

OHPELRA Update

THE OHIO PUBLIC EMPLOYER LABOR RELATIONS ASSOCIATION NEWSLETTER, WINTER 2011

REGISTER NOW for the 27th Annual Training Conference!

Managing Chaos: True Stories, Sound Solutions

OUR 27TH ANNUAL TRAINING CONFERENCE, *Managing Chaos: True Stories, Sound Solutions* will take place at the Cherry Valley Lodge and Conference Center, Sunday, February 6 - Tuesday, February 8, 2011. The program line-up for the ATC will provide experienced and practical information that you can use. The ATC will provide education on a variety of aspects of human resources and labor relations from bargaining, to legal issues and specific law compliance, to diversity and leadership. It is a "can't miss" conference, it is specific to public sector, and it is the best way to network with your peers. So mark your calendars and register today at www.ohpelra.org. The conference agenda may also be viewed at www.ohpelra.org.

News From Membership Services

DESPITE A CHALLENGING ECONOMY in which training and membership dollars continue to be limited for most jurisdictions, OHPELRA's membership numbers continued to grow in 2010.

We think this is quite a testimony to the value public sector employees place on being an OHPELRA member.

In 2009, OHPELRA had 352 members. We had a net gain of 19 members this year, including 4 new sponsorship members, to bring OHPELRA's membership total for 2010 to 371. Our members live and work in over 115 different communities across Ohio and cover all aspects of public sector service thus bringing a vast and diverse range of experiences together in one organization.

For more information, please contact Todd Hunter, OHPELRA Board Member at hunter.155@osu.edu.



OHPELRA President's Letter

HAPPY NEW YEAR!!! Hope you've survived the holidays and the really cold weather of December (that came way too early). At the New Year, being people of traditions, it seems everyone contemplates with great anticipation the potentials ahead. We also tend to look back at our accomplishments from the past year during this period. As I reflect back at the last two years that you have allowed me the privilege of serving as OHPELRA's president, I am humbled and thankful for the gift of that opportunity that you have given to me.

During the past two years, we've collectively seen our world turned upside down by the deepest recession experienced in our lives, but yet, OHPELRA has continued to thrive and be the place of refuge for many of us. During the lowest point, OHPELRA brought you programs that allowed dialogue about the impacts of the recession and gave us ideas and strategies to aid us in survival. Our training workshops, seminars, and conferences over the past two years, especially in 2010, have been some of the most well-attended we've ever had and in a couple cases possibly record-breaking. It is our desire to bring you the information and training that you require for best performance. The OHPELRA Board of Directors was, is, and, I predict, will always be committed to that goal.

Speaking of the Board of Directors, as I move on to become the Immediate Past President in February, I cannot appropriately state how dedicated each of these people are to you. Each person on the board has taken on responsibilities and in turn shifted the work to many from a few and make being a member of the board a gift and not a burden. There are no words that I can say or write that fully or fairly express my gratitude and fondness for this wonderful group.

Please join us February 6-8, 2010, for your Annual Training Conference, *Managing Chaos: True Stories, Sound Solutions*. You will not get better training anywhere, and you will not find better people to spend time with any other place.

Thank you,

Kevin G. Williams

President, OHPELRA, kgwilliams@columbus.gov



Kevin G. Williams,
OHPELRA President

Circumventing Change... Unions Seeking to Circumvent Any Effort to Alter Conciliation Under 4117

NOT SURPRISINGLY THE RESULTS of the November 2010 elections were a great disappointment to public sector organized labor much of which had heavily backed Governor Strickland's reelection. Shortly after the election, Governor-elect Kasich made known his legislative priorities, including potential revisions of Ohio's Public Sector Collective Bargaining Law. Comments by the new Governor concerning the impact of binding arbitration upon local government and its burden on the taxpayers has likely set the stage for a legislative battle in the coming months that may very well reshape R.C. 4117.

