

**13th ANNUAL
LOCAL GOVERNMENT OFFICIALS'
CONFERENCE**

FUNDAMENTALS OF A SOUND HR SYSTEM

March 8, 2012

Presented By:

**CLEMANS, NELSON & ASSOCIATES, INC.
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CLEMANS NELSON PROFILE

General Company Characteristics

Clemans Nelson is the preeminent public sector labor relations and human resource consulting firm in the state of Ohio. Originally founded in 1976 and now 100% employee-owned, Clemans Nelson employs thirty to thirty-five management consultants and support staff with complementary skills and backgrounds. Among our consulting staff are business executives, former government executives, attorneys practicing as consultants, and other professionals with experience in education, labor relations, civil rights, unemployment compensation, insurance, personnel, and other areas.

All Clemans Nelson consultants, managers, and principals, including the CEO, work regularly with clients on projects in order to stay current and ensure delivery of state-of-the-art consulting services, and as an employee-owned firm every employee takes a strong interest in providing top quality client service.

Government as Business

We believe government should be run as a service business, and that government can only deliver superior service through optimum management of all its resources, especially its human resources. Human resources are assets to be developed, enhanced, managed, and conserved—assets that directly affect both the employer's reputation and the bottom line. Clemans Nelson has proven repeatedly that public employers can manage their human resources effectively and efficiently within their financial means.

Clemans Nelson is a professional management consulting firm specializing in the following:

- **Operational and Organizational Analysis**
- **Personnel Systems Analysis**
- **Employee Relations Audits**
- **Labor Negotiations and Labor Arbitrations**
- **FLSA, EEOC, UC, COBRA, OSHA, FMLA, ADA, and other Employment-Related Civil Service Matters**
- **Policy Manuals, Handbooks, and Performance Evaluations**
- **Leadership and Supervisory Training**
- **Regulatory Compliance Training (e.g., Discriminatory Harassment, FLSA, FMLA, etc.)**

Employer Representation Only

Clemans Nelson represents only employers. Many firms occasionally take cases or assignments against employers on behalf of individuals or employee organizations. We do not subscribe to that practice. We serve both employer and employee interests by advocating professional management.

MICHAEL D. ESPOSITO, ESQ.

Shareholder-Manager of Client Development

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Biography

Michael received his B.A. from Miami University (Ohio) and his Juris Doctor from Cleveland State University's Marshall School of Law, and joined Clemans Nelson in 2002. With more than 100 sets of labor negotiations to his credit, he primarily represents municipal, township, and county clients as chief spokesperson in complex labor negotiations and dispute resolution proceedings. In addition to labor relations matters, he also focuses on dealing with sensitive disciplinary matters, developing personnel system components for clients (i.e., personnel policy manuals; selection, hiring, and documentation systems; job descriptions; classification specifications; civil service rules; personnel evaluation systems; etc.); counseling clients on matters involving general Ohio Civil Service Law, FMLA, FLSA, ADA, and other employment related issues; providing representation in arbitrations and administrative appeals; and conducting management and supervisory development training on various public sector employment issues.

A sought-after speaker, Michael has lectured on selected public sector personnel and labor relations topics for the Ohio Public Employers Labor Relations Association (OHPELRA), Ohio City/County Management Association (OCMA), Ohio Municipal League (OML), Ohio Township Association (OTA), Mayors Association of Ohio, Kent State School of Public Policy & Public Administration, and other statewide associations.

Organizational Affiliations

National Public Employer's Labor Relations Association (NPELRA), Member

Ohio Public Employer's Labor Relations Association (OHPELRA), Member

Ohio State Bar Association (OSBA), Member

Speaking Engagements

Speaker: Employee Investigations: "Well That is Your House On Her, and You Are Wearing Her Shoes!" Ohio Public Employer's Labor Relations Association (OHPELRA), February 2012

Speaker: Layoffs, Job Abolishments, and a Few other Tools for Managing Costs, Governmental Finance Officers Association, September 22, 2011

Speaker: Overview: Senate Bill 5, Ohio Public Treasurers Association, May 11, 2011

Speaker: Understanding Civil Service, County Commissioners Association of Ohio, Training Seminar for New & Veteran County Commissioners, February 28, 2011

Speaker: Collective Bargaining 2010: Leveraging Efficiency into the Public Sector, Ohio Association of Public Safety Directors, September 30, 2010

Speaker: Collective Bargaining 2010: Reestablishing Efficiency in the Public Sector, Ohio Township Association, July 30, 2010

