

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO ex rel.	:	
Schiffbauer	:	
	:	
Relator,	:	Case No. 2014-0244
	:	
v.	:	Original Action in Mandamus
	:	
Larry Banaszak, et al.	:	
	:	
Respondents.	:	

AMICUS MEMORANDUM IN SUPPORT OF
RELATOR'S OPPOSITION TO MOTION TO DISMISS

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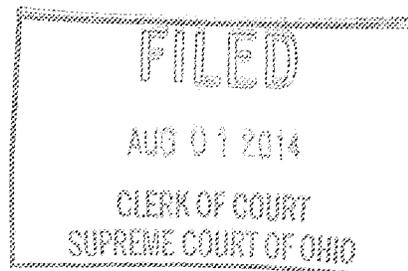
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**AMICUS MEMORANDUM IN SUPPORT OF
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I. INTRODUCTION

The Otterbein University Police Department (Otterbein Police) employs sworn, state-certified peace officers vested with the plenary police power to search and confiscate property, detain and arrest, and use deadly force. These officers have jurisdiction to exercise these plenary police powers over students, visitors, and employees on Otterbein property, and in the City of Westerville through a mutual aid agreement. Police officers exercise some of the most intrusive and consequential powers wielded by government, and their plenary authority to do so is granted uniquely from the sovereign power of the state. Otterbein University itself is not a public entity, and its records as a private educational institution are not available to the public under Ohio’s Public Records Act. However, where statutorily empowered Otterbein police officers exercise their plenary police powers, records relating to the exercise of this power must be available to the public to ensure accountability.

II. FACTS AND PROCEDURAL POSTURE

The Otterbein Police Department is authorized by Ohio statute as a campus police department pursuant to R.C. 1713.50(B), and each police officer appointed to the department,

“is vested, while directly in the discharge of that member's duties as a police officer, with the same powers and authority that are vested in a police officer of a municipal corporation or a county sheriff under Title XXIX of the Revised Code and the Rules of Criminal Procedure, including the same powers and authority relating to the operation of a public safety vehicle that are vested in a police officer of a municipal corporation or a county sheriff under Chapter 4511. of the Revised Code. Except as otherwise provided in this division, members of a campus police department may exercise, concurrently with the law enforcement officers of the political subdivisions in which the private college or university is located, the powers and authority granted to them under this division in order to preserve the peace, protect persons and property, enforce the laws of this state, and enforce the ordinances and regulations of the political subdivisions in which the private college or university is located, but only on the property of the private college or university that employs them. The board of trustees of a private college or university may enter into an agreement with any political subdivision pursuant to which the members of the campus police department of the college or university may exercise within that political subdivision, but outside the property of the college or university, the powers and authority granted to them under this division. A member of a campus police department has no authority to serve civil process.” (emphasis added)

All police officers, including those employed by the Otterbein Police Department, are subject to the basic training, peace officer certification, firearms requalification, continuing professional training, administrative action for decertification, and other requirements administered by the Ohio Peace Officer Training Commission within the Ohio Attorney General's Office. To the best of Amicus Attorney General's knowledge, the Otterbein Police Department has entered into an agreement with the City of Westerville, as authorized in R.C. 1713.50(C), pursuant to which the members of the Otterbein Police Department may exercise within Westerville, but outside the property of Otterbein University, their police powers and authority.

Relator Anna Schiffbauer made a public records request for specified Otterbein Police Department “criminal reports” which would include, at the least, initial criminal incident reports subject to the requirements of the Ohio Public Records Act. Otterbein Chief of Police Larry

Banaszak, through Robert Gatti, Vice President and Dean for Student Affairs, responded that the request was denied because records documenting the law enforcement operations of the Otterbein Police Department are not records of a “public office.” The records sought by Ms. Schiffbauer document the police department’s role as a police agency enforcing the criminal laws, and do not document any non-law enforcement tasks that the Otterbein University Board of Trustees may assign to officers or to other employees of the Otterbein P.D. It is only this class of law enforcement documents that is at issue before the Court, and the only class of documents addressed by the Attorney General in this brief.

This case was referred to mediation following the filing of Ms. Schiffbauer’s Petition, and subsequently returned to the regular docket. Respondents Banaszak and Gatti have now moved to dismiss the petition on the sole ground that the Otterbein P.D. is neither a “public office,” nor the functional equivalent thereof, or a “person responsible for public records,” all of which are subject to the requirements of the Ohio Public Records Act.

