

IN THE SUPREME COURT OF OHIO

**State of Ohio Ex Rel.
Northwestern Ohio Building
& Construction Trades
Council, et al.,**

Relators-Appellants,

v.

**Ottawa County Improvement
Corp., et al.,**

Respondents-Appellees.

*

* On Appeal from the Ottawa County
Court of Appeals, Sixth Appellate
District

*

* Court of Appeals
* Case No. OT-07-017

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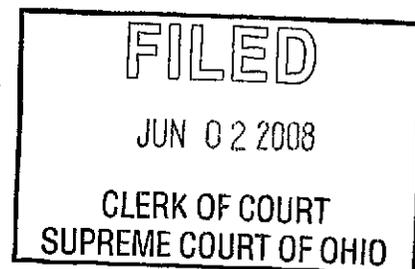
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**MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT
STATE OF OHIO EX REL. NORTHWESTERN OHIO BUILDING &
CONSTRUCTION TRADES COUNCIL, ET AL.**

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EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST

Ohio prevailing wage law has governed public works construction as the expressed public policy of this State for 77 years. In its original enactment, prevailing wage only applied to public improvements of the state and its political subdivisions.¹ But coverage was later expanded to include projects constructed, at least in part, with expenditures of quasi-public entities. Specifically, present-day R.C. 4115.03(A) was amended to include the operative language governing this case:

As used in sections 4115.03 to 4115.16 of the Revised Code

(A) "Public Authority" means * * * any institution supported in whole or in part by public funds ***and said sections apply to expenditures of such institutions made in whole or in part from public funds.***

(emphasis added).² Publicly supported institutions are defined as "public authorities." More importantly, the prevailing wage law is deemed to apply to projects funded in part by expenditures of such institutions,³ regardless of R.C. 4115.03(C).

¹ GC § 17-3 (enacted 7/27/1931).

² In 1935, Amended Senate Bill 294 first codified the above quoted language from R.C. 4115.03(A). The original language of this statute makes it clear that present-day R.C. 4115.03(C) only applies to the state and political subdivisions, and that the prevailing wage law is deemed applicable to all projects where institutions supported in part by public funds make expenditures of public funds, then under GC § 17-3 as amended in 1935, and today under R.C. 4115.03(A).

³ The original enactment said, "[t]he term 'public authority' shall also mean any institution supported in whole or in part by public funds and this act shall apply to expenditures of such institutions made in whole or in part from public funds." Am.S.B. 294.

This case thus poses a substantial question regarding the reach of prevailing wage applicability. This Court has not even touched such a scope of coverage question since its 1995 ruling in *U.S. Corrections Corp.*⁴ Prevailing wage applicability has not been squarely addressed by this Court since 1991.⁵ Indeed, this case presents a needed sequel to *Episcopal Retirement Homes*. While most public construction falls within R.C. 4115.03(C), the statute's reach goes beyond that section, and hence beyond *Episcopal Retirement Homes*.

The Appellate Court accepted this general proposition, but declined to rule that the Fellhauer Project is subject to prevailing wage law for two equally invalid reasons: (1) it held that the Ottawa County Improvement Corporation (OCIC) is not an "institution" as defined under prevailing wage law; and (2) it found that the public funds expended on the project could be isolated to acquisition of equipment or property, as opposed to "construction," and thereby evade prevailing wage applicability. In effect, the Court approved of subdividing the project into discrete contracts in order to avoid prevailing wage applicability.⁶

This case presents two unacceptable methods by which public authorities and contractors may circumvent prevailing wage law. First, the decision allows public funds to be funneled through a community improvement corporation and thereby avoid application of R.C. 4115.03(A). Second, by merely labeling public sources of project funding as purchase of equipment, property, or any number of other creative non-construction sounding categories, prevailing wage may be

⁴ *U.S. Corrections Corp. et al. v. Ohio Dept. of Indus. Relations et al* 73 Ohio St.3d 210, 1995-Ohio-102.

⁵ *Episcopal Retirement Homes, Inc. v. Ohio Dept. of Indus. Relations et al* (1991), 61 Ohio St. 3d 366.

