conference in February 2007. The OHPELRA award recipients will also be nominated for awards at the national level at the NPELRA Conference in Scottsdale, Arizona in April 2007.

Award applications will be released later this year, but start thinking now of worthy individuals or groups to nominate.

and how they like that information provided. The forum also provided those attending to ask questions of the arbitrators and discuss issues that we encounter in arbitration and mediation. It gave the attendees a sense of where the arbitrator is coming from and the arbitrator a sense of where the employer stands on issues and why in both accounts.

Many thanks to the academies’ presenters and coordinators, and a special thank you to Jonathan Downes for coordinating the topics and the arbitrators for “The Arbitration Seminar.”

The three days of training was “Wow!!!” It provided the academia, veteran experience, and the practical exercise without risk, necessary to be competent “sitting at the table.” Remember, NPELRA Labor Relations Academy II follows on February 7, 2007 in conjunction with the OHPELRA Annual Training Conference (February 4 – 6, 2007). Mark your calendars.

*Oh, Those Courts – They Are Busy:*

## Public Employers May Impose an Involuntary Disability Separation Upon An Employee Receiving Temporary Total Disability

IN 2003, THE OHIO SUPREME COURT issued its decision in Coolidge v. Riverdale Local School District, (2003) 100 Ohio St. 3d 141 limiting an employer's options to address an employee who was receiving temporary total disability (TTD) payments pursuant to workers' compensation law due to a workplace injury. In Coolidge, the Court reversed the employer's decision to terminate an employee on TTD after she had exhausted all available leave. The Court held that such an action violated the retaliation provisions set for in R.C. § 4123.90 and the public policy in Ohio.

Recently, the 10th District Court of Appeals in Franklin County held that a public employer did not violate the retaliation provision nor the public policy exception as recognized in Coolidge when imposing an IDS upon an employee receiving temporary total disability. Cordial v. Ohio Dept. of Rehabilitation & Correction, 2006 Ohio 2533, 2006 Ohio App. LEXIS 2391 (May 23, 2006). This decision helps clarify the interplay between the law and public policy pertaining to the ability of public employers to impose an IDS pursuant to Ohio Administrative Code (123:1-33-02(C)) while balancing an employee's right to not have their employment terminated for filing a Workers' Compensation claim.

Ms. Cordial was employed as a Corrections Officer by the Ohio Department of Corrections & Rehabilitation when she sustained a work-related injury. She filed for, and received, TTD as a result of her injuries. Ms. Cordial was incapable of performing the essential job duties of a corrections officer and, subsequently, was issued an IDS pursuant to O.A.C. Ann. 123:1-33-02(C) after a pre-separation hearing. At the time of the IDS order as well as all other relevant times she was receiving TTD. She filed an appeal with the State Personnel Board of Review and claimed that the IDS order violated R.C. § 4123.90 and public policy as recognized by Coolidge. The SPBR rejected this argument but the trial court agreed with Cordial.

In reversing the trial court the Court found that there was no conflict between R.C. § 4123.90 and O.A.C. Ann. 123:1-33-02 as an "IDS is not inherently disciplinary or punitive." Accordingly, the Court found that the IDS did not violate R.C. § 4123.90. However, public employers should heed the Court's warning that "we do not find that an IDS could never violate R.C. § 4123.90." If the employer's motive in issuing an IDS is in retaliation for the employee filing a Workers' Compensation claim the employer may be found to have violated R.C. § 4123.90. Thus, prudent employers must be cognizant of all the facts and circumstances as well as complying with appropriate procedural requirements when issuing an IDS order.

Also, the Court found that the IDS did not violate the Ohio Supreme Court's holding in Coolidge recognizing that terminating an employee for violation of an employer's attendance policy while on TTD violates public policy by forcing an employee to

choose between their right to TTD or retaining their employment. The Court noted that an IDS is "significantly different" from the firing in Coolidge as an IDS does not force such a choice upon an employee. An IDS employee has the right to reinstatement under Ohio law providing they can perform the essential job duties of their position with or without reasonable accommodation within three years of separation. Therefore, an IDS does not violate the public policy recognized by Coolidge as the right to reinstatement strikes a an appropriate balance between the public employer's right to impose an IDS and the employee's right not to be retaliated against for receiving TTD.