III. ARGUMENT

A. The Otterbein Police Department is a Statutory Public Office

The statutory definition of a public office is found at R.C. 149.011:

- (A) “Public office” includes any state agency, public institution, political subdivision, or other organized body, office, agency, institution, or entity established by the laws of this state for the exercise of any function of government.

Regardless of organizational affiliation, every police department in Ohio is an “organized body, office, agency, institution, or entity established by the laws of this state for the exercise of [a] function of government,” namely, the function of enforcing the criminal laws and maintaining the peace within its jurisdiction. In *Oriana House, Inc. v. Montgomery*, the Court’s analysis of statutory “public office” status under R.C. 149.011(A) was limited to the narrow claim that

Oriana House met the specific term, “public institution.” 110 Ohio St.3d 456, 2006-Ohio-4854, *syllabus* 2, ¶¶ 16-20. However, *all* qualifying terms of the R.C. 149.011(A) definition must be given effect. Separately from the term “public institution,” the General Assembly includes in the definition other, non-public “institutions” with this phrase: “... *organized* body, office, agency, *institution*, or entity *established by the laws of this state for the exercise of any function of government.*” The term “public” does not apply to the entire definition. Indeed, this Court has noted that “[a]n entity need not be operated by the state or a political subdivision thereof to be a public office under R.C. 149.011(A).” *State ex rel. Freedom Comm’n., Inc. v. Elida Cmty. Fire Co.*, 82 Ohio St.3d 578, 579, 697 N.E.2d 210 (1998). Doubt as to the “public” status of any entity should be resolved in favor of finding it subject to the disclosure statute, *State ex rel. Strothers v. Wertheim*, 80 Ohio St.3d 155, 156, 684 N.E.2d 1239 (1997). The above terms in their commonly used meanings easily encompass an organized police agency established by R.C. 1713.50(C) to exercise, “the same powers and authority that are vested in a police officer of a municipal corporation or a county sheriff under Title XXIX of the Revised Code and the Rules of Criminal Procedure.” The Otterbein P.D. is a statutory public office.

Respondents assert, without citation to law, that the Otterbein P.D. was only established “under,” but not “by,” the laws of Ohio. MTD, p. 6. However, as with the police powers vested in the officers of a public college or university under R.C. 3345.04, or in local and other police forces that may be, but do not have to be, established under various provisions of the Revised Code,¹ the police powers of the Otterbein Police were not “established by” the corporate

¹ See R.C. 109.71(A) for a listing of the current state, local, and private agency peace officers established in Ohio.

authority of Otterbein University, but only by the state's delegation of its sovereign police authority to its police officers through R.C. 1713.50.

Therefore, under the plain language of R.C. 149.011(A), the Otterbein P.D. *is* a public office when exercising plenary police powers, and thus subject to the Ohio Public Records Act and other statutes applicable to public offices. Even were R.C. 149.011(A) ambiguous as to the status of any fully empowered police department as a public office, an interpreting court would consider the consequences of a particular construction of the statute, R.C. 1.49(E), the object to be obtained, R.C. 1.49(A), and that a just and reasonable result was intended, R.C. 1.47(C). These considerations all affirm that records of the Otterbein P.D. that document the exercise of "the same powers and authority that are vested in a police officer of a municipal corporation or a county sheriff under Title XXIX of the Revised Code and the Rules of Criminal Procedure," R.C. 1713.50(C), are records of the activities of a public office.

B. The Otterbein Police Department is the Functional Equivalent of a Public Office When its Peace Officers Exercise Their Plenary Police Powers

Even were the Court limited to considering whether Otterbein Police Department is the "functional equivalent" of a public office, the factors set out by this Court in *Oriana House* compel the conclusion that a fully empowered police department at a private university is the functional equivalent of a "public institution," when it is exercising plenary police powers. In fact, in the case of campus police departments, there is no need to analogize to dissimilar functions of other public offices in different contexts, as there is a close match between the Otterbein P.D. and the police departments established at public colleges and universities under R.C. 3345.04. These departments, also discretionarily created by their boards of trustees, are similarly vested with plenary police powers and are subject to the requirements of the Ohio

Public Records Act for the same law enforcement records which Ms. Schiffbauer requested from the Otterbein Police Department.

