E|R|F

Ennis Roberts Fischer
School Law Review

January 2010

1714 West Galbraith Rd.
Cincinnati, Ohio
45239

PHONE
(513) 421-2540
(888) 295-8409

FAX
(513) 562-4986

Inside This Issue:

Ohio Court Interprets Continuing Contract Requirements

State ex rel. Richard Browne v. Sandusky City School District Board of Education

The Sixth Appellate District Court of Ohio recently decided that in order to be eligible for a continuing contract under Ohio Revised Code section 3319.08(B)(2), a teacher must commence and complete thirty hours of coursework after receiving his or her initial teaching certificate or licensure. This case involved a teacher who received his Bachelor's degree in 1982. In 1983, the teacher received three credit hours in an area related to the teaching field. Similarly, in 1984, the teacher received an additional eighteen credit hours for coursework completed in the teaching field. In 1994, the teacher was awarded his first four-year provisional teaching certificate and was subsequently employed by the Sandusky City School District Board of Education. Between 1994 and 2003, the teacher completed ten hours of coursework in his area of licensure or in an area related to the teaching field.

In 2005, the teacher applied for a continuing contract but was informed that he needed to complete two additional semester hours in order to be eligible for continuing contract status. In 2006, the teacher completed three additional hours of coursework, received his five-year professional educator's license, and requested that the Board reconsider his eligibility for a continuing contract. After examining the teacher's degree and transcripts, the District Superintendent informed the teacher that he needed to complete an additional twenty hours to be eligible for continuing contract status.

In 2008, the teacher filed a complaint for a writ of mandamus, requesting that the Erie County Court of Common Pleas compel the Board to issue him a continuing contract pursuant to ORC section 3319.11. The Board, however, filed a motion to dismiss the complaint because the teacher had failed to complete thirty additional semester hours of coursework as required by ORC section 3319.08(B)(2)(a). The trial court granted the Board's motion to dismiss the complaint and the teacher appealed to the Sixth District Court of Appeals.

On appeal, the Court considered whether the teacher met the requirements for continuing contract eligibility as specified in ORC sections 3319.08 and 3319.11. The only requirement provided in these statutes that was disputed by the parties was the interpretation of the requirement that the teacher complete thirty additional semester hours of coursework. The relevant part of ORC 3319.08 provides that, "If the teacher did not hold a master's degree at the time of initially receiving a teacher's certificate under former law or an educator license, thirty semester hours of coursework in the area of licensure or in an area related to the teaching field since the initial issuance of such certificate or license, as specified in rules which the state board of education shall adopt;…"

The teacher asserted that so long as any of the thirty semester hours are completed after the issuance of the initial teaching certificate, the statutory requirement has been met. The teacher relied heavily on a 2007 opinion written by Attorney General Marc Dann who interpreted the statute in a similar manner. The Attorney General opined that nothing in the statute indicates that a teacher must

(Continued on page 2)

Ohio Court Interprets Continuing Contract Requirements

have both started and finished thirty hours of applicable coursework after the issuance of the initial certificate or license. In his opinion, the statute only requires that the teacher must have finished those thirty hours after receiving the initial certificate or license.

The Board, however, argued that the statute requires the thirty hours to be commenced *and* completed after the issuance of the initial teaching certificate. The Court agreed with the Board's interpretation. The Court focused on the language of the statute, which requires thirty hours of coursework to be completed "*since* the initial issuance of such certificate or licensure." According to the Court, this language is unambiguous and clearly requires that the coursework be commenced and completed after the initial issuance of the license. Therefore, the teacher had not completed the requisite hours to be eligible for continuing contract status and the Board's motion to dismiss the complaint was upheld.

How this impacts your district:

This decision is significant because it reaches a different conclusion than that offered by the Ohio Attorney General's office in 2007. In its decision, the Court noted that the Attorney General Opinion is considered persuasive authority. The Attorney General's interpretation, however, does not bind Ohio courts to reach the same result. The Sixth District Court of Appeals reached its decision based on what it believed to be plain and unambiguous language in the statute, which required the thirty hours of coursework to be completed *since* the initial teaching certificate was issued. Although this decision is not binding on Ohio courts outside of Erie County, the logic may prove to be more persuasive than the Attorney General's opinion cited in the case. Consequently, courts faced with interpreting this language in the future are more likely to determine that the coursework requirements be commenced and completed after the initial teaching certificate or license was issued instead of allowing coursework completed prior to the initial issuance of a certificate or license to count towards the hourly requirements to reach continuing contract status.

United States Supreme Court to Rule on Public Employee Privacy Issues

City of Ontario v. Quon

In December, the United States Supreme Court decided to hear a case involving the Fourth Amendment rights of government employees to be free from unreasonable searches conducted by their public employers. Specifically, the Supreme Court will be determining whether a city employee's rights were violated when his superiors accessed text messages he sent on a city-provided pager.