Based on this decision, it is clear that public employers have some flexibility in dealing with employees who are on TTD for an extended period. Employers are cautioned to review each case based on its facts and to consider other laws that may apply such as the Family Medical Leave Act.

*Article submitted by Marc A. Fishel, Esq. of Downes, Hurst & Fishel, LLP*

## Supreme Court Limits Ability of Public Employees To Cash In Unused Sick Leave

IN A 5-2 DECISION HANDED DOWN ON MAY 10, the Ohio Supreme Court has ruled that public employees cannot convert unused sick leave into cash if they leave their jobs before the date on which they are eligible to retire.

The justices also said that public employees, if they retire before their eligibility date, cannot hold onto the unused sick leave until the date on which they are eligible to retire and then cash it in.

The case involved Joyce Davenport, a court reporter in Montgomery County. She retired in 2002 at the age of 48. She was not eligible to retire under PERS rules until age 55. She applied to convert 964 hours of accumulated sick leave into a pro-rata cash payment. The county denied her application because she was not transitioning directly from active public employment to retirement. Davenport then filed suit against the county.

Justice Evelyn Stratton, writing for the majority, said that while state law permits public employees to convert sick leave into cash "upon retirement," it is neither an entitlement nor a retirement benefit. Absent a clear mandate from the General Assembly, the court will interpret the current statute to mean that sick leave conversion is available to an employee if the employee's separation from service coincides with (or follows), the date on which he or she is eligible to retire.

Concurring with Stratton's opinion were Chief Justice Thomas Moyer, Justice Maureen O'Connor, Justice Terence O'Donnell and Justice Judith Lanzinger. Dissenting were Justices Alice Resnick and Paul Pfeifer.

Citation: Davenport v. Montgomery County, 109 Ohio State 3d 135. 2006-Ohio-2034. Number 2005-0074. Submitted October 12, 2005. Decided May 10, 2006.

*Article re-printed from CCAO County Information and Data Service, May 21, 2006.*

## Supreme Court's Decision in *Garcetti v. Ceballos* Is Win for Public Employers

FOR PUBLIC EMPLOYERS, it can be a difficult task to navigate the murky waters of employees' free speech rights while also striving to promote the public mission of the organization. On May 30, 2006, the United States Supreme Court offered some clarity regarding these often conflicting areas of constitutional law and employment law. ***In a significant victory for public employers, the Court held that when public employees make statements pursuant to their official job duties, they are not speaking as citizens for First Amendment purposes and, therefore, their communications are not insulated from employer discipline.***

The Court's decision stemmed from a lawsuit filed by Richard Ceballos, a deputy district attorney in Los Angeles. Ceballos, believing that an affidavit used to obtain a criminal search warrant of a defendant contained serious misrepresentations, wrote a memorandum to his supervisor advocating dismissal of the defendant's case and later testified for the defendant. After these events, Ceballos claimed he experienced retaliation on the job, including loss of job duties, transfer, and denial of a promotion, as a result of exercising his free speech rights. When his internal employment grievance was denied, he initiated his lawsuit.

The Supreme Court, in a 5-4 decision, concluded that speech made pursuant to an employee's official duties is *not protected* by the First Amendment and, therefore, Ceballos had no viable constitutional challenge. The Court specifically differentiated Ceballos' situation from cases where on-the-job speech is not made within the scope of an employee's duties. Ceballos was simply doing what he was employed to do — speaking as an attorney fulfilling his professional duties as a government prosecutor — not speaking as a citizen on matters of public concern.

In its decision, the Court showed great respect for the right of public employers to manage the workplace and retain control over employees' official communications: "Employers have heightened interests in controlling speech made by an employee in his or her professional capacity ... Supervisors must ensure that their employees' official communications are accurate, demonstrate sound judgment, and promote the employer's mission." The Court reasoned that any contrary holding would lead to an improper judicial intrusion into official governmental business and the employee-supervisor relationship.