In the interim, however, public sector safety forces unions have already begun to act in an effort to blunt any forthcoming changes. This preemptory action is taking shape with police, fire, and other conciliatory units coming to the bargaining table with proposals for the adoption of mutually-agreed dispute procedures (MADs) essentially seeking one common theme — **the preservation of the current process of conciliation or its equivalent.**

As a relatively new development, it is crucial that employers get out in front of this tactic and reject any proposals that may thwart forthcoming legislative action to deal with a process that has become more like legalized extortion as opposed to anything that could be described as conciliatory. These types of proposals, at their very essence, are permissive in nature and cannot be allowed to be submitted to conciliation without vehement objection, less an employer lose the ability to effectively seek review of an improper conciliation award. See *City of Fostoria v. Ohio Patrolmen's Benevolent Association et al.* (2005), 106 Ohio St.3d 194.

One of the first battles over this issue was recently fought

Continues on next page.

NPELRA President's Message:

WARM WINTER GREETINGS!

I have been fortunate as NPELRA President to travel to some of the States for their annual training conferences. I went to Saratoga Springs NY in July; Galena IL in October; and Columbia MO in November. Our conferences are all different, but we all have one thing in common: our profession and the challenges it brings. It's amazing what issues may have been solved in "our neck of the woods", but may still be outstanding elsewhere. The opportunity to help others by sharing experiences and telling stories (good and bad) is a link we have across the nation.

This professional link is also evident at the local level. OHPELRA's discussion board is a great tool for our members to share those experiences on an ongoing basis. The more members who use the discussion board, the more value it provides. The OHPELRA discussion board can be found at <http://www.ohpelra.org/members.asp?page=DB>. Particularly timely, OHPELRA President Kevin Williams has requested that we share our collective bargaining act stories on the discussion board given the change of leadership in Ohio. Please take this opportunity and share the good, the bad, and the ugly!

And finally, make a difference: get involved at the local and national levels, and find rewards, both personally and professionally.