⁶ *But see* R.C. 4115.033 and O.A.C. 4101:9-4-17(C).

avoided. This is in stark contrast to the statute, which defines “construction” in terms of the “total overall project cost.”⁷

STATEMENT OF THE CASE AND FACTS

The facts in this case are undisputed. Respondent-Appellee Fellhauer Mechanical Systems, Inc. (Fellhauer) is an electrical contractor. Fellhauer operated out of the building it leased at 2435 Gill Road in Port Clinton, Ohio. The project at issue encompasses Fellhauer’s acquisition and renovation of this building in order to expand its business operations. Approximately half of the Project was funded by public funds received from two sources. One was a loan (approximately \$300,000) from Respondent-Appellee the Ottawa County Board of Commissioners. The funds for the loan came from the Ohio Department of Development’s (ODOD) Economic Development Program, and were originally Federal Small Cities Community Development Block Grant (CDBG) funds. The other source was a loan (approximately \$36,750) from Respondent-Appellee the Ottawa County Improvement Corporation (OCIC), a non-profit public institution that is almost entirely publicly funded. The public funding totaled \$336,750, which was 48.5% of the estimated \$695,000.00 total overall project cost.

Respondents did nothing to comply with Ohio’s Prevailing Wage laws. They failed to appoint a prevailing-wage coordinator for the project, did not have the director of commerce determine the prevailing-wage rates that apply to the project, attach the prevailing-wage rates to the project’s work specifications, or print the prevailing-wage rates on the bidding blanks for the project. This is

⁷ R.C. 4115.03(B).

because respondents believed that the prevailing wage laws do not apply. Relators requested the County Prosecutor to take all legal actions necessary to bring Respondents into compliance with the prevailing wage law in regard to the Project. The Prosecutor refused.

This case was brought as a common law and R.C. § 309.13 taxpayer suit to restrain respondents' misapplication of public funds, restrain respondents' execution and performance of contracts made in contravention of law, and to enjoin affirmatively respondents to comply with the provisions of the Ohio prevailing wage law, including specifically R.C. § 4115.04(A). The Trial Court found that both funding sources were public authorities under R.C. 4115.03(A).⁸ But the Court ruled that R.C. 4115.03(C) must be met in order for prevailing wage to apply. It found that the Fellhauer project was not for the benefit of the public authority, and therefore was not "for the public authority." Therefore, the trial Court held that the prevailing wage law did not apply to the Fellhauer project.

In a 2-1 decision The Court of Appeals affirmed the Trial Court on different grounds. Contrary to the Trial Court, the Court of Appeals found that there was no institution associated with the Project. Further, the Court found that the public money was not spent on actual "construction." The Court agreed with Appellants that R.C. 4115.03(C) does not apply to expenditures by an institution supported in part by public funds because the express terms of the section only apply to the state and its political subdivisions. But the lack of an institution, in the Court's view, was fatal to Appellant's case. This appeal followed.

⁸ Indeed, the Trial Court found that OCIC is an "institution" under prevailing wage law.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1: An R.C. Chapter 1724 “Community Improvement Corporation” is an “institution” as defined by O.A.C. 4101:9-4-02(P), and a “public authority” under R.C. 4115.03(A).

As defined by O.A.C. 4101:9-4-02(P), “Institution’ means any society or corporation of a for-profit, not-for-profit, public or private character established or organized for any charitable, educational **or other beneficial purpose.**”⁹ R.C. 4115.03(A) defines “public authority” to include “institutions supported in whole or in part by public funds.” The Trial Court found that the OCIC is an institution and a public authority within the prevailing wage law. The Court of Appeals found that it was not.

The OCIC is an R.C. Chapter 1724 “Community Improvement Corporation.” R.C. 1724.01 provides that such corporations “may be organized * * * for the sole purpose of advancing, encouraging, and promoting the industrial, economic, commercial, and civic development of a community or area.” The sole purpose for which a community improvement corporation may be formed constitutes an “other beneficial purpose” within section 2(P) of the regulations as a matter of law.

Since the phrase “other beneficial purpose” is not defined in the O.A.C. section or anywhere else, the plain meaning of the words should be used.¹⁰ Webster’s defines “beneficial” as “conferring benefits: contributing to a good

⁹ O.A.C. 4101:9-4-02(P) (emphasis added).

¹⁰ See *Goodyear Tire & Rubber Co. et al. v. Aetna Casualty & Surety Co. et al.*, (2002) 95 Ohio St. 3d 512, 519.

end.”¹¹ An institution with the purpose of “advancing, encouraging, and promoting the industrial, economic, commercial, and civic development of a community or area” confers benefits to the community and contributes to the good end of the development of the area.

Therefore, the OCIC is an “institution” under the law. And because it is undisputed that the OCIC is supported by public funds, it is also an “institution supported by public funds” i.e., it is a “public authority” under the law and the Appellate Court erred when it held otherwise.

Proposition of Law No. 2: Expenditures of an institution supported in part by public funds trigger prevailing wage applicability under R.C. 4115.03(A) as a matter of law.

