

# OHPELRA Update

THE OHIO PUBLIC EMPLOYER LABOR RELATIONS ASSOCIATION NEWSLETTER, FALL 2011

## REGISTER NOW!

### *Finding Solid Ground in the New Ohio Public Sector Employment Environment*

#### **OHPELRA FALL PROGRAM – November 18, 2011**

WHETHER SENATE BILL 5, the Ohio public sector collective bargaining reform law, survives the referendum process or not, the public sector labor relations environment in Ohio is changing. Pension reform appears imminent too. To help make sense of these changes, OHPELRA has put together a group of experts that will cover such important questions as: After the election, what happens next? How do we manage negotiations, arbitrations and conciliations now? What is the future of public sector pensions and how does this impact employment in the public sector? How do we put the labor relations relationship back together after this major battle?

**Come join us November 18, 2011 at the Columbus Police Academy Training Facility located at 1000 N. Hague Ave., Columbus, Ohio 43204.** The program will run from 9am to 3pm. Registration materials are available online at [www.ohpelra.org](http://www.ohpelra.org). The cost is just \$175.00 for members and \$275 for non-members. Also, the program is approved for 4.75 hours of continuing legal education. Register by clicking here:

[www.ohpelra.org](http://www.ohpelra.org).

We look forward to seeing all of you!

## President's Letter

OCTOBER 2011



**Brooke Carnevale,**  
OHPELRA President

IF YOUR WORK LIFE HAS BEEN anything close to mine, chaos would be the best description. Summer has flown by and Fall has definitely settled in. While I would like to think that November may bring some stabilization to this current environment, I think we all still fear the "great unknown." It is with that backdrop that OHPELRA will host the **2011 Fall Seminar, "Finding Solid Ground in the New Ohio Public Sector Employment Environment"** on Friday,

November 18, 2011 at the Columbus Police Training Academy. Whatever the outcome of the election, we will be ready to deliver timely advice for this climate.

In August, the OHPELRA Board of Directors met to plan the programming for the 2012 Annual Training Conference (ATC). The ATC will once again be held at the Cherry Valley Lodge and Conference Center in Newark, Ohio on Sunday, February 5 through Tuesday, February 7, 2012. The program is titled, **"OHPELRA: Leading with Courage."** We have lined up some great topics thanks to all of the recommendations by our members. And, thanks to some incredible sponsors that support OHPELRA, we have some great speakers to feature. We believe you will find the program educational, relevant, timely and hopefully a bit entertaining. The ATC brochure and registration should be available by mid-December. As you are planning your 2012 training budget, please set aside \$299 for your ATC registration cost (\$399 for non-members). Let me know how you may want to help out at the ATC. We are always looking to get members involved in the association.

I must once again recognize your OHPELRA Board members. They have really been a great group of professionals and friends. They step up whenever asked, or even without asking. They balance their families, demanding jobs and still find time to devote volunteer hours on behalf of this association. When

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# OHPELRA Summer Program – A Tale Of Two Cities - June 2011

THE SUMMER PROGRAM SCHEDULE was busy. For the first time in quite some time, OHPELRA held two summer programs, one in Columbus and one in Cleveland. Both programs were well attended. And why not! Senate Bill 5 had recently been signed into law. A referendum drive was clearly under way. Our panels of experts helped dissect the new law and outlined collective bargaining strategies in this period of uncertainty.

Our special OHPELRA thanks to Ron Linville and Dan Guttman from the law firm of Baker & Hostetler for sharing their insight during the Columbus program. Ditto to our afternoon panelists: Jonathan Downes, Downes Fishel, Haas, and Kim LLC, moderated the session with four of our esteemed OHPELRA colleagues, Michael Duco, Barry Tiffany, Stephanie Echols, and Brent McKenzie. We appreciate everyone's contribution to an excellent program.



Pictured above from left to right are partners Dan Guttman and Ron Linville, Baker & Hostetler, LLP, at the June 2011 Columbus Program

Not to be outdone, our Cleveland program was successfully held at the Auburn Career Center in Concord Township. Marc Fishel, Downes Fishel, Haas and Kim LLC, and Doug Duckett, Duckett Consulting and Training Services, skillfully outlined the various provisions of the statute. Our afternoon panelists, moderated by Michael Esposito, Clemans, Nelson & Associates, were first time contributors, Marc Block, Walter & Haverfield LLP, James Budzik, Mansour, Gavin, Gerlock & Manos Co., LPA, and George Crisci, Zashin & Rich Co., LPA. Thank you for a timely and astute assessment of the collective bargaining environment in the Cleveland market.