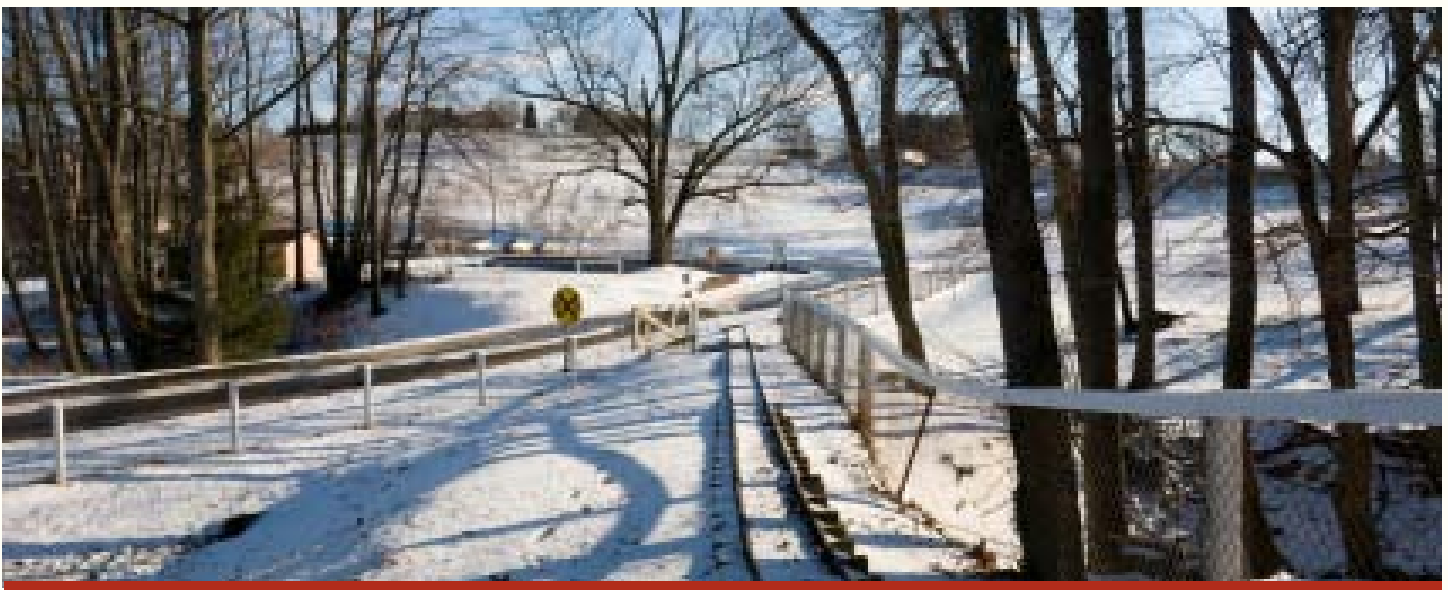
Janet (Campbell) Lanza

NPELRA President 2010-2011

jjcampbell@columbus.gov



**NPELRA President
and OHPELRA
Past President
Jan J. (Campbell)
Lanza**



Railroad Tracks in Ohio During Winter, © Jesse Kunerth

“Circumventing Change...” from page 2

in the matter of conciliation between the *City of Girard v. Ohio Patrolmen's Benevolent Association*, SERB Case No. 09-MED-10-1213 (Meredith). In that case, negotiations proceeded unremarkably, going to fact-finding and then proceeding to conciliation which occurred December 9, 2010. In between the two proceedings, however, the results of the election occurred and governor-elect Kasich's comments concerning binding arbitration were widely publicized.

The parties attempted to mediate their dispute in an effort to avoid conciliation, but those efforts proved unsuccessful. Thus, the parties proceeded to conciliation on five outstanding issues: (1) Wages, (2) Shift Differential, (3) Holidays, (4) Personal Days, and (5) Duration. As provided by law, both parties submitted pre-hearing statements outlining their respective positions and final offer language in anticipation of the conciliation hearing.

In the OPBA prehearing final offer for language on Issue 5, Duration, it included both an issue and language that had never been presented at any time during the bargaining process, had never been offered at any point in the interim period between fact-finding and conciliation, and had, in fact, never been discussed at all with the employer. The proposed language was offered in the context of the duration article as a new sentence stating: "Negotiations for a successor agreement shall be conducted according to RC 4117.14 as said statute reads on 12/31/10."

The employer objected to the union's proffered final offer language on the basis of: (1) the procedure to be used in negotiations is permissive as it in no way relates to wages, hours, or other terms and conditions of employment, thus is an improper submission to impasse;¹ (2) though framed as an issue in the duration clause, in reality the union was attempting to engage in arbitration by ambush since it had never identified the issue of a MADD

prior to the submission of the five-day letter or sought to bargain over the matter;² (3) the union's offering of language was inherently defective because should 4117.14 be altered so as to remove SERB's ability to perform certain acts under R.C. 4117.14 (such as appoint conciliators or issue subpoenas) the language would be impossible to administer.

The conciliator rejected the union's attempt to force an alternative to the statutory dispute resolution procedure through conciliation as a permissive topic of bargaining.

When a successor to the new Agreement is negotiated in late 2012, impasse will be governed by the collective bargaining law then in effect. Any deviation from this would be a MADD, and thus the union's final offer must be construed as proposing a MADD. **This is a permissive subject of bargaining, and it would not be appropriate to order a deviation from statutory impasse procedures absent actual mutual agreement of the parties.**

Moreover, implementation of the Union's proposal would require actions by SERB, such as appointing a conciliator pursuant to the current statute. If the bargaining law is amended as feared by the Union, SERB quite likely would lack authority to take these steps.

Naturally, the desirable outcome when confronted with union demands for such language would be to succeed during the process of fact-finding and conciliation, should such prove necessary. To that extent, this case and its cited authority should enhance our ability to do so. However, with these types of proposals cropping up with greater frequency, it is also equally as important that employers raise these objections and get them on the record so as to preserve appeal rights should such be necessary.

Michael D. Esposito, Shareholder, Account Manager
Clemans, Nelson & Associates, Inc.
www.clemansnelson.com

¹ See *Hancock County MRDD Board and Blanchard Valley Teachers and Instructional Staff Assistants Association*, OFT/AFT, 95-MED-04-0432, Donald Sugarman, Fact-Finder.

² The conciliator's award misstates the exact nature of this objection as being merely an objection to the introduction of a new issue between fact-finding and conciliation as opposed to the introduction of a new issue for the first time in a five-day submission at conciliation without notice or the opportunity to bargain.



