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New Limits on Public Records Liability

***Rhodes v. New Philadelphia*, New Philadelphia, Slip Opinion No. 2011-Ohio-3279**

The Ohio Supreme Court decided in July that a person is not "aggrieved" by the destruction of a public record when the person's entire objective was not to obtain the record, but to create a forfeiture liability.

Rhodes sent a public records request to many Ohio police departments, one of which was New Philadelphia. He requested all reel-to-reel tape recordings made by the police department between the years of 1975 and 1995. If the department would have had these tapes, there would have been at least one for each day in that time period. These types of tapes were antiquated and the department had disposed of them. The main issue is that the department did not have a records-retention schedule, as is required by R.C. 149.39. When Rhodes discovered the lack of a retention schedule he filed a complaint for civil forfeiture under R.C. 149.351. In his complaint, Rhodes stated that the New Philadelphia police department had acted unlawfully when it destroyed the recordings without approval and that he was aggrieved by the violations and was entitled to $1,000 for each improperly destroyed 24-hour recording. He was looking to collect about 5 million dollars.

At trial the jury was presented with evidence that showed Rhodes had also made requests to many other police departments in the state. In one of his request letters, he stated that he would like certain public records only if the city did not have an approved record-disposition schedule. This type of evidence showed that Rhodes was not interested in the records, but recovering a forfeiture. The jury found in favor of New Philadelphia, because the law clearly states that an "aggrieved" person may recover a forfeiture. The jury decided that Rhodes was not an "aggrieved" party, but just a person looking to collect easy money.

This was appealed to the Ohio Supreme Court. After looking at the statutes' language, the Court found that the General Assembly intended to allow "any person" to inspect public records, but the enforcement mechanism is not available to "any person" but to an "aggrieved person." The court concluded that the General Assembly did not intend to impose a forfeiture when it can be proved that the requester's legal rights were not infringed, because the requester's only intent was to prove the nonexistence of the records. Therefore, if the goal is to seek a forfeiture, then the requester is not aggrieved and thus not entitled to the forfeiture sought.

Furthermore, in HB 153, the General Assembly changed R.C. 149.351 in order to address this very issue. Now, statutorily an aggrieved party wishing to collect a forfeiture must divulge his or her purpose for the records request. Should there be clear and convincing evidence that the records request was made only to create a potential liability under public records laws, then the requester is not aggrieved and may not collect.

In addition, there is a $10,000 limit on the amount a person can recover for a forfeiture and while attorney's fees may still be awarded, they cannot exceed the forfeiture amount awarded. Also, once one person collects forfeiture relating to a particular record, no other person may claim forfeiture related to those particular records.

How this Affects your District:

This decision, as well as the General Assembly changes to the public records law, is very helpful to public entities. In the past, a person requesting records did not have to give any reason for the request. Now, if the person plans to try to claim a forfeiture because of a denial of the request, he or she must disclose the reason for the

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request.

This decision and law should make it much more difficult and less likely for people to arbitrarily request documents in an effort to create a public records law liability issue. Also, because there is a new limit on the amount of money that must be paid out, public entities do not need to worry about being financially handcuffed when dealing with these cases.

Districts still need to ensure that they have a records-retention policy and that it is being followed properly. These decisions make it less likely that people will make erroneous claims, but if a district is not following its own policy which causes a person to become aggrieved the district can expect to have monetary repercussions from those actions, albeit less than in the past.

Recent Attorney General Opinion About Superintendent Benefits

Recently the Ohio Attorney General wrote an opinion stating that a school board has the right to pay a superintendent annually for his or her accrued vacation leave. However, the Attorney General also noted that there is a statutory mandate that requires boards who wish to implement this type of compensation to first develop a policy that outlines a plan for implementing such compensation.