The Court's decision is certainly a victory for public employers, but it still has limits. While the Court allows employers to discipline employees for speech made in the scope of their duties, it does not address how to determine which speech is "in the scope of an employee's duties." The Court rejected the idea that employers can restrict employee's speech rights simply by creating excessively broad job descriptions, but otherwise decided that determining whether speech is within the scope of an employee's duties is a "practical" inquiry that must be determined case by case. Though cases may arise over the "scope of employees' duties" definition, *Garcetti v. Ceballos* is a step in the right direction for public employers that is worth celebrating.

Article submitted by Ron Linville, Esq., of Baker & Hostetler, LLP

## 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!

PATRICK ARCARO,  
Executive Director,  
Ashtabula County  
Department of Job &  
Family Services

STEVE BENSON,  
Director of Public  
Services, City of Jackson

CHRIS BIERSACK,  
LABOR RELATIONS  
OFFICER,  
Hamilton County  
Department of Job &  
Family Services

STEVEN C. BRUNDT,  
Finance Director,  
City of Macedonia

MARK COZY,  
City Manager,  
City of Canal Fulton

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Human Resource  
Director, Ashtabula  
County Board of  
Commissioners

CHRIS GILBERT,  
Development Services  
Director, Springfield  
Township

HON. SHANE A.  
GOODMAN,  
Mayor, City of Jackson

CHARLES W. GOVEY,  
Human Resources  
Administrator, Jefferson  
County Department of  
Job & Family Services

SANDRA HARVEY,  
Human Resources  
Administrator, Clermont  
County Department of  
Job & Family Services

DAVID HELM,  
Labor Relations Manager,  
Hamilton County  
Department of Job &  
Family Services

BILL J. HODGES,  
Fire Chief, Perkins  
Township

SHARON A. JERMAN,  
ESQ.,  
Assistant Attorney,  
City of Dayton

MICHELLE JONES-  
JOHNSON,  
Johnson Group  
Consulting

PATTY KURSCAK,  
Personnel Administrator,  
City of Macedonia

AL LEDBETTER,  
Safety Service Director,  
City of Sharonville

URSULA MCDONNELL,  
ESQ.,  
Supervising Human  
Resources Analyst,  
City of Cincinnati

PAMELA MEIHLS,  
Director of Management  
Services, Allen County  
Children Services

TOM MOBLEY,  
Director of Human  
Resources Initiatives,  
Miami University

TASHA PETERS,  
Human Resources  
Technician, City of Xenia

GWYN SCOTT,  
Catering Manager, Dining  
Services, Ohio University

CHRISTINE SHEETS,  
Director, Residence  
Auxiliary Services, Ohio  
University

MICHAEL T. SHORT,  
ESQ.,  
Attorney, Littler &  
Mendelson, P.C.

LESLIE STREDNEY,  
Personnel Director,  
Trumbull County Sheriff's  
Office

DENNIS R. STUCKEY,  
Assistant City Manager,  
City of Fairfield

PAMELA THOMPSON,  
Human Resources  
Generalist, City of  
Columbus, Department  
of Recreation and Parks

DARYEL STERNBERG,  
Highway Superintendent,  
Perkins Township

LINDA WARRINGTON,  
Assistant Deputy  
Director, Office of  
Local Operations, Ohio  
Department of Job &  
Family Services

LISA WATSON,  
MAS 2, Ohio Department  
of Job & Family Services

PEGGY WHEELER,  
Assistant to the  
Administrator,  
Deerfield Township

DONOVAN WORKMAN,  
Chief of Staff,  
City of Jackson

## Help Us Serve You – Update Your Information Today

OHPELRA AND NPELRA ARE COMMITTED TO PROVIDING you the most up-to-date training and information as possible. In order to continue to provide these services, we ask that you visit the OHPELRA website at [www.ohpelra.org](http://www.ohpelra.org) and check your membership information. If your information is not up-to-date, please update it on-line at the website. And, please, if your e-mail address is not included, please enter it. From time-to-time we provide time-sensitive information to our members using the internet and we do not want to leave you out.