Farm Landscape in Winter in Ohio, © BRPH

High Court Confirms Standard for Political Subdivision Liability under Monell

by Jennifer R. Fuller, Esq., Thompson Hine LLP

ON NOVEMBER 30, 2010, the U.S. Supreme Court decided the case of *Los Angeles County v. Humphries*, confirming that a political subdivision cannot be liable for constitutional violations committed by others—regardless of the type of relief sought—unless the violations are attributable to a specific “policy, custom, or practice” of the political subdivision itself. This ruling resolves conflicting interpretations of the Supreme Court’s 1977 decision in *Monell v. Department of Social Services*, which originally established the “policy, custom, or practice” causation standard but did not address whether it applied to all forms of relief that might be sought in a particular case (e.g., monetary, declaratory, injunctive).

In *Humphries*, the Appellants were charged with child abuse. The charges were dismissed, but the Humphries had already been posted on California’s public database of offenders. According to California law, the State was responsible for maintaining the database, while political subdivisions were responsible for providing accurate information about offenders. There was no statutory or regulatory guidance as to how and when offender information was to be provided or updated. The Humphries sued the State of California and Los Angeles County, claiming that the database violated constitutional due process because accused individuals did not have a fair opportunity to challenge the allegations before being identified.

The district court dismissed the case, but the Ninth Circuit Court of Appeals reversed and found the database unconstitutional. The Ninth Circuit awarded declaratory relief and attorneys’ fees against the County, despite the fact that there had been no

finding as to whether the violation was caused by a policy or practice of the County. The Ninth Circuit distinguished the case as involving an ongoing violation resulting in a declaratory judgment (as opposed to past conduct resulting in damages) and ruled that *Monell* does “not apply to claims for prospective relief.”

The County appealed to the Supreme Court, challenging the Ninth Circuit’s finding of liability without first conducting a *Monell* causation analysis by determining whether the County had a specific “policy, custom, or practice” that governed its release of information to the State. In turn, the Humphries argued that the County had adopted a de facto policy by virtue of the fact that inaccurate information had been—and was continuing to be—provided and that no procedures had been adopted to ensure the information’s accuracy. Thus, the Humphries argued, no further showing of causation was necessary for the County to be liable.

The Supreme Court reversed the Ninth Circuit and confirmed that a *Monell* causation analysis must be conducted in every case, “[f]or whether an action or omission is a municipality’s ‘own’ has to do with the nature of the action or omission, not with the nature of the relief that is later sought in court.” The Supreme Court remanded the case for a causation determination, echoing *Monell*’s holding that a political subdivision is not liable “solely because it employs a tortfeasor” but rather “when execution of a government’s **policy or custom** ... inflicts the injury.” This decision will better insulate political subdivisions from liability for acts and omissions committed by others, including employees and independent contractors, regardless of the type of relief requested by the complaining party.



Don’t forget to visit the www.NPELRA.org website for all the national news!



The Rest of the Story: Sixth Circuit Reverses Bad Case Law in Martin Allen v. Butler County Commissioners

by Douglas E. Duckett

SOME OF YOU WILL REMEMBER back to the fall of 2007 when Marc Fishel of the Columbus firm of Downes Fishel Hass Kim and I spoke to the OHPELRA Fall Seminar. The topic was “Living with the FMLA,” and Marc and I told the story of a truly disastrous ruling out of the US District Court for the Southern District of Ohio, and how Marc and his associate Brad Bennett pulled an amazing jury victory out of a seemingly unavoidable loss at trial. Yet the problematic ruling remained, and was on appeal before the US Court of Appeals for the Sixth Circuit in Cincinnati. The Court of Appeals finally weighed in on the issue, and it is long overdue to share the rest of the story – and a ruling that affects all employers in our state, public and private alike, who offer paid sick leave as well as the federally-required leave under the Family and Medical Leave Act (FMLA).

To refresh you on the facts of the case, Martin Allen was an employee with the Butler County Water and Sewer Department with a long record of disciplinary problems. That record led to a last-chance agreement providing discharge for any future disciplinary offense of any kind. Mr. Allen subsequently flexed his work hours on the Friday before Memorial Day weekend without his supervisor's permission, and then failed to call off sick one day during a subsequent paid sick leave of several weeks, despite his collective bargaining agreement's requirement to call in daily unless he had provided a doctor's statement with a return to work date. The county discharged him, citing both violations. While Mr. Allen was on paid sick leave at the time, the department's human resources manager had also tentatively designed the leave as covered by the FMLA. Mr. Allen grieved his discharge, but the Union declined to arbitrate the case.