## *"President's Letter" from page 1*

I took over as President of the great association, I did so optimistically thinking that the worst of my personal struggles were over and that I would have much time and energy to give to this association.

In my last President's letter I told you that my father was diagnosed with pancreatic cancer. He passed away on June 2, 2011. I cannot begin to express the depth of the hole this has left in my heart and soul. As an elected official and law enforcement officer for 48 years, my father's funeral and our grief was very public. As a family, we knew this was something we had to share because he loved what he did so much and he impacted so many people. He not only loved his family and friends, but he **absolutely loved** being the Sheriff of Franklin County. As many of you also know, Steve Jobs, CEO of Apple Computer and of Pixar Animation Studios also passed away from pancreatic cancer. Much publicity was given to his 2005 Commencement address at Stanford University. In closing I would like to offer you an excerpt from his speech.

***"You've got to find what you love. And that is as true for your work... Your work is going to fill a large part of your life, and the only way to be truly satisfied is to do what you believe is great work. And the only way to do great work is to love what you do..."***

***Brooke K. Carnevale***

OHPELRA President, [bkcarnevale@columbus.gov](mailto:bkcarnevale@columbus.gov)



Pictured from left to right at the June 17, 2011 Columbus Summer Program, are panelists: Jonathan J. Downes, Partner, Downes Fishel Haas Kim LLP; Michael Duco, Deputy Director, State of Ohio Office of Collective Bargaining; Barry Tiffany, Township Administrator, Sugarcreek Township; Stephanie Echols, Human Resource Director, Montgomery County; Brent McKenzie, Labor Relations Manager, City of Dayton.

## Board Seeking Nominations for OHPELRA Pacesetter Award & Award of Excellence



EACH YEAR prior to the Annual Training Conference (ATC), OHPELRA seeks nominations from its members in two award categories, the Pacesetter Award and the Award of Excellence.

The Award of Excellence is given to an individual who has made an outstanding contribution to management in the field of public sector labor relations.

The Award of Excellence represents the highest acknowledgement of the recipient's dedication and achievement in the development of positive labor-management relations.

It signifies professional efforts, which have demonstrated creative and innovative leadership over an extended period of time.

The Pacesetter Award is given to individuals, groups or organizations who have made contributions to or whose accomplishments or innovations in the last two years have been significant to the labor and/or employee relations field.

We would like to remind you of these prestigious awards and encourage you to recognize your colleague's ingenuity, contributions and accomplishments in these two categories throughout the year. Nominations are typically solicited toward the end of the calendar year prior to the ATC. However, we would like to be sure that our member's achievements are reflective of their outstanding efforts throughout the entire year; therefore, we encourage you to nominate those deserving of consideration now and throughout 2011. Award winners will be announced at the 2012 Annual Training Conference. Those selected will be eligible in the same award categories at the annual NPELRA conference. Many OHPELRA award recipients have gone on to be selected for NPELRA awards so please submit your nominations in order to recognize our outstanding OHPELRA members.



Fall view on the campus of Ohio State University. 09-07-09 © Yan-chun Tung

### OHPELRA President's List

Roy Bechtel	1984
Thomas Payne	1985
Jonathan Downes	1986
Kevin Sellards	1987
Bob Burnett	1988
William Logie	1988-1989
Marsha Jordan-Smart	1990-1991
Douglas E. Duckett	1992-1993
Richard Strader	1994-1995
Frank Hotze	1996-1997
Felicia Bernardini	1998-1999
Janet J. Campbell Lanza	2000-2001
Stephanie Echols	2002-2003
L. Joy Campbel	004-2005
James Sennish	2006
Marsha Jordan-Smart	2006-2008
Kevin Williams	2009-2010
Brooke Carnevale	2011

# Lee v. City of Columbus (2011) – A Practical Lesson in the Use of Doctor’s Notes

MANY ARE CURIOUS ABOUT THE BACKGROUND of the *Lisa Lee* case and how it was defended. Initially, the case had nothing to do with the requirement of giving a doctor’s note stating the nature of the illness to one’s supervisor. The case started with the denial of a request for FMLA leave. An employee requested FMLA leave but indicated that the only time leave would be needed was when she was assigned to work mandatory overtime. The request for FMLA was denied but the employee was advised that if she were sick she could mark off work pursuant to the Division’s sick leave policy. The employee marked off often enough that she was required to bring in a doctor’s note stating the nature of the illness pursuant to the Division’s policy. On several occasions she failed to bring in a compliant note. Ultimately, her refusal led to disciplinary charges. She resigned before the charges were heard. Her initial complaint was that the City had interfered with her FMLA rights by not approving her leave request.

