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Inside This Issue:

Ennis, Roberts & Fischer's School Law Review has been developed for use by clients of the firm. However, the review is not intended to represent legal advice or opinion. If you have questions about the application of an issue raised to your situation, please contact an attorney at Ennis, Roberts, & Fischer for consultation

Public Records Law and the Attorney-Client Privilege

The state Ex Rel. Toledo Blade Company v. Toledo-Lucas County Port Authority. Slip Opinion No. 2009-Ohio-1767

The Ohio Supreme Court issued a decision last month which reaffirmed the attorney client privilege exception to the public records laws. In this case, a Toledo newspaper, *The Blade*, sought access to a report that resulted in the termination of the president of the Toledo-Lucas County Port Authority. The report had concluded that the president had engaged in an inappropriate relationship with a lobbyist who did business with the agency. *The Blade* initiated the suit against the Port Authority to compel production of the report after the Port Authority refused to comply with the newspaper's initial request for a copy of the report. The Port Authority maintained that the report constituted attorney-client communication, and as such it was not subject to disclosure. The newspaper argued that because the Port Authority is a public agency, Ohio's public record laws require production of the report. The main issue before the court, however, was whether the report in question was written by an attorney, and whether the attorney-client privilege traditionally provided confidentiality of this type of communication.

The Port Authority claimed the attorney-client privilege was implicated when it contracted with attorney Teresa Grigsby to investigate the factual and legal issues concerning the allegations involving the agency's president. The agency claimed that it was important for the attorney to be involved because it feared that some staff members may be reluctant to speak on the issue unless the confidentiality of the investigation could be assured. Following the investigation, the attorney issued sealed copies of the report to the board of directors and indicated that the report was confidential. The Board subsequently terminated the president.

The court began its discussion of the case by noting that public records law contained in Ohio Revised Code 149.43 is to be construed liberally in favor of broad access. The court then noted that under R.C. 149.011(G), records are subject to disclosure if the they, "serve to document the organization, functions, polices, decisions, procedures, operations, or other activities of the office." The court found that that the investigative report clearly documents decisions and actions of the office, therefore, the newspaper would be entitled to the report under R.C. 149.43 unless an alternative exception from disclosure existed. The Port Authority asserted that the Report was exempt from disclosure under the attorney-client privilege.

The court then examined the background of the attorney-client privilege and noted that it was one of the oldest recognized privileges for confidential communications. The court also explained that R.C. 149.43 (A)(1)(v) provides a public records exception for records that are prohibited from disclosure under state or federal law. The court determined that the attorney-client privilege, covering records of communications pertaining to legal advice, is a state law prohibiting the release of records otherwise subject to the public records laws.

The Blade, however, asserted that the factual portions of the report were subject to disclosure because the factual information did not constitute "legal advice" under the

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attorney-client privilege. The court rejected this argument and explained the difference between the statutory and common law privilege. Specifically, R.C. 2317.02(A) provides a mere testimonial privilege, precluding an attorney from testifying about confidential communications. The common-law privilege, however, protects against any dissemination of information obtained in the confidential attorney-client relationship.

The court further explained that the underlying policy of the privilege is to encourage open communication between an attorney and her client. As a result, the court determined that the relevant question was whether the investigation was in some way related to the rendition of legal services. In other words, the report did not need to contain pure legal analysis or advice to be completely excluded from production under public records law. Accordingly, the court determined that the facts investigated in this case were incident to, or related to, the legal advice that the attorneys were to provide. Consequently, the court concluded that the investigative report was related to the rendition of legal services and, therefore, excluded from disclosure.

How this impacts your district:

This case involves the important interplay between the public records law and privileged communication. While the public records law mandates disclosure of public records, this case makes clear that if such a record was written by an attorney for the purpose of legal advice, then the information is confidential under the attorney-client privilege. Some commentators have criticized the court's approach in this case as allowing a public agency to thwart pubic records law by simply having an attorney write memos, but it appears that the court did not significantly change the operation of these laws in any manner. The attorney-client privilege has existed for a long time and documents containing legal advice should continue to be excluded from disclosure under Ohio public records law.

House Bill 138 and the Acquisition of Foreclosed Property

House Bill 138 was enacted last year and contains some important changes to Ohio property law that may affect school districts. The Bill specifically changed Ohio Revised Code Section 5723.01 to allow school districts to obtain title to tax foreclosed properties which failed to sell at a Sheriff's Sale. O.R.C. section 5723.01 provides that property subject to foreclosure proceedings must be advertised and offered for sale on two separate occasions, not less than two weeks apart. If the land remains unsold for want of bidders, the land is forfeited to the state.