Eventually, Mr. Allen brought suit in US District Court, and the case was assigned to Chief District Judge Sandra Beckwith. Ruling on cross motions for summary judgment, Judge Beckwith ruled that, even though Mr. Allen was on a paid sick leave above and beyond anything that the FMLA requires, the employer could not enforce any rules for the use of paid sick leave running concurrent with FMLA leave if those requirements go above what the FMLA would otherwise allow. Since daily call-in requirements could arguably not (at that time) be required for an unpaid FMLA leave, the court ruled that Butler County had unlawfully interfered with Mr. Allen's exercise of his rights under the FMLA. The judge set the case for trial days later, with on the sole remaining issue of damages. At that time, I was Butler County's personnel director and in-house labor counsel, and hearing this news was the mother of all “uh oh!” moments. It seemed that the only question left was “how much money will we have to pay?”

Now, at this point, Mr. Fishel and Mr. Bennett displayed their extraordinary skill as trial lawyers. In a flurry of motions, they

urged the court to allow the defendant to mount a “same decision anyway” defense. In other words, if Butler County could prove, as an affirmative defense, that the county would have fired Mr. Allen in any event for the flex-time violation alone (which was completely unrelated to the FMLA), then the alleged “interference” with FMLA rights was moot. He would have been fired anyway; therefore, he suffered no damages. Backing away from its initial ruling (which had completely ignored the employer's claim of the “same decision anyway” defense), the court agreed four days before trial that Butler County could indeed offer such a defense. There was a glimmer of hope. After a two-day trial and some masterful legal work, the jury ruled that Butler County had, in fact, proven that Mr. Allen would have been fired anyway. Verdict for Butler County – a day we were truly elated! Marc Fishel's outstanding work on this case led to his receiving OHPELRA's Pacesetter Award, one of our highest honors.

So what was the problem? The District Court's underlying ruling on the issue of whether employers can enforce the rules of their paid sick leave programs if the FMLA is also in the picture still stood unaffected. In effect, Butler County had won the battle but still lost the war – and employers throughout the Southern District of Ohio still faced an interpretation of the law that hobbled any meaningful attempt to control sick leave. Thus Butler County found itself in the paradoxical position of hoping that the plaintiff would appeal so that Judge Beckwith's ruling – which cited only her own ruling in a previous case – could be challenged and reviewed before a higher court. The plaintiff obliged with an appeal of the jury verdict, and Butler County cross-appealed the District Court's ruling on the underlying legal issue: Can an employer lawfully enforce the rules of paid leave policies if that leave is also being counted against the employee's annual allotment of leave under the FMLA? During the oral argument before the Sixth Circuit, one judge even challenged Mr. Fishel by claiming that employer could not count the use of paid sick leave against the employee's FMLA allotment without his consent. Since

Continues on next page.



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Please email your **newsletter articles** and **information of general membership circulation** to Andrew R. Votava, Board Member, at avotava@fultoncountyoh.com or call 419 337-9675 ext. 523 for more information.



“The Rest of the Story...” from page 5

anyone who had taken FMLA 101 knew better than that, our hearts sank again.

But the Court of Appeals came through, and in a 2-1 decision, upheld the verdict for the defendant Butler County and squarely reversed the District Court's holding that the county could not enforce the sick leave provisions of the collective bargaining agreement. The Sixth Circuit held that “that the County's internal call-in policy neither conflicts with nor diminishes the protections guaranteed by the FMLA. In so holding, we adopt the reasoning of the Third Circuit in Callison, that “[n]othing in the FMLA prevents employers from ensuring that employees who are on leave from work do not abuse their leave. . . .” [Citation omitted.]

This ruling was obviously music to the ears of Butler County – and to every employer in the four states that make up the Sixth Circuit (Kentucky, Michigan, Ohio, and Tennessee). But it may be a tune you didn't hear. Why? Because even though the Court of Appeals acknowledged that this issue was a case of first impression, i.e., a new issue of law never before decided by this court, the court chose not to formally publish its decision! Thus a case that created important new law for public and private employers in Ohio is relatively unknown – and we wanted to make sure that at least OHPELRA members knew about it. A copy of the Sixth Circuit's full decision can be found at www.ohpelra.org.

And as Paul Harvey would say, “now you know the rest of the story.”