When the complaint was filed, however, it included the employee’s individual allegations of FMLA interference, retaliation and other complaints, and the allegation that the Division’s policy of requiring employees in certain circumstances to bring in a doctor’s note stating the nature of the illness and providing it to one’s supervisor violated the Rehabilitation Act. Five other current and former employees joined in the lawsuit. The Court certified two classes, one class for injunctive relief consisting of current employees seeking an end to the policy and one class for damages consisting of current and former employees who claimed they were entitled to monetary relief for having been required to provide the doctor’s note.

Although the City lost at the District Court level, the Sixth Circuit Court of Appeals reversed, holding that the Division’s policy did not violate the Rehabilitation Act or the ADA (although this was not an ADA case) and was constitutional. We like to think the Court was persuaded by several things the Division had done correctly. The policy applied uniformly to all employees regardless of their disability status. The requirement to bring in a doctor’s note was triggered in only a few specified situations and was narrowly drawn so that being required to bring a doctor’s note was the exception, not the rule. The policy was worded in such a way that the Division was seeking only very general information as to the reason for that particular leave, not a medical diagnosis. The policy provided an “out” for employees. The general requirement was that employees call the Information Desk, staffed with sworn personnel, to mark off. They were required to give the reason for the mark off. However, if the reason was of a personal nature, as determined by the employee, they could tell the Information Desk “sick” and then call Human Resources to give the reason. The Division was able to establish that it has a long standing policy requiring supervisors to maintain medical information with confidentiality and threatening discipline if the policy is violated.

The Division also had an established policy of maintaining medical information separately from personnel files. Much of the City’s argument was devoted to explaining the reasons for the policy.

We also relied heavily on guidance from the EEOC noting that a supervisor is an employer for purposes of the ADA, that an employer is authorized to ask the reason for the use of sick leave so long as it has a policy that applies to all employees and that under the ADA requests for accommodations should be handled at the lowest level. We also were able to point the Court to the sick leave policies of federal agencies that were virtually identical to the Division’s, including the requirement to give the note to one’s supervisor, federal regulations that specifically required “administratively acceptable evidence or medical certification” for a sick leave absence, and EEOC and federal Merit Systems Protection Board cases that had construed the language of the ADA and determined that this type of policy did not violate the ADA. The Sixth Circuit considered all of the foregoing and found:

...the City’s Directive is a universal sick-leave policy applicable across the board to all Division employees, disabled or not, who use contractual sick leave for a personal illness of more than three days or a family illness of more than two days, as well as those employees who are on a sick-leave verification list. Consistent with the above authorities, it constitutes a valid and acceptable inquiry under § 12112(d)(4)(A).

The Sixth Circuit also rejected the District Court’s finding that because the Division had a human resources office, supervisors were barred from receiving the doctor’s note:

The district court stated: "Of course, not every employer will have human resources personnel. The City of Columbus does, however, which creates a distinction and a confidentiality barrier between these personnel, whose jobs consist of handling medical information, and supervisors."

The district court has created an artificial distinction where none exists. It is not within the province of the courts to rewrite legislation, superimpose language onto statutes, or "act as super personnel departments to second guess an

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“*Lee v. City of Columbus (2011)*” from page 4

employer's facially legitimate business decisions." *Adams v. Tenn. Dep't of Fin. and Admin.*, 179 F. App'x 266, 272 (6th Cir. 2006) (unpublished) (citation and internal quotation marks omitted). There is no language in either the Rehabilitation Act or the ADA that, with regard to the processing of medical inquiries, differentiates between employers based on the size or organizational structure of the work force or the existence of a separate human resources department. The ADA clearly permits an employer, including by express definition a supervisor (as an "agent" of the employer), to make inquiries and receive medical information in accordance with § 12112(d). See 42 U.S.C. §§ 12111(2) and (5)(A). Nothing in § 12112(d) prohibits the City from designating an employee's immediate supervisor as the initial contact for purposes of administering its sick leave benefits.

Plaintiffs have no basis to challenge the Directive based on unwarranted speculation that supervisors will disobey the statute's confidentiality strictures or the City's Directive. Supervisors are obligated to follow the City's rules and policies, which include an express prohibition against discrimination on the basis of disability and disclosure of confidential medical information. Division policy prohibits supervisors from sharing or disseminating doctors' notes or any confidential information contained therein.