Speaker: Collective Bargaining Strategies in Tough Economic Times...Bargaining for Survival," Ohio Township Association, February 19, 2010

Speaker: "Surviving and Thriving in Tough Economic Times...Reductions in Force, Furloughs, and Beyond," Ohio Public Employer's Labor Relations Association (OHPELRA), February 2010

Speaker: "2009 Collective Bargaining Update," Ohio Municipal League (OML) Annual Conference, October 2009

Speaker: "2009 Public Sector Employment Overview," Kent State University School of Public Policy & Public Administration, April 2009

Speaker: "Legal Requirements of Discipline: *Loudermill, Garrity, Piper, et. al.*," Ohio Public Employer's Labor Relations Association (OHPELRA), February 2009

Speaker: "2008 Labor Arbitration Update," Ohio Public Employer's Labor Relations Association (OHPELRA), July 2008

Speaker: "2008 Collective Bargaining Update," Ohio City/County Management Association (OCMA) Spring Conference, June 2008

Speaker: "You Be the Arbitrator," Ohio Public Employer's Labor Relations Association (OHPELRA), February 2008

Speaker: "Current Events in Personnel Management," Northeast Ohio Auditor's Association, August 2007

Speaker: "Discriminatory Harassment," Kent State University School of Public Policy & Public Administration, October 2006

Speaker: "2006 Collective Bargaining Update," Ohio Municipal League (OML) Annual Conference, September 2006

Speaker: "Legal Considerations in Public Employment," Kent State University School of Public Policy & Public Administration, April 2006

BRIAN D. BUTCHER, ESQ.

Senior Consultant

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Biography

Brian D. Butcher, Esq., is a Senior Consultant for Clemans Nelson. He joined Clemans Nelson in 2007 after a short stint working for one of the largest cities in the State of Ohio. Mr. Butcher advises clients in human resource management, labor relations, contract negotiations, regulatory compliance, discipline, and policy development. He regularly conducts training on a variety of human resource and labor relations issues such as FLSA, FMLA, ADA, discriminatory harassment, leave abuse, the use of social media, and union certification/representation. Additionally, Mr. Butcher has experience advocating on behalf of his clients in front of the State Employment Relations Board (ULP, REP, MED).

Mr. Butcher has become a frequent lecturer for public sector state-wide associations (ODJFS, CCAO, CCC/EAPA, OML, etc.) and has been an Instructor for the Ohio State John Glenn School of Public Affairs.

Mr. Butcher received his J.D. from Capital University Law School and his B.A. from Muskingum College (now University) in both Business and Political Science.

Organizational Affiliations

National Public Employer's Labor Relations Association (NPELRA), Member

Ohio Public Employer's Labor Relations Association (OHPELRA), Member

Ohio State Bar Association (OSBA), Member

Columbus Bar Association (CBA), Member

Central Ohio Labor and Employment Relations Association (COLERA), Member

Buckeye State Sheriff's Association, Associate Member

Speaking Engagements

Ohio Public Employer's Labor Relations Association (OHPELRA), February 2012: "Employee Investigations: "Well That is Your House On Her, and You Are Wearing Her Shoes!"

CCAO - CCC/EAPA, Winter Conference (2011): "Administrative Hearings – A Primer: What to Expect and How to Prepare"

Ohio Mayor's Conference (June 2011): "Collective Bargaining: Where We Are"

ODJFS Annual Conference (May 2011): "Senate Bill 5"

Buckeye State Sheriff's Association Training (May 2011): "Senate Bill 5: What to Expect"

CNA Seminar (April 2011): "Senate Bill 5: What is Required, What is Permitted, and What IS an Employer to Do?"

OHPELRA, ATC (2011): "Still Broke After all these Months...Negotiating When the Boom has Busted"

CCAO - CCC/EAPA, Winter Conference (2010): "Proper Discipline Procedures: Why Public Employees are Unique?"

CCAO - Dog Warden Association, Winter Conference (2010): "Classified or Unclassified?"

OML Annual Conference (2010): "Collective Bargaining: Leveraging Efficiency into the Public Sector"

CNA Seminar (2010): Employee Abuse of Technology"

ODJFS Annual Conference (2010): "FMLA, FLSA, and Beyond..."