This case stems from a decision rendered by the United States Court of Appeals for the Ninth Circuit. The plaintiff in this case was a member of a city SWAT unit who had been issued a pager by the police department. The city intended that the pagers be used for sending work-related text messages. While the city did not create a specific policy regarding the use of the pagers for personal text messaging, it did maintain a general "Computer Usage, Internet and E-mail Policy" which was applicable to all employees. This policy provided that the use of city-owned computers and associated software, e-mail, networks, and internet was to be limited to city-related business only. The policy specifically provided that use of internet and e-mail was not confidential. Furthermore, city employees were required to sign a statement acknowledging that they maintained no expectation of privacy in these systems.

In addition to this policy, city employees were limited in the amount of data they could transfer on the city-issued pagers each month. Significantly, the employees were informally told that their text messages would not be reviewed if they paid for any excessive usage. The plaintiff in this case exceeded his monthly limit several times and eventually the city decided to conduct an investigation to determine if he was using the pager for personal use. The city contacted the private company which maintained the city's network and requested that the company examine the plaintiff's use of the pager. The company audited the plaintiff's messages and reported to the city that the plaintiff had used the pager to transmit personal messages, some of which were sexually explicit. The plaintiff subsequently filed a lawsuit against the city, alleging that the city violated his Fourth Amendment right to privacy when it authorized an investigation of the messages.

In analyzing this claim, the Ninth Circuit relied in part on the Supreme Court's decision in O'Connor v. Ortega which articulated a framework for Fourth Amendment rights in the public workplace. The O'Connor case indicated that searches and seizures conducted by government employers are subject to the restraints of the Fourth Amendment and that individuals do not lose their Fourth Amend-

(Continued on page 3)

United States Supreme Court to Rule on Public Employee Privacy Issues

ment rights merely because they work for the government rather than a private employer. In O'Connor, the Supreme Court recognized that the nature of the public workplace at times may render some employees' expectations of privacy unreasonable, but that a determination of whether an employee has a reasonable expectation of privacy must be determined on a case-by-case basis.

The Supreme Court also noted that even if a government employee has a reasonable expectation of privacy in an item seized or searched, he must also demonstrate that the search was unreasonable in order for the court to find that the Fourth Amendment was violated. In order for a search to be deemed reasonable, it must be justified at its inception. In other words, there must be a legitimate governmental reason to search the item. Additionally, the scope of the search must be reasonably related to the circumstances which justified the interference in the first place.

Ultimately, the Ninth Circuit determined that the plaintiff had a reasonable expectation of privacy in the text messages he sent because he reasonably believed that the messages were free from third-party review. The city had informally told employees that no one would review their text messages if the employees paid for their excessive usage. According to the Ninth Circuit, this fact indicated that the plaintiff maintained a reasonable expectation of privacy in the text messages despite his acknowledgement of the city's computer usage policy.

The Ninth Circuit then examined whether the search was reasonable. It found that the search was justified at its inception because the purpose of the search was to ensure that the officers were not being required to pay for work-related expenses. The Court, however, found that the scope of the search was unreasonable because it was excessively intrusive. The Court presented several options that the city could have followed which would have allowed the city to determine whether the plaintiff used the pager for personal messages without actually reading the content of the messages. Therefore, the Ninth Circuit determined that the plaintiff's Fourth Amendment right to privacy was violated.

How this impacts your district:

The Supreme Court will likely hear this case in the next few months and issue an opinion in June of 2010. The Supreme Court's decision is likely to impact the scope of Fourth Amendment rights as applied to government employees. For instance, some individuals have expressed their opinion that if the Ninth Circuit's decision is allowed to stand, it will have an adverse affect on local government efforts to enforce written policies restricting the personal use of government-issued equipment. Ennis, Roberts, & Fischer will follow this case and update your district on the Court's decision and any potential impact that it may have on government employers and employees. In any event, this case should serve as a reminder of the importance of drafting good policies and enforcing them consistently.

Fifth Circuit Allows Wide Discretion to Enact Content-Neutral Dress Codes

***Palmer v. Waxahachie Indep. Sch. Dist*. (5th Cir. 2009).**

The United States Fifth Circuit Court of Appeals recently determined that school districts retain considerable authority in enacting content-neutral dress code policies. This case arose out of a student's challenge to a school district's rather extensive dress code policy. The district's dress code prohibited nearly all words and logos on student apparel. It allowed only certain logos smaller than two inches by two inches and shirts approved by the principal as school spirit wear.

The student challenging the policy sought to wear a "John Edwards for President" T-shirt and polo shirt, as well as a T-shirt with "Freedom of Speech" printed on the front and the text of the First Amendment on the back. All three shirts were rejected by the district under the dress code policy. The student subsequently challenged the dress code under the First Amendment.

The Fifth Circuit considered the student's claim by first examining the circumstances when student speech may be limited. It highlighted several Supreme Court decisions which permit schools to limit materially disruptive speech, sexually explicit, indecent, or lewd speech, school-sponsored speech, and speech advocating illegal drug use. The student argued that the dress code was invalid because his shirts did not fit into any of these categories.