As the City points out, the legitimacy of sick-leave policies that require employees returning from leave to provide

medical information to supervisors is demonstrated by the sick-leave policy for employees of the EEOC, which essentially mirrors the Directive. The EEOC's own policy provides that "[t]he approval of sick leave is a responsibility of the supervisor," who "shall determine that . . . medical documentation submitted by the employee . . . supports charging the absence to sick leave." The EEOC also recognizes that in the context of disability requests, which would likely entail medical information of a more serious nature than a doctor's note furnished for occasional sick leave, that it is appropriate for first-line supervisors to review and approve ADA accommodation requests in the first instance: "To eliminate unnecessary levels of review, agencies should authorize first-line supervisors to approve requests for reasonable accommodation wherever possible."

Even with the successful outcome of this case, caution is still the order of the day. Policies should be narrowly drawn. Although the Sixth Circuit did not require the City to articulate a business necessity for the policy, an employer should be able to do so. It is essential that employers have a clear, written policy prohibiting discrimination and prohibiting supervisors from disseminating medical information. Equally important is a clear, written policy on what the supervisor does with the information once received, where the information will be housed and how it gets there (e.g. place it in a sealed envelope marked confidential and send directly to Human Resources).

**Article written by Pamela J. Gordon, Chief, Labor and Employment Section, Office of the Columbus City Attorney.**



## Upcoming BWC RX Program Changes

THERE ARE SEVERAL UPCOMING CHANGES for BWC's RX program for Injured Workers. Administrative rules have recently been passed that pave the way for this change.

Rule 4123-6-21.2 creates a Pharmacy and Therapeutics Committee (P&T). The committee is made up of the BWC Pharmacy Program Director and 6 physician (MD or DO) and 6 pharmacy providers. The responsibilities of the committee include:

- Development, approval and annual review of formulary of approved medications
- Development, approval and annual review of a list of non-covered, non-reimbursable medications
- Review and approval of proposed medication treatment guidelines

Effective 9/1/2011, BWC will put a formulary in place. The formulary limits the medications that will be covered by BWC under a workers compensation claim. The P&T Committee will review medications to determine which new medications should be included in the formulary and which should be excluded.

Also effective 9/1/2011, there will be no reimbursement for a brand name medication when there is a generic equivalent. If the injured worker wants to get the brand name medication, he/she will be responsible for the difference in cost between the generic and the brand name medication. The only way that an injured worker can get a brand name medication is if the physician has documented a **clinical** allergy to the generic medication. This documentation must include physical findings concurrent with an unanticipated allergic reaction as opposed to a known side effect or

adverse reaction to the drug.

Effective 10/1/2011, the BWC will no longer pay for medications prescribed by physicians that have lost their BWC certification.

The BWC will no longer allow the MCO's to pay for any compounded medications. This includes both ordinary compounded products such as an ointment, as well as sterile injections such as pain pumps. Sterile compounds must be prepared by a facility that meets the compounding guidelines contained in the United States Pharmacopoeia. Prescriptions for these medications must be processed through SXC Healthcare.

Injured Workers affected by these changes (it applies to all claims, regardless of date of injury) will receive a letter from BWC advising them of the next steps they need to take.

Finally, because this change was made via rule, and not BWC policy, it overrides all previous Industrial Commission orders (for example, if an IC order specifically allowed the IW to receive Vicodin, this does not mean they have to get the brand name and not the generic equivalent). Additionally, if the IC were to rule that an injured worker must receive the brand name medication, they would be going against an administrative rule.

***If you have any questions regarding this article, please call Ron Lucki at 614-760-3510. The Board thanks Ron and Careworks for its continued support and contribution to the newsletter. Careworks is a 2011 Contributing Sponsor of OHPELRA.***



**OHPELRA**

**OHPELRA's mission is to educate, inform, provide professional interaction for its members, and advocate for excellence in public-sector labor and employee relations.**

## Please Welcome All New OHPELRA 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!

**Ronda Burke**, Human Resources Analyst  
– City of Columbus (Department of Development)

**Bradley Euans**, HR/Safety/Workers' Comp Coordinator – Delaware County Human Resources

**Gina Fasone**, Recruiter – Delaware County Human Resources

**Jennie Kaltenback**, Business Administrator – Preble County Job and Family Services

**Brian Kempton**, Area Vice President – Gallagher Benefit Services (Sponsor)

**Colleen Lockhart**, HR Administrator – Geauga County Board of Commissioners

**Larry Mullins**, Human Resources Director – Springfield Township

**Julie Murawski**, Administrative Services Manager – City of Brunswick

**Katerina Papas**, Department Executive Director/Chief Legal Counsel – Summit County Children Services

**Nancy Stir**, Human Resources – Canal Winchester Finance Department



## OHPELRA Board of Directors, February 2011

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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 current – great!!! We can continue to provide you timely 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.**

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Please continue to consider our sponsors when seeking professional services, and remember to thank them for supporting OHPELRA!

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