1. The Otterbein Police Department performs a quintessential government function

The records at issue in this case² are reports of police incident and investigation reports, created by an organized police department exercising the public function of enforcing the criminal laws and keeping the peace. The statute which gives the Otterbein Police Department its plenary police powers, R.C. 1713.50, could not be more comprehensive in establishing its equivalence to public police, and even Sheriffs', departments:

“(C) Each member of a campus police department appointed under division (B) of this section is vested, while directly in the discharge of that member’s duties as a police officer, with the same powers and authority that are vested in a police officer of a municipal corporation or a county sheriff under Title XXIX of the Revised Code and the Rules of Criminal Procedure,”

This statutory empowering language is clear and unambiguous establishment of the functional equivalence of a campus police department with the functions and authority of municipal police departments and county sheriffs.

In accord, the Sixth Circuit Court of Appeals has held that where private actors enjoy virtually the same power as public police officers, they are performing a public function. *Romanski v. Detroit Entm't, L.L.C.*, 428 F.3d 629, 636-37 (6th Cir. 2005), citing *Henderson v. Fisher*, 631 F.2d 1115 (3d Cir. 1980) (university policemen with plenary police authority throughout the university’s campus); see also *Hayward v. Cleveland Clinic Found.*, 878 F. Supp. 2d 860, 863 (N.D. Ohio 2012) (“Although the Cleveland Clinic is a private, non-profit hospital,

² In other forums, Otterbein University has stated that it does not want records of faculty disciplinary investigations to be swept into the category of public records just because Otterbein may ask its police employees to conduct such investigations. Such records are not at issue here, and the Attorney General takes no position in this brief on such records.

the Clinic operates its own police department pursuant to Ohio Revised Code § 4973.17 and a written agreement between the Cleveland Clinic Foundation and the City of Cleveland. Thus, even though the Clinic is a private concern, their police officers are effectively state actors.”), rev’d in part on other grounds, No. 12-3132, 2014 WL 3558095 (6th Cir. July 21, 2014). The federal decisions confirm the public function of fully empowered police officers, as distinguished from the limited powers of a private security operation.

Contrary to Respondents’ characterization of the Otterbein Police as mere “campus security,” MTD, pp. 8-9, the Otterbein Police Department’s official job description states that an Otterbein police officer’s duties include the full spectrum of police enforcement, investigatory, and patrol functions. (Copy attached.)³ The Otterbein P.D. is a fully empowered police department, and the records of law enforcement functions at this level are not private records—they are the people’s records. *State ex rel. Nat. Broad. Co., Inc. v. City of Cleveland*, 38 Ohio St.3d 79, 81, 526 N.E.2d 786 (1988).

This Court’s determination of whether an agency is the functional equivalent of a public office is not dependent on any one factor. *Oriana House*, 110 Ohio St.3d at ¶ 23 citing *Bd. of Tr.s of Woodstock Academy v. Freedom of Info. Comm.*, 181 Conn. 544, 555-56, 436 A.2d 266 (1980) (“A case by case application of the factors noted above is best suited to ensure that the general rule of disclosure underlying the state’s [Freedom of Information Act] is not undermined by nominal appellations which obscure functional realities.”). However, Amicus respectfully suggests that plenary police power is so fundamental to public safety, personal liberty, and law enforcement accountability that the first factor, public function, is in this case sufficient by itself

³Otterbein University Police Department, *Police Officer Job Description*, <http://www.otterbein.edu/Files/pdf/Police/Police%20Officer%20-%20Job%20Description.pdf> (last accessed August 1, 2014).

to establish clear functional equivalence. *Oriana House* was a 4-3 decision, and Chief Justice Moyer penned a vigorous dissent to the outcome reached by the majority in its application of the factors to an incarceration facility program with at least some outside oversight. The application to the case at bar is far more striking and consequential for the accountability of a police force that is solely controlled and overseen by a private university board of trustees. This factor alone compels a finding of functional equivalence.

2. The Otterbein P.D. Department is subject to government involvement and regulation

Respondents state that the level of government funding for the Otterbein Police Department is low, and for the purposes of this memorandum Amicus Attorney General accepts that representation. This is but one factor, however, and is not dispositive.