House Bill 138 provides that this land may be forfeited to a political subdivision, such as a school district. After foreclosed land meets the above requirements, the court must notify the political subdivision in which the property is located and offer to forfeit the property to the political subdivision. In order to effectuate this transfer, a school district receiving notice must file a petition with the court within ten days of the court's notification. If a school district petitions the court to acquire the foreclosed property, the acquisition will be effective when the court enters an order granting the transfer of the property. The court will certify a copy of the entry to the county auditor and, after the date of certification, all the rights, title, claims, and interests of the former owner is transferred and vested in the political subdivision.

How this impacts your district:

House Bill 138 may provide school districts with some opportunities to acquire foreclosed land that will be very useful to developing the school in the future. It must be noted, however, that the statute is ambiguous with respect to whether a school district will be required to make payments, for instance tax liens, before it may effectuate a transfer. House Bill 138 laid out more specific guidelines for other entities acquiring foreclosed property requiring payment of taxes, assessments, and fees prior to the transfer. The language pertaining to schools indicates that the district will acquire the rights, title, claims, and interests of the former owner. Ennis, Roberts, & Fischer sought clarification from the prosecutor's office, but the office agreed that the statutory language is ambiguous. For now, it is a bit unclear as to what fees will be required of a school district when attempting to acquire foreclosed property through this procedure. Ennis, Roberts, & Fischer will update you with any information that becomes available which clarifies the current law. For now, it is important to recognize that if your district receives notice of foreclosed property in the area, it will have ten days to file a petition with the court if it wishes to acquire the property. Also, be sure to recognize that your district may be required to pay fees associated with the property. Please contact Ennis, Roberts, & Fischer if your district has any questions pertaining to this procedure or is confronted with an issue of whether to acquire foreclosed property.

Supreme Court Rules on Arbitration Provision

14 Penn Plaza LLC v. Pyett

The United States Supreme Court recently rendered a decision finding an arbitration provision in a collective bargaining agreement enforceable against a claim brought under the Age Discrimination in Employment Act (ADEA). This case involved a dispute between a multi-employer bargaining association and a union of service employees in New York City. The two parties negotiated a collective bargaining agreement that required union members to submit all claims of employment discrimination to binding arbitration. The agreement's grievance and dispute procedures were to be the sole remedy for employment discrimination violations.

In the past, many employees who believed that they were subject to unlawful employment discrimination filed charges with the Equal Employment Opportunity Commission (EEOC). The EEOC would investigate the matter and decide whether to issue the individual a right-to-sue letter, indicating that the EEOC believed the employee to have a valid employment discrimination claim.

The union attempted to pursue this course of action after it believed that its employees were subject to age discrimination when they were reassigned to different tasks. The EEOC, however, dismissed the charge of age discrimination. Nevertheless the union filed suit in federal court claiming violations of the ADEA. The employer in turn sought to compel arbitration of the claim pursuant to the collective bargaining agreement. The main issue in the courts was whether a clear and unmistakable union-negotiated waiver of a right to litigate federal and state statutory claims in a judicial forum is unenforceable.

The Supreme Court was sharply divided on the issue, but in a 5-4 decision, the majority determined that the arbitration provision was enforceable. The dissenting Justices believed that the statutory guarantees against workplace discrimination included a right to a judicial forum. The majority opinion, however, stressed that the guarantees were substantive, non-waivable rights protected by the ADEA, but not rights to a judicial forum. These rights are upheld when a union voluntarily decides to bargain for arbitration.

Significantly, the Court mentioned that Congress was free to enact legislation specifically finding mandatory arbitration unenforceable in relation to specific statutory claims. Congress is currently considering amending the Federal Arbitration Act. A proposed bill offered in February seeks to find unenforceable any pre-dispute mandatory arbitration of any employment, consumer, or franchise dispute or any dispute arising under any statute intended to protect civil rights other than an arbitration provision in a collective bargaining agreement.

How this impacts your district:

The Supreme Court's decision may lead to an increased use of arbitration to resolve employment discrimination claims, however, employers must also be aware that Congress may respond by enacting legislation guaranteeing a right to judicial access for certain statutory claims. Nevertheless, mandatory arbitration may provide a more cost-effective and efficient resolution of discrimination claims that can be considered in collective bargaining agreements. Ennis, Roberts, & Fischer will follow-up with any relevant information regarding the proposed amendments to the Federal Arbitration Act. Please do not hesitate to contact us if your district has any questions or concerns pertaining to collective bargaining agreements.

Ohio Credit Flexibility Plan

Ohio schools will undergo a number of significant changes as Governor Strickland strives for education reform within the state in an effort to ensure that students will be ready to meet the demands of an evolving global and technological age. One change is already in motion; as Ohio seeks to reform the manner in which high school students earn course credit. The reform began with Senate Bill 311, which raised the graduation requirements for high school students and included a requirement that by March 31, 2009, the State Board of Education adopt a plan that enables, "students to earn units of high school credit based on a demonstration of subject area competency instead of or in combination with competing hours of classroom instruction."