The AG opinion is based on the interpretation of R.C. §§ 3319.01, 124.39 (C), and 124.384(C). Section 3319.01 states that a board of education has the authority to provide for payment of a superintendent's accrued, unused vacation leave upon the death of the superintendent or upon separation from employment. While it does not specifically state that a board may pay a superintendent annually for his or her accrued, unused vacation days, it also does not put a specific limitation on a board's authority to pay a superintendent for unused vacation days. Absent specific prohibitive language, a school board has the authority to adopt a policy for the annual payment of a superintendent's accrued, unused vacation days as it deems appropriate.

Additionally, R.C. §§ 124.39(C) and 124.384(C) give school boards specific permission to provide payment for a superintendent's accrued, unused vacation time at other times than just at death or termination. Therefore, the AG states that R.C. § 3319.01, in concert with the other two sections, includes the power to adopt a policy that provides for the annual payment of the superintendent's accrued, unused vacation leave.

How this Affects your District:

The key point here is that the AG has confirmed that school boards may adopt a policy allowing for the annual payment for accrued, unused vacation days. He has also made clear that unless there is a policy in place, this fringe benefit cannot be offered in the contract of a superintendent.

So, if your district plans to offer the benefit of annual payment for accrued, unused vacation days, then the district must first adopt a policy with formal guidelines authorizing this type of benefit. Without these guidelines, it is the AG's opinion that school boards may not provide for this type of benefit in any superintendent contract. The adoption of this policy by any board that may at some point wish to offer this benefit will help the district avoid problems when dealing with state audits.

We have developed a policy that follows these guidelines. If you have any questions or would like a copy of the policy please contact us.

Workers' Compensation Claims Do Not Have to Specify Causation at Administrative Level

***Starkey v. Builders FirstSource Ohio Valley, L.L.C.*, Slip Opinion No. 2011-Ohio-3278**

The Ohio Supreme Court held that a workers' compensation claimant is not prohibited from arguing a new theory of causation on appeal to court even if it was not raised before the Industrial Commission.

In a worker's compensation claim, the claimant must establish that the injury suffered is causally related to the performance of the claimant's job duties. Causation generally falls into two categories; direct causation, or substantial aggravation of a preexisting condition (repetitive trauma and "flow-through" are also recognized).

In the *Starkey* case, the employer argued that substantial aggravation of a preexisting condition is a separate claim distinct from a claim for injury by direct causation. The Bureau, along with the claimant argued that "aggravation" refers to the manner in which a medical condition is causally connected to a work-related injury and does not refer to a separate medical condition. The Court agreed with the Bureau and claimant recognizing that the condition for which the claimant was seeking benefits, degenerative osteoarthritis, had not changed from the time the claimant was before the industrial commission. Only the theory of how the condition was caused had changed.

"The ultimate question in a workers' compensation appeal is the claim-

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Workers' Compensation Claims Do Not Have to Specify Causation, Cont.

ant's right to participate in the fund for an injury received in the course of, and arising out of, the claimant's employment. As long as the injury has a causal connection—whether direct or aggravated—to the claimant's employment, the claimant is entitled to benefits."

How this Affects your District:

Districts should be aware that they need to be prepared to defend against all theories of causation when a claim is appealed to court because the claimant will not be limited to those theories advanced and argued before the Industrial Commission.

Should you have any questions about this case or other workers' compensation issues please contact us.

OSBA Legal Assistance Fund Helps in Barberton Case

When the Barberton City Board of Education began the process of planning for a new middle school construction project, two taxpayers sued the Board in an effort to prevent it from applying Ohio's prevailing wage requirement to its bid specifications.

The Board's argument was that the two taxpayers lacked standing to sue. The OSBA Legal Assistance Fund provided supplemental funding and an *amicus curiae* brief in support of Barberton's position.

The court sided with Barberton and held that the taxpayers had no "special interest" different from any other taxpayer as was required by a precedent set in 1954 by the Ohio Supreme Court. This precedent holds that in the absence of statutory authority, a taxpayer cannot prevent a public entity from spending public funds unless he or she has some special interest and can "allege and prove damages different in character than sustained by the public generally." Therefore, with no proven special interest, the taxpayers had no standing.