ODJFS Summer Conference (2009): "R.C. 124.393 and Furloughs"

Ohio County Recorder's Association (2009): "Dealing with Today's Economy"

Publications

"Redefining Bargaining," *Ohio Township Association Newsletter 2010*

"Pitfalls in the Public Sector Terminations," *OHPELRA 2010 Fall Newsletter*

"Furloughs, Reduced Schedules, and Alternate Work Schedules: Reducing Costs and Avoiding Layoffs," *OHPELRA 2010 Winter Newsletter*

Fundamentals of a Sound HR System

Michael D. Esposito, Esq. and Brian D. Butcher, Esq.
Clemans, Nelson, & Associates, Inc.
13th Annual Local Governmental Officials' Conference
March 8, 2012

2012 Public Sector Overview

- Public Sector Employment is NOT Private Sector Employment
 - Public employment is different because public employees simply have more rights and more agencies before whom to seek "review."
 - In addition, for whatever reason, public employees are simply more aware of their rights under federal and state law.
- Many local governments are facing financial crisis making it that much more important that they have sound HR practices in place
- Litigiousness of our society is compounded by economic downturn

How Did We Get Here?

- There is no single factor.....
- Escalating Operating Costs
 - Personnel Related
 - Fuel, Salt, Raw Materials
 - Equipment
- Declining Revenue Sources
 - Municipal Income Tax
 - Grant Funding Availability
 - Property Tax
- Unfunded Mandates

Public Sector Employment

At the Federal Level:

- Age Discrimination in Employment Act
- Americans With Disabilities Act, as amended
- Brady Bill
- Civil Rights Act of 1866
- Civil Rights Act of 1871
- Civil Rights Act of 1871
- Civil Rights Act of 1871
- Civil Rights Act of 1964
- Civil Rights Act of 1964
- Civil Rights Act of 1968
- Civil Rights Remedies for Gender Motivated Violent Crime,
- Clean Air Act
- Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA)
- Consumer Credit Protection Act
- Drug Free Workplace Act of 1988
- Employee Retirement Income Security Act of 1974
- Equal Pay Act of 1963
- Fair Credit Reporting Act

Public Sector Employment

- Fair Labor Standards Act
- Family and Medical Leave Act
- Federal Merit System Standard
- Federal Water Pollution Control Act
- Federal Wiretapping Act
- GINA
- Hatch Act
- H.L.P.P.A.
- Immigration Control Reform Act
- Jury System Improvement Act
- Occupational Safety and Health Act
- Older Workers Benefit Protection Act
- Omnibus Transportation Employee Testing Act
- Rehabilitation Act of 1973
- Veterans Reemployment
- Vietnam Era Veterans Readjustment Assistance Act
- Violence Against Women Act of 1994

Public Sector Employment

At the State Level:

- 3.06 Deputies and Clerks "serve at the pleasure of."
- 9.84 Witness has right to counsel.
- 102.03 Ethics in government, public employees. Complex interaction with R.C. 2921.42. Some nepotism prohibited.
- 102.03(B) Prohibition against revealing confidential information.
- 102.09(E) Appointing authorities are required to furnish each new appointee with a copy of ethics law.
- 117.01 "...Public officials are liable for all public money received or collected by them or by their subordinates under color of office..."
- 117.28 Finding for recovery by state auditor.
- 121.22 Open meeting law. 24 hour notice.
- 124.01-124.57 Classified and Unclassified Employment (State, County, City, limited Township applicability)
- 149.43 Public records law, limited exceptions. Must provide copy on request.
- 153.59 All construction contracts by political subdivisions must have nondiscrimination clause and an affirmative action program.
- 505.491 Township procedure for discipline (police)
- 737.12 Municipal procedure for suspension. (police & fire)
- 1333.81 Employee cannot knowingly disclose confidential information.
- 1347 Personal Information Systems, annual report, rights of individuals.

Public Sector Employment

- 1347.05 One person must be named to coordinate system.
- 1347.09 Disputes over information in database.
- 2313.18 A permanent employee may not be discharged for having taken time off for jury duty.
- 2317.02 Physician-patient privilege. (This is frequently an issue in ADA and FMLA-related cases.)
- 2506 Appeals to common pleas court from adjudications, quasi-judicial proceedings.
- 2711 Arbitration and appeals from arbitration.
- 2716.05 Prohibits discharge based upon a single wage garnishment within a twelve month period.
- 2744.02(C) Any order denying immunity is immediately appealable.
- 2744.03 Political subdivision tort immunity. Immunity for officials as to state court actions, causes of action.
- 2921.02 Bribery/accepting bribes by public employees prohibited.
- 2921.03 Intimidation of public servants prohibited.
- 2921.05 Retaliation against public servants prohibited.
- 2921.13 Falsification with purpose to mislead public officials prohibited.