However, Respondents' incorrectly deny that the Otterbein Police are subject to oversight or access beyond the University's corporate Board of Trustees. Unlike the operations of the Oriana House incarceration facility, which were at least statutorily subject to financial and performance audits by the Auditor of State, and which were overseen by a board composed of common pleas judges, Respondents assert that in operating the Otterbein P.D. "the Board [of Trustees of Otterbein University] is truly independent," and that its "ability to hire, fire, and assign duties to its police officers demonstrates that [the Board of Trustees] has day-to-day control of its police department." This is a position that should concern any citizen whose rights or interests are affected by the plenary police operations of a campus police department, and who wishes to access calls, reports, video, or any other record of a police department's public functions. Respondent Police Chief Banaszak is either statutorily required to produce the public records of the indisputably public functions of the Otterbein Police, or he is free to manage law

enforcement records of the Police Department only as determined by the “policies and agendas” of the Otterbein Board of Trustees. MTD, p. 12.

In reality, however, all police officers and departments are subject to “government involvement and regulation,” the third Oriana House factor. Relator Schiffbauer has correctly identified some of the training, certification, and requalification requirements that apply to all Ohio peace officers. Further, such officers are subject to continuing professional training requirements, R.C. 109.803, administrative action for decertification, R.C. 109.77(F), and other requirements under the aegis of the Ohio Peace Officer Training Commission within the Ohio Attorney General’s Office. While the relationship of the Attorney General to the state’s law enforcement agencies should not be exaggerated as pervasive “supervision” or “control,” it is indisputable that Ohio police departments are subject to significant government involvement and regulation. Respondents’ attempt to limit this factor to the straw man of only “whether a government agency controls the day-to-day operations of the Otterbein P.D.,” MTD, pp. 11-12, should be rejected.

3. The Otterbein Police Department was created by the government and could not exist independent of the government

The fourth factor considered in functional equivalence is whether an entity was “created by the government,” not, as Respondents assert, whether it was created “by a governmental entity.” MTD, p. 13. Unlike a hospital or an incarceration facility, a plenary police department cannot exist independently of government establishment. Otterbein did not first privately create a police department, and then shop around to contract or partner with government offices for its services. The sovereign power of the state must flow in the first instance through the statutorily enabled, exclusive process for establishment of a campus police force of government-certified peace officers under R.C. 1713.50.

4. The effect of the establishing of the Otterbein P.D. has been to avoid the requirements of the Public Records Act for records of the exercise of plenary police powers within its jurisdiction

The fifth *Oriana House* factor (the disjunctive “or” in the fourth factor effectively creates two separate factors) is whether an entity was created to avoid the requirements of the Public Records Act. Prior to Otterbein University establishing the Otterbein P.D., only the Westerville Division of Police and the Franklin County Sheriff's Office were vested with plenary police powers on the campus of Otterbein University. At that time, the records of Otterbein-related incident reports, investigations, and arrests kept by those agencies were subject to the requirements of the Public Records Act. Following the creation of the Otterbein P.D., the same class of records of police activity involving the Otterbein campus are now withheld.

When exercising plenary police powers, the Otterbein Police Department is clearly and unequivocally the functional equivalent of public university and other police departments under the collective factors set out in *Oriana House*, although the weight of the public function factor, evidenced by the comprehensive powers vested through R.C. 1713.50, is sufficient alone to reach this conclusion.

C. The Otterbein Police Department is an Institutional “Person Responsible for Public Records”

Associated with every public office are one or more individuals either expressly charged by statute, or implicitly tasked by custom and usage, with being a “person responsible for public records.” This term appears at R.C. 149.43(B)(1) in connection with the obligation to produce copies of public records. A private entity is also an institutional “person responsible for public records” if it meets this test: “(1) it must prepare the records in order to carry out a public office's responsibilities, (2) the public office must be able to monitor the private entity's performance, and (3) the public office must have access to the records for this purpose.” *State ex*

rel. Cincinnati Enquirer v. Krings, 93 Ohio St.3d 654, 657, 758 N.E.2d 1135 (2001). There is no requirement that the obligation to prepare records be due to a contractual relationship.

The Otterbein P.D. acts as one component of the criminal justice system, and must prepare records of incidents reported, investigations, arrests, and other activities in order that prosecutors, courts, and sister agencies can carry out their responsibilities in the justice system. The relevant prosecutor's offices, at the least, monitor and evaluate the performance of the police departments whose cases they charge, reject, present to grand jury, or otherwise process, and prosecutors have access to the police department's records for these purposes.