In general, this case is good for school districts in Ohio because it maintains school districts' high level of discretion when making decisions regarding local community issues.

Emails Used in Disciplinary Decisions Are Public Records

***State ex rel. Bowman v. Jackson City School District*, 2011-Ohio-2228**

The Ohio Court of Appeals, Fourth District, recently found that emails sent by a teacher, later used in making decisions to discipline the teacher, are public records.

Jackson City School District disciplined a teacher for her inappropriate use of the district email system. The teacher wrote excessive emails to a personal friend during a time when she should have been teaching. These emails were unrelated to the students in her classroom or any other school activities.

The appellant in this case made a public records request for the emails that were referenced by the school district in its investigation. When the school district denied this request, she filed a petition for mandamus in order to force the district to release the emails.

This court first outlined the three pieces that are required in order for the emails to be classified as public records. First, they must be documents, devices, or items. Next, they must be created or received by or coming under the jurisdiction of the state agencies. Third, the emails must serve to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office. The first two pieces were relatively undisputed in this case. Emails are documents, even if they are electronic, and since these emails were received and sent during the school day the second prong is also met.

The disputed piece was whether these emails served to document the organization. The school district argued that the emails were personal in nature and did not serve to document anything related to the organization. However, the court agreed with the appellant. The court found that the emails served as the basis for the school district's decision to discipline the teacher, because the superintendent used the emails discovered during the course of the investigation to make his decision to discipline the teacher.

Therefore, because the decision to discipline the teacher was related to her inappropriate use of email during instruction time, the emails discovered during the course of the investigation were public records.

How This Affects Your District:

While personal emails are not generally public records, if they are used as part of an investigation to make a decision about disciplining a public employee then those emails do become public records. The main statutory piece that must be looked at is whether these emails serve to document the organization, functions, policies, decisions, procedures, operations, or other activities of the public entity. While personal emails would not normally serve that type of purpose, the trigger word is decision. If there are decisions that are made about the employment of a particular employee and those decisions are based on emails, even if those emails are personal in nature, then they will become public records and must be released when requested.

Non-Teacher Who Is Also Golf Coach Not Entitled to Overtime Under FLSA

***Purdham v. Fairfax County School Board* (C.A. 4, 2011) 637 F.3d 421**

The Fourth Circuit Court of Appeals recently ruled that a nonteaching employee, who also served as the golf coach, was a volunteer in his capacity as golf coach under the Fair Labor and Standards Act (FLSA). Under FLSA volunteers are not entitled to overtime pay. Thus in this case the plaintiff is not entitled to overtime pay.

The plaintiff in this case had been a safety and security assistant for twenty years in a Virginia school district. He had also taken on the position of golf coach for one of the local secondary schools and held that position for fifteen years. The plaintiff filed his case claiming that he was an employee under FLSA standards and thus should be afforded overtime pay.

Any individual seeking compensation pursuant to the FLSA must bear the initial burden of proving there is an employee-employer relationship and that the activities in question constitute employment. Congress provided that two things must be true in order for a person to be a volunteer rather than an employee. First, the individual must receive no compensation or must be paid only expenses, reasonable benefits, or a nominal fee to perform the services for which the individual volunteered. Second, the services must not be of the same type of service which the individual is employed to perform normally for the public agency. It is critical that the facts show that the volunteer offers his or her services freely and without pressure or coercion (direct or implied) from an employer.