The importance of the Sixth Circuit's ruling in *Martin Allen v. Butler County Commissioners* was diminished somewhat when the Bush Administration issued amended FMLA regulations in late 2008 that provided just what Butler County had argued – that an employer can enforce its standard absence-notification policies

provided that they are applied to all leaves, and not just FMLA leaves. But regulations can still be challenged as violating the express terms of the statute itself, and since the District Court had anchored its ruling in both the statute and then-existing regulations, a question could remain whether federal courts in Ohio would have enforced the new regulations. Employers in the Sixth Circuit can breathe a lot easier, knowing that some very bad law was knocked out on appeal.

The end result is that employers can actually require employees to tell us if they are coming to work. Once in a while, common sense wins! (And it sure helps to have darned good lawyers like Marc Fishel and Brad Bennett arguing your case!)

Douglas E. Duckett, the principal and owner of **Duckett Consulting and Training Services**, is a labor and employment lawyer who served Butler County for 23 years before starting his private consulting and training practice in late 2009. Duckett Consulting serves the needs of public and private employers in Ohio and throughout the nation, and is OHPELRA's and NPELRA's newest sponsor. For more information, contact him at (513) 484-7216 or see www.duckettconsulting.com.

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



Lighthouse in Marblehead, Ohio on Lake Erie, © Josh Bishop

Success! Fall Program: No Good Deed Goes Unpunished

THE OHPELRA FALL PROGRAM WAS A HUGE HIT. Over 125 people registered for the program, “No Good Deed Goes Unpunished” at the Columbus Police Training Academy.

All the program speakers (Jim Sennish, Douglas Duckett, Esq., Lori Torriero, Esq., and Kevin Locke, Esq.) did a great job guiding us through all the nuances of the disciplinary process in the public sector. Topics included proper policy and procedure; emotional fortitude to carry through with discipline; recommendations how to avoid arbitrations; and interesting “war” stories.

Further adding value to the program, two of our sponsors (Clemans, Nelson & Associates; Thompson Hines) submitted white papers supplementing the program materials. For all those members and participants who attended, we should all have an enhanced knowledge base for those times when we need it most in our home jurisdictions.

Thank you to everyone who participated.



Jim Sennish (left) is an OHPELRA past president and current Vice President of Human Resources at Firelands Regional Medical Center in Sandusky. Douglas Duckett (right) is, among many well known OHPELRA accomplishments, a NPELRA past president, and is currently the owner of Duckett Consulting and Training Services. Fall 2010.

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 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.**



Kevin Locke, Esq. (Left) is a partner with the law firm of Pepple & Waggoner and a frequent contributor to OHPELRA. Lori Torriero (Right) is a long time friend of OHPELRA and is currently serving as the Assistant Director of Franklin County Child Support Enforcement Agency.

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!

- Laura Alkire**, Law Director, City of Huron
- Christopher Biersack**, Labor Relations Officer, Hamilton County Human Resources
- Tracena Fowler**, Fiscal Manager, City of Columbus Public Safety
- Chris Heaton**, Captain, Jefferson Township
- David Helm**, Labor Relations Manager, Hamilton County Human Resources
- Tanya Jones**, Human Resources Manager, Cleveland Municipal Court
- Tammy Kalail**, Assistant Director of Law, City of Akron
- Donald Kerniskey**, Service Director, City of Wickliffe
- Robert Kidd**, Fire Chief, Clearcreek Township
- William McCullough**, Captain, Jefferson Township
- Ramona Patts**, Assistant Administrator, City of Columbus, Public Safety
- Tasha Peters**, Personnel Analyst, City of Springfield
- Jerry Sargent**, Director, Employee and Labor Relations, Miami University Human Resources
- Gary Sheets, Esq.**, Human Resources Director/Board Counsel, Butler County Board of Commissioners
- Shannon Wahl, Esq.**, Marti, Browne, Hull & Harper
- Porter Welch**, Fire Chief, Scioto Township
- Mark Wendling**, City Manager, City of Silverton
- Terra Woolard**, HR Technician, West Licking Joint Fire District



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Labor Relations Manager,
City of Columbus

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Please give special welcome to our new sponsor, **Duckett Consulting and Training Services!** Please see below for more information. Click the links below and on our web site at www.ohpelra.org for more information on these sponsors. Please continue to consider our sponsors when seeking professional services, and remember to thank them for supporting OHPELRA!

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