The Fifth Circuit, however, determined that dress codes which are content-neutral may be analyzed under a less burdensome constitutional standard, known as "intermediate scrutiny." According to the Court, in order to survive intermediate scrutiny, a content-neutral policy must further an important or substantial governmental interest. Under this test, the governmental interest may not be related to the suppression of student expression, and incidental restrictions on First Amendment speech must not be more than is nec-

(Continued on page 4)

Fifth Circuit Allows Wide Discretion to Enact Content-Neutral Dress Codes

essary to further the government's interest.

The Fifth Circuit then determined that the district's policy was in fact content-neutral because the restrictions on student apparel were not based on preventing unpopular messages conveyed by the clothing. Consequently it set about applying the intermediate scrutiny test to determine whether the policy violated the First Amendment. In applying this test, the Court found that the district had numerous governmental interests in enacting a dress code, such as improving the educational process and improving student performance. The Court also determined that the policy was unrelated to the suppression of student speech and that the policy was not excessively restrictive. As a result, the Fifth Circuit denied the student's claim.

How this impacts your district:

It is important to recognize that this case was decided in the Fifth Circuit, and thus does not bind the courts in Ohio which are located in the Sixth Circuit. Nevertheless, at least three other federal circuits have applied the intermediate scrutiny test to content-neutral dress code policies. This means that the intermediate scrutiny test has become the predominant analysis for determining the constitutionality of a school district's dress code policy, and in turn, may influence future decisions in Ohio. Under this test, student dress code polices which do not seek to suppress any particular viewpoint, will be upheld if (1) they further an important governmental interest; (2) the governmental interest is unrelated to the suppression of student speech; and (3) the incidental restrictions on First Amendment expression are no more restrictive than is necessary to facilitate the governmental interest. In sum, a dress code policy is much more likely to survive judicial scrutiny if it is content-neutral.

SEHCB Establishes Best Practices for Public School District Health Plans

Pursuant to Ohio Revised Code section 9.901, the School Employees Health Care Board (SEHCB) established "best practice standards" for public school district health plans on January 1, 2009. The statute requires city, local, exempted village, and joint vocational school districts, and educational service centers associated with those districts, to comply with the board's standards by January 1, 2010. Accordingly, if after January 1, 2010, a public school district negotiates any contract that either calls for the issuance or renewal of a health care plan, it must agree to a plan that conforms to the board's best practice standards set forth in the Ohio Administrative Code, chapter 3306-2.

A health care plan for purposes of the statute includes, "group policies, contracts, and agreements to provide hospital, surgical, or medical expense coverage, including self-insured plans." It does not cover, "an individual plan offered to the employees of a public school district, or a plan that provides coverage only for a specific disease or accidents, or a hospital indemnity, medicare supplement, or other plan that provides only supplemental benefits, paid for by the employees of a public school district."

SEHCB's best practice standards are contained in OAC 3306-2-03. In short, they require a Wellness or Healthy Lifestyle Program set forth in section (A), a Disease Management Program described in section (B), access to institutions and providers offering "clinically superior health care for complex medical conditions" as indicated in section (C), and periodic dependent eligibility audits pursuant to section (D).

In December of 2009, SEHCB should have e-mailed compliance forms to all public school districts. Each district should submit the electronic compliance forms by July 1, 2010. SEHCB will then review the forms to determine whether the district has complied with the best practice standards above. If a district is not in compliance, SEHCB will make recommendations for what the district must do in order to obtain the board's certification of compliance.

In addition to this initial compliance review, OAC 3306-2-05 requires public school districts to file an annual compliance report with SEHCB. This written report is to describe the progress made to reduce the rate of increase in insurance premiums and employee out-of-pocket expenses, the progress made to improve the health status of employees and their dependents, and the implementation of the best practice standards adopted by the district. This report must be filed each year by the first day of July.

SEHCB will review the compliance reports to determine if the districts are utilizing the best practice standards effectively. The board may request additional information if it concludes that the district has not adopted all of the standards. If the board requests further information, the district in question will have ninety days to submit a report documenting the reasons that a certain practice should be omitted from that district, or describing how the district plans to implement the remaining standards within one hundred eighty days.

It is imperative that your district becomes familiar with these standards and implements the new requirements in any future negotiations.

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
HB 190 and Professional Misconduct

To schedule a speech or seminar for your district, contact us today!

Upcoming Speeches:

Gary Stedronsky at the Ohio Association of
Local School Superintendents on January 20, 2010,
Student Discipline

Contact One of Us

William M. Deters II
wmdeters@erflegal.com

J. Michael Fischer
jmfischer@erflegal.com

Jeremy J. Neff
jneff@erflegal.com

Ryan M. LaFlamme
rlaflamme@erflegal.com

C. Bronston McCord III
cbmccord@erflegal.com

David J. Lampe
dlampe@erflegal.com

Gary T. Stedronsky
gstedronsky@erflegal.com

Rich D. Cardwell
rcardwell@erflegal.com