Under the proposed credit flexibility plan students will be able to earn credit in a variety of ways. The plan will allow students to test out of courses or to demonstrate mastery of course content for credit. Other "educational options" include distance learning, educational travel, independent study, internships, music, arts, after-school/tutorial programs, community service, and other engagement projects.

The credit flexibility design team conducted extensive research on the credit earning practices and policies of Ohio schools and schools in other states. Several findings specifically encouraged the adoption of the flexibility approach. For instance, a significant portion of students who drop out of school offer that they were bored or that school lacked meaning. By fostering a more hands-on approach to earning credit outside of the classroom environment, the flexibility plan should address the drop-out problems. Proponents of the credit flexibility plan also believe that it will allow for expanded learning opportunities and provide real world learning environments which more appropriately reflect current society. Specifically, the plan will allow students to demonstrate what they know, and move on to higher-order content when they are ready to learn. It will allow students to learn

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subject matter and earn course credit in methods that are not confined to "seat time." The system attempts to move beyond the traditional one-size fits all approach, and implement a new approach designed to allow students to shorten the time necessary to complete a high school diploma, broaden the scope of curricular options available to students, and increase the depth of study available for a particular subjects. The new system allows for a considerable amount of customization. Proponents envision that this process will allow students to become more engaged in the learning process and have a greater sense of ownership of their learning. In theory, learning will be accelerated while dropout rates should be reduced. In the meantime, the environment should cultivate habits that are essential to future success in employment or post-secondary education.

How this impacts your district:

Ennis, Roberts, & Fischer will update your district when the State releases a finalized plan. For now, it is important to recognize that changes are coming in the near future and that boards of education will have to develop strategies and procedures to implement the credit flexibility plan. It should also be noted that credit will remain a local decision and will be awarded by teachers. Other mechanisms may prove important in informing the credit determination, such as a multi-disciplinary team, a professional panel from the community, a state performance-based assessment in one of the core content areas. The design team expects that teachers and students will pre-identify and agree on the learning outcomes that align with the state's academic content standards, and on how these outcomes will be assessed. We expect to have additional information in the near future, but if your district has any questions, please do not hesitate to contact Ennis, Roberts, & Fischer.

Ohio BWC Rate Changes

On March 20, The Ohio Bureau of Worker's Compensation (BWC) approved a comprehensive rate reform plan with the hopes of providing more accurate and equitable rates for non-group employers. BWC decided to implement rate changes after determining that it had systematically overcharged individual employers, while undercharging group employers within the same industry group. It now appears that the individual employers have been in effect, subsidizing group rated employers since the group rated category was defined in 1993. The following list found on the Ohio BWC website, highlights the changes that will be implemented by the new plan.

- Base rates for non-group employers are projected to decline by an average of 25.3 percent;
- Group-rated employers will pay an average of 9.6 percent more in premium as a result of the credibility table change from 85 percent to 77 percent maximum credibility limit;
- The introduction of a "break-even" factor for group-rated employers keeps their rate levels at the targeted 9.6 percent change. This change prevents groups from receiving the base rate reductions intended for non-group employers;
- This recommendation has no projected premium shortfall for the July 1, 2009 policy year;
- Only employers with an individual experience modifier (EM) of 1.01 or greater will be eligible for a 100-percent EM cap;
- Group-rated employers cannot stack other discounts associated with other BWC programs except those associated with the deductible program;

As the list suggests, BWC plans to reduce base rates by an average of twenty-five percent, while subsequently increasing rates based on modifiers. The modifiers are essentially the rates calculated with respect to the loss experienced by individual employers. Additionally, all group-rated employers will have their rates increased by thirty-one percent. It appears that the thirty-one percent group rate increase may eliminate the lower tier of groups with savings between ten and thirty percent. The individual employer plans that emerge from these former group-rated plans may actually incur savings averaging near twelve percent over what they would have paid without the rate adjustments.

An additional benefit for formerly group-rated employers with unfavorable losses will be a cap of one hundred percent for those that end up penalty rated. These employers must adopt safety measures and be in good standing with BWC to be eligible.

In April, BWC contacted employers to let them know whether they qualified for a group rated plan for the policy year running from July 1, 2009 through June 30, 2010. In the past BWC has issued these determinations earlier in the year, however, the modifications to employer rates have delayed the administration thus far.

How this impacts your district:

The BWC reform should have the greatest impact on Ohio State Fund Employers. Many of our clients fall into this category and are also part of a group plan. Your district should be aware of whether your group status has been changed by BWC and of the corresponding rate changes that may apply. If you have any questions pertaining to the new BWC rates, please contact Ennis, Roberts, & Fischer for consultation.

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

June 26, Jeremy Neff at the 2009 OSBA Sports Law Workshop in Columbus, Ohio
Ins and Outs of Coaching Contracts

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