In this case, the plaintiff argued that he was not paid a nominal fee. The court stated that the regulations provide that a nominal fee should (1) not be a substitute for compensation; (2) must not be tied to productivity; and (3) should be examined by the total amount of payments made in the context of the economic realities of the situation. In this district, all coaches of a particular sport received the same stipend regardless of each coach's time or effort. Therefore, the court found that this was not compensation for services rendered. Additionally, the stipend was not tied to productivity, in that if a coach won a championship or had a winning record they were not given more money. Furthermore, the plaintiff was paid a stipend of $2,114 in his most recent year of coaching. During that year, the plaintiff conceded he worked somewhere between 350 and 400 hours. That would put his hourly wage, even at 350 hours, at just five cents above the minimum wage at that time. This was much lower than his normal hourly wage of upwards of twenty-five dollars an hour. Therefore, the Court did find that this was a nominal fee.

Also, the Court found that the plaintiff's duties related to being the golf coach were not of the same type as his duties relating to his job as the safety and security assistant. Therefore, the second prong set out by Congress was met. Moreover, at no time during the fifteen years the plaintiff held the golf coach position did the school district try to coerce the plaintiff into continuing in that position. The plaintiff took the position willingly and, by all accounts, enjoyed his time with the students without being pressured into keeping the coaching position.

Since the plaintiff was paid only a nominal fee and was not performing duties related to his regular position, the Court held that the plaintiff was a volunteer and thus not entitled to overtime pay under FLSA.

How This Affects Your District:

First of all, this case is not binding in Ohio. It is, however, interesting because the Court seems to ignore at least one important factor that was laid out in the Department of Labor (DOL) opinion it cites to. The court stated that the DOL did not give any specific guidelines as to how to decide when a stipend is a nominal fee in reference to the economic realities of the situation. So, it chose to base its findings on the fact that the stipend paid to the golf coach was a nominal fee because it amounted to only a bit over minimum wage rather than the coach's normal hourly wage.

However, the DOL did give a basis for deciding the economic realities of the situation. The DOL opinion letter states explicitly that it believes that a nominal fee is the same as an incidental or insubstantial fee. Congress set out a 20% test to determine whether something is insubstantial. Therefore, the DOL extends this to the nominal fee analysis. Basically, a stipend would need to be less than 20% of what the district would have to pay to hire a full-time coach for the same services. That being said, it would be difficult to argue that the district would have to pay a full-time coach $10,570 per season to provide the same services this golf coach was providing. Therefore, regardless of the opinion of this Court we would believe that the golf coach in this situation was not paid a nominal fee.

In order to avoid any issues with these types of cases we have generally recommended that districts be cautious when using classified employees to perform supplemental duties, such as coaching. Unlike classified employees, certified employees such as teachers are exempt from FLSA regulations. Therefore, by having certified employees hold coaching positions the district will avoid any overtime pay FLSA issues such as the ones raised here. If a district still plans to hire non-exempt employees to handle coaching positions these districts should keep in mind the factors considered by the DOL in distinguishing volunteers from employees. These include only providing a nominal fee and ensuring that the person is not providing services that are the same as his or her normal services of employment. Additionally, districts should be careful to avoid coercing any employee into coaching as this would provide evidence that the position was not taken voluntarily.

Education Law Speeches/Seminars

Ennis, Roberts & Fischer regularly conducts seminars concerning education law topics of interest to school administrators and staff.
Popular topics covered include:

Cyber law
School sports law
IDEA and Special Education Issues
Employee Misconduct

Pamela Leist
Northwest Ohio ESC Administrator's Conference, Pokagon State Park on August 5, 2011
Ohio School Law Legal Update

Gary Stedronsky
Defiance City Schools Administrative Retreat on August 5, 2011
Ohio School Law Legal Update

Jeremy Neff
OSBA/OASBO School Law for Treasurers Workshop on October 14, 2011
Human Resources Legal Update

Bill Deters
At the OSBA Capital Conference School Law Workshop on November 15, 2011
Strategies for Managing your eNightmares

Administrator's Academy Dates at Great Oaks Instructional Resource Center

August 11, 2011 — *Student Residency, Custody and Homeless Students*

December 8, 2011 — *FMLA*

March 22, 2012 — *New Teacher Evaluation Procedures*

June 14, 2012 — *Special Education Update*

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