In addition to its status as a public office and the functional equivalent of a public office, the Otterbein P.D. is an entity "responsible for public records" needed by other offices. Those public records include, at the least, records of reported crime, investigation records, and arrest records.

D. Privacy and other issues in the management of police records under the Ohio Public Records Act are fully addressed under existing law

Concerns for privacy necessarily exist in a balance with the rights of families who are entitled to request records of all levels of crime in the location where their children attend school, or requests by persons who plan to visit the area, or even persons who want to know if they have been reported to the campus police for an alleged offense. There is no special right of a police department at any school campus to withhold information about criminal and police activity that is a public record in other police and sheriffs' departments.

Ohio has evolved a thorough and tested body of statutes and case law governing the production and withholding of confidential law enforcement investigative work product, residential and familial information of peace officers, the identities of uncharged suspects and confidential information sources, and other sensitive records kept by all police agencies in the

state. There is no legal or policy reason why a statutorily empowered campus university police department should not have the records of its public law enforcement function subject to the same scrutiny, and protections, as other police departments.

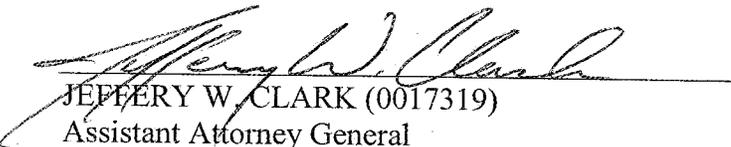
IV. CONCLUSION

The Otterbein Police Department is vested with the quintessential public function of plenary police power to enforce the laws and preserve the peace. Like other law enforcement agencies, it clearly meets the definitions of a public office, the functional equivalent of a public office, and an institutional person responsible for public records, any one of which renders its law enforcement records subject to the requirements of the Public Records Act. This status is clear, and the consequences of any Ohio police department operating to the contrary are serious and potentially irreparable.

The Attorney General respectfully requests this Court to overrule Respondents' motion to dismiss, and issue a peremptory writ of mandamus.

Respectfully submitted,

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CERTIFICATE OF SERVICE

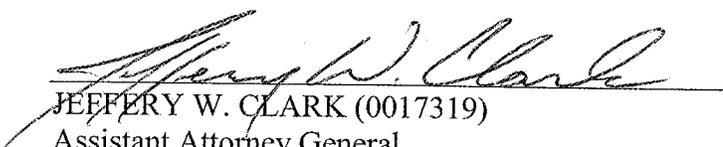
I hereby certify that the foregoing *Memorandum in Opposition to Motion to Dismiss* was served by first class mail via the U.S. Postal Service on August 1, 2014, upon the following:

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OTTERBEIN UNIVERSITY POLICE DEPARTMENT POLICE OFFICER JOB DESCRIPTION

The Otterbein Police Department accepts applications for the position of Police Officer based on position availability. Potential candidates are encouraged to view all application documents as well as the minimum qualifications before submitting an application.

ESSENTIAL DUTIES AND RESPONSIBILITIES: include the following. Other duties may be assigned.

Enforcement: Officers will enforce all local, state and federal criminal laws, as well as University judicial rules and regulations; traffic and parking regulations; officers will obtain warrants, apprehend, arrest, search, pat down, handcuff, pursue, physically secure resisting suspects with the appropriate amount of force. Officers will safely transport prisoners and professionally testify in criminal court or University judicial hearings as required.

Investigation: Officers will investigate criminal violations, judicial violations, traffic crashes, and citizen complaints. Officers will protect crime scenes and preserve evidence.

Patrol: Officers will patrol on foot, in motor vehicles including University owned golf carts. They will protect persons and property and provide assistance as needed. Officers will lock and unlock buildings, provide escorts for citizens on campus, manage traffic and parking, and report any safety or security concerns to supervisors and appropriate campus personnel.

Operation and Maintenance of Police and Campus Equipment: Officers will correctly maintain and safely operate patrol vehicles, and all departmental equipment including but not limited to: firearms, tasers, pepper spray, batons, handcuffs, radios, computers, copiers, fax machines, telephones, and first aid equipment. Officers will also correctly operate the campus emergency notification system, the Clery notification system, all panic alarm systems, fire panel systems, WOCC TV system, and camera system on campus. Officers will enter work orders as needed.