Public Sector Employment

- 2921.41 Theft in office by public employees prohibited. Forfeit PERS.
- 2921.42 Unlawful interest on public contract prohibited; applies to civil service employment, nepotism.
- 2921.43 Soliciting improper compensation prohibited.
- 2921.431 Soliciting political contributions from public employees prohibited.
- 2921.44 Dereliction of duty; criminal; bar to reinstatement.
- 2921.45 Public officials, employees criminally liable for deprivations of civil rights.
- 2961.01 Convicted felon cannot hold public office.
- 3517.092 Elected officials cannot solicit or accept contributions from employees
- 3599.05 Employer cannot threaten employee with termination in order to affect his vote in an election; cannot put political fliers in pay envelopes.
- 3599.06 Employee cannot be discharged for taking a reasonable amount of time off in order to vote.
- 3923.38 (MINI-COBRA) Right to group coverage for six months. Not available unless employee was entitled to U.C. at time of separation.
- 4101.10 Employer duty to respond to inquiries by State Department of Industrial Relations.
- 4101.12 Prohibition against requiring, permitting, or suffering an employee to work in an unsafe place.
- 4101.17 Prohibits age discrimination; not available where employee can go to arbitration.
- 4111.03 State, city, and county employers, and employers with sales gross over \$150,000 per annum, must pay overtime; county comp time outlined.

Public Sector Employment

- 4111.08 Duty to maintain employee records for three years.
- 4111.09 Duty to post regulations.
- 4111.13 Nonretaliation against employee who enforces overtime right.
- 4111.17 Prohibition against discrimination based upon sex, race, color, religion, or national origin in payment of wages (MINI-EQUAL PAY ACT). Merit pay exception.
- 4112.02 State level Title VII, prohibits discrimination on basis of race, color, religion, sex, national origin, handicap, age, or ancestry (OCRC).
- 4113.21 Employer must pay cost of medical examinations required of applicants for employment.
- 4113.23 Employee is entitled to a copy of any medical report from a work-related examination.
- 4113.52 General "Whistleblower" protection. County application.
- 4113.71 Limited immunity for employee reference checks.
- 4117 Public sector collective bargaining law.
- 4167.13 Unlawful to retaliate against employee who files OSHA charge; separate appeal rights to civil service commission or SPBR.
- 5903.02 Unlawful to fire public employee who is called to military duty.
- 5906 State FMLA - Military Leave

Public Sector Employment

- **Constitutional Roots Affecting Public Employment**
 - First, Fourth, Fifth, and Fourteenth Amendments to the U.S. Constitution
- **Contractual Roots Affecting Public Employment**
 - Contracts under R.C. 4117 (collective bargaining)
 - (see also R.C. 2711) (arbitration)
 - Individual contracts of employment
 - (see R.C. 737.05, R.C. 3319, R.C. 5126)
 - State and federal grant "contracts"
 - (see 28 CFR §42.301, relating to special requirements under COP grants)

Definitions 101

The Terminology of Public Sector Employment

- **Classified / Unclassified**
 - Property Interest
 - Liberty Interest
 - "Name-Clearing"
- **Exempt / Non-exempt / Non-Covered (FLSA)**
- **Exempt / Non-exempt (R.C. 4117)**
- **"At-Will"**

Fundamentals of an HR System

- **Employee Handbook/Personnel Policy Manual**
 - Employee Handbooks are also often called Personnel Policy and Procedures Manuals. The Handbook/Manual is a statement of the personnel policies of the Employer and how related business is to be conducted. These essential documents serve to set forth an Employer's expectations for its employees. It is important that your Handbook/Manual be clear and unambiguous as it can serve as "notice" when defending employment actions.
 - "Must Have" Policies
 - Disclosures/Disclaimers (e.g. at-will, no authority to bind, complete agreement); Discrimination/Harassment and Reporting Procedure; ADA/Reasonable Accommodation; Workplace Violence; FMLA; Discipline; BWC; Leave/Benefits; Internal Complaint

Fundamentals of an HR System

- Employee Handbook/Personnel Policy Manual

- Policies for Consideration

- Social Media
 - Technology/Computer Use
 - Attendance/Tardy
 - Cell Phone
 - Use of Employer Vehicles
 - Travel/Reimbursement

Fundamentals of an HR System

- Position Descriptions/Class Specifications

- A position description (PD) is a structured document assigning work to a specific position as it is expected to be performed after customary orientation and training. The PD should accurately and completely describe the essential functions that are assigned and performed.
 - A Class Specification (Class Spec) is a general description of a job class detailing examples of duty-grouped tasks and representing a category of jobs similar enough to carry the same title, pay range, and minimum qualifications for employment.
 - Important for all personnel actions (e.g. layoff, compensation, performance evaluation, ADA accommodation, discipline, etc.)
 - Neither are static documents and should be revised as jobs morph.