# OHPELRA Welcomes New Board Member

WITH THE CHANGES IN THE OHPELRA board triggered by Jim Sennish's move to the private sector, David Miller officially became a board member this past month.

David Miller, Coordinator, Erie County Environmental Services, has over sixteen years experience in public sector administration in Ohio and has served as Coordinator of Environmental Services for Erie County since 2001. Under the direction of the Sanitary Engineer, his duties have included many of the department's human resources functions and serving as a liaison between the department and the County's Human Resources department.

Prior to working for the County, David worked nearly a dozen years at the Ohio Veterans Home in various positions including Resident Affairs Officer, Business Manager and Acting Director. At the Veterans Home, David was involved in contract negotiations, discipline and grievance processes, and labor management meetings.

In addition to government employment, David has extensive community involvement, currently serving on the City of Sandusky's Planning Commission, Erie Regional Planning Commission, and the Sandusky Area YMCA Board of Directors. He is a past President of Greater Perkins Kiwanis, the Child Assault Prevention board, The Erie County Volunteer Center and the Sandusky Chapter of the International Management Association.

David received a B.A. in Liberal Arts from the University of Iowa in 1976, and a M.A. in Hospital and Healthcare Administration from the University of Iowa in 1985.



**David Miller**

# ATC Speaker Provides Follow-up to Presentation

DURING THE ABSENTEEISM SESSION of the OHPELRA Annual Training Conference (ATC), presented by Lori Torriero of Downes, Hurst & Fishel, several attendees had questions that Lori promised to provide follow-up. In order to reach all interested parties, Lori has presented the below comments for the OHPELRA Update.

Several attendees questioned the definition of "dependent child" as it relates to an adult child. The child must be "incapable of self-care" due to a mental or physical disability.

29 C.F.R. 8825.113: Incapable of self-care means that "the individual requires active assistance or supervision to provide daily self-care in three or more of the 'activities of daily living' (ADLs) or 'instrumental activities of daily living' (IADLs). Activities of daily living include adaptive activities such as caring appropriately for one's grooming and hygiene, bathing, dressing and eating. Instrumental activities of daily living include cooking, cleaning, shopping, taking public transportation, paying bills, maintaining a residence, using telephones and directories, using a post office, etc."

AND the definition of mental or physical disability is to be taken from the ADA and its accompanying regulations. 29 C.F.R. 8825.113(c)(2).

Several attendees also asked questions related to intermittent leave, i.e., the person working part-time or taking specific days off on a regular basis, after the birth of child. Intermittent leave in that situation can only be taken with the agreement of the employer. 29 C.F.R. 8825.203(b). The situation discussed at the ATC, in which the parent comes back to work, then has to be off again, would be considered a new request, but as long as the employee had not used 12 weeks in the 12 month period he/she would still be entitled to the leave.

Finally, an attendee stated that she had been advised that appointments with attorneys, court hearings and other meetings leading to the adoption of a child were considered FMLA covered absences, even when they occurred prior to the employee being awarded legal custody. Research did not reveal any support for that interpretation in the regulations, letter rulings or case law.

# NPELRA Business Office Heads West

EFFECTIVE AUGUST 21, NPELRA RELOCATED its business office from Washington, D.C. to Oceanside, California, which is a few miles north of San Diego. NPELRA will continue to represent the needs of its members in Washington, D.C., as the Seyfarth Shaw law firm has graciously agreed to provide office space for our legislative and lobbying activities.

The NPELRA board is excited about the changes and improvements occurring within NPELRA, and the fact that it now has a presence on both the East and West coasts to better serve its membership!

Over the next few months NPELRA will be taking great strides to ensure that the membership database is current and accurate, and may be contacting members to confirm and/or update information.

Please note NPELRA's new contact information:

**NPELRA**  
1012 South Coast Highway,  
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Oceanside, CA 92054  
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815 Connecticut Avenue,  
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## **OHPELRA Update**

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