Language and Written Communication: Officers will demonstrate competency in verbal and written communications with all constituencies; will use proper spoken English, grammar, spelling and punctuation on all University documents including but not limited to reports, tickets, daily logs, and property/person receipts.

General Conditions and Work Environment: Officers must be able to occasionally work overtime, change shifts, work special duty events, be called in while off duty for a crisis on campus, perform dispatch or administrative assistant responsibilities, fire prevention responsibilities, train new officers and student workers, attend meetings, research and conduct safety presentations on campus. Officers shall positively interact, enhance relations, and represent the University with local law enforcement and fire protective agencies.

Training Requirements: Officers will fully participate in required training operations to include any methods of instruction such as, but not limited to: lecture, practical hands-on training including first aid, self-defense, firearms, taser, pepper spray, tactical training, and computer based training. Instruction may be on or off site.

The above statements reflect the general duties considered necessary to perform the essential functions of the position and shall not be considered a detailed description of all duties and responsibilities that may be inherent in the position of an Otterbein University Police Officer.



OTTERBEIN UNIVERSITY POLICE DEPARTMENT POLICE OFFICER JOB DESCRIPTION



SUPERVISORY RESPONSIBILITIES: Police Officers will supervise student security workers and new officers when serving as a field training officer. Patrol Officers are required to obey all lawful orders from supervisors and University officials.

QUALIFICATIONS: To perform this job successfully, an individual must be able to perform each essential duty satisfactorily. The requirements listed below are representative of the knowledge, skill, and/or ability required. Reasonable accommodations may be made to enable individuals with disabilities to perform the essential functions.

EDUCATION/MINIMUM REQUIREMENTS: Officers shall possess a minimum of a High School diploma or equivalent, pass an extensive background investigation to include a criminal history and credit check; must be at least 21 years of age, and have both eyes corrected to 20/20 vision and no color blindness; must successfully complete and meet all standards to include: academic, physical fitness, medical, psychological, and truth verification.

CERTIFICATES, LICENSES, REGISTRATIONS: Officers must possess and maintain a current Ohio Peace Officer Training Commission certificate in good standing with the State of Ohio. Must possess and maintain a valid Ohio driver's license. The current driver's license record must not reflect six points or more.

MATHEMATICAL SKILLS: Required to be able to accurately manipulate data using basic addition, subtraction, multiplications, division, skills.

REASONING ABILITY: Officers shall have the ability to establish and maintain effective working relationships in an academic and law enforcement environment. Must demonstrate sound judgment and appropriate decision making skills. Must maintain confidential information. Must demonstrate a high degree of initiative, independent judgment, and flexibility. Must be able to read and understand a map. Must be able to give and follow instructions according to established protocol.

PHYSICAL DEMANDS: Officers shall be in good physical and mental condition to make arrests and secure uncooperative/resisting violators, as well as utilize and be proficient with all the protective equipment provided by the University. Officers shall fully be able to participate and satisfactorily complete any physical training requirements as set forth by the agency. Strength demands include the ability to drag or carry human bodies in emergency situations, sit in a vehicle or stand for long periods of time, walk up and down at least 4 flights of stairs without pause. Must be able to run, stoop and bend, on an occasional basis. Must be able to sit regularly for 2-4 hours at a computer desk.

WORK ENVIRONMENT: The work environment characteristics described here are representative of those a police officer encounters while performing the essential functions of the job. Reasonable accommodations may be made to enable individuals with disabilities to perform the essential functions.

Duties are performed in a variety of settings across campus and in the Westerville, Ohio area; also exposed to environmentally controlled office conditions, as well as seasonal weather conditions including heat, cold, wind, precipitation; sound levels consist with alarm sirens; conditions present at emergency scenes including smoke, hazardous materials, various sound levels, etc.

This description is intended to indicate the kinds of tasks and levels of work difficulty that will be required of positions that will be given this title and shall be construed as declaring what the



OTTERBEIN UNIVERSITY POLICE DEPARTMENT
POLICE OFFICER JOB DESCRIPTION



specific duties and responsibilities of any particular position shall be. It is not intended to limit or in any way modify the right of any supervisor to assign, direct and control the work of employees under supervision. The use of a particular expression or illustration describing duties shall not be held to exclude other duties not mentioned that are of similar kind of level of difficulty.

Otterbein University is an Equal Opportunity Educator and Employer