Fundamentals of an HR System

- Performance Evaluations

- Performance evaluations are a critical part to the development of every organization. They should be performed at a minimum on an annual basis. Evaluations serve to hold individuals accountable for the duties they are assigned to perform.
 - A well-drafted performance evaluation should be "behaviorally anchored" in order to be legally defensible.
 - Promotion
 - Development
 - Discipline
 - Compensation (Merit Pay)

Fundamentals of an HR System

- Compensation System
 - A well-developed compensation system is critical to an Employer's ability to recruit and retain employees. A standard system can also serve as an Employer's first line of defense against discrimination charges.
 - Internal and External Pay Equity
 - Old adage – 25-year employee (in the same position) hired in at \$10.00 and has received 3% compounding each year. Does this compensation exceed the position value?
 - Different Types
 - Step Plan
 - Min, Mid-point, Max
 - Merit
 - Longevity

Fundamentals of an HR System

- Hiring and Selection
 - A proper hiring and selection process can streamline all the documentation involved which can sometimes prove to be tedious. Uniform methods can also insulate an employer from possible discrimination claims. Because choosing the "right" candidate is so important in the public sector (hard to get rid of a public employee once they complete a probationary period), it can save money and time on the back end.
- Job Posting Policies – Standard policy for asking candidates to apply for jobs.
- Structured Interviews – Consistent, job-related questions asked to each applicant set (or sub-set).
- Validated Tests and Assessment Centers

Fundamentals of an HR System

- Training
 - Perhaps the most important and over-looked aspect of a Sound HR System is training.
 - Why Train?
 - Educate
 - Increase Efficiency
 - Career Development
 - Mandated (e.g., Discriminatory Harassment, Safety Training, Certifications)
 - Legal Defense

Labor Relations

- Ohio's Collective Bargaining Law - R.C. 4117
- Many of the "fundamentals" discussed earlier impact the administration of a labor agreement. Nearly every aspect of labor relations is somehow integrated into human resources.
- Do we have policies, position descriptions, class plan, etc. in place?
- What do we need to bargain?

Key Concerns for HR in 2012

- Limiting Liability
 - Practice Point: This begins BEFORE an employee is ever hired!
 - On the front end.
 - Thurman v. Daimler-Chrysler, 397 F.3d 332 (6th Cir.)
 - Going out the door.
 - Cole v. Temple Israel, et al., 2007-Ohio-245 (9th App. Dist)

Key Concerns for 2012

- Social Media
 - Facebook, MySpace, Twitter, LinkedIn, Google+, Blogs
- Regulating On/Off-Duty Conduct
- Is it protected speech? (*Pickering*, *Garcetti*, NLRB, SERB)
- How did we obtain the material? (*Konop*, *Pietrylo*)
- Training – A Policy of Prevention

Key Concerns for 2012

- Hiring and Selection
 - What are the costs of hiring the wrong employee?
 - What are our decisions based upon?
 - Essential functions of the Position
 - Documenting the Process
 - Obtaining a Waiver from those Interviewed
- Civil Service Reform – HB 153
 - Isabel v. Memphis, 404 F.3d 404 (6th Cir. 2005)

Key Concerns for 2012

- Dealing with the ADA Amendments
 - Focus Now Shifts Away from “is it a Disability or Not”, to an interactive dialogue with the affected Employee.
 - Position Descriptions Updates/Analysis
 - Adding objective standards for performance- (i.e. keystrokes; error rates; etc.)
 - Cutting of the expansion of claims based on:
 - “personality disorder”—ability to work with the public
 - “attention deficit disorder”—ability to work in an area with traffic/distraction
 - Other questionable, nebulous claims.
 - A reasonable accommodation does not eliminate an “essential function.”; Reeves v. Swift Transportation, 446 F.3d 6376

Questions???



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