The OCIC is an institution supported in part by public funds that expended funds on the Project. Prevailing wage law thus applied to the Project by operation of law. R.C. 4115.03(A) provides that:

As used in sections 4115.03 to 4115.16 of the Revised Code

(A) “Public Authority” means * * * any institution supported in whole or in part by public funds ***and said sections apply to expenditures of such institutions made in whole or in part from public funds.***

(emphasis added). “Institutions supported in part by public funds” are a separate category of public authority, and are treated separately within Section 3(A) of the statute. The requirements of 4115.03(C) do not apply.

Specifically, R.C. 4115.03(C), by its express terms, applies only to the state and its political subdivisions. If the legislature intended for R.C. 4115.03(C) to

¹¹ Webster’s Third New International Dictionary (2002), 203.

apply to institutions supported in whole or in part by public funds, it would not have included the language “* * * and said sections apply to expenditures of such institutions made in whole or in part from public funds” in Section 3(A) of the statute. Therefore, any argument in this case that R.C. 4115.03(C) must be met is contrary to the wording, history, and purpose of the statute. The Project was subject to the prevailing wage by application of R.C. 4115.03(A).

Proposition of Law No. 3: An Administrative Rule, 4101:9-4-02(BB)(1)(d), cannot be construed in a way that restricts the application of the Revised Code, 4115.03(A).

R.C. 4115.03(A) extends prevailing wage coverage to projects receiving “expenditures” from publicly supported institutions. This deemed applicability is unconditional. But the Court of Appeals grafted a restriction onto “expenditures” under the statute, by interpreting O.A.C. 4101:9-4-2(BB)(1)(d) to require that the “expenditures” must be made for actual construction. This interpretation of the regulation must fail for three reasons: (1) it is more restrictive than, and hence conflicts with, R.C. 4115.03(A); (2) it ignores the fact that R.C. 4115.03(B) defines “construction” in terms of the “total overall project cost,” hence also conflicting with this section; and (3) it ignores, and hence conflicts with, the prohibition stated R.C. 4115.033 against subdividing public improvements in order to avoid prevailing wage applicability.

In *State ex rel. American Legion Post 25 v. OCRC*, this Court recently clarified the standard for when the Administrative Code improperly conflicts with the Revised Code, stating:

“Administrative rules are designed to accomplish the ends sought by the legislation enacted by the General Assembly. Therefore “[r]ules promulgated by administrative agencies are valid and enforceable unless unreasonable or in conflict with statutory enactments covering the same subject matter.” * * * However, an administrative rule may not add to or subtract from a legislative enactment. If it does, the rule clearly conflicts with the statute, and the rule is invalid.”¹²

In this case the Appellate Court’s interpretation of O.A.C. 4101:9-4-2(BB)(1)(d) conflicts with the statute in three distinct ways. It converts any “expenditures” under R.C. 4115.03(A), into only “expenditures for construction.” In doing so, it used the ordinary sense of the word “construction” rather than treating it as a term of art defined by statute. The Court’s ruling thus limits “construction” to discrete items that are less than the “total overall project cost.” Finally, its interpretation of the administrative rule permits what R.C. 4115.033 expressly prohibits: subdividing projects into component parts in order to avoid prevailing wage applicability. Therefore the Court’s interpretation must fail.

Proposition of Law No. 4: Subdividing a single public improvement project into construction and acquisition component parts to avoid prevailing wage applicability violates R.C. 4115.033 and O.A.C. 4101:9-4-17(C).

Public improvement projects are treated as a whole undertaking by the statute. Application of the thresholds is to the total overall project cost. And even the regulations acknowledge that “[a] single project which exceeds the fifteen-thousand-dollar limit as set forth in this rule shall constitute construction of a public improvement regardless of how many separate contracts are included

¹² *State ex rel. American Legion Post 25 v. Ohio Civil Rights Commission*, 2008-Ohio-1261 ¶14.

within the project.”¹³ The only exception to the prohibition against subdividing projects is where the component parts are conceptually separate and unrelated.¹⁴

Where, as here, the total overall project cost includes acquisition of property and equipment, and renovation of the property so acquired, there can be no disputing that “acquisition” and “construction” are not only conceptually related, they are directly intertwined. Though they may entail different contracts, they are not conceptually separate and unrelated in terms of the project. Therefore, the statute and regulations prohibit subdivision on this basis as an illicit circumvention of the prevailing wage law.

Separating the “acquisition” and “renovation” costs of the Project is little more than artificial, and not-so-creative, accounting. Fellhauer’s expenditures all come from or through Fellhauer. Labeling the public funds as “acquisition,” and the private funds as “construction,” does not change the fact that the money came from the same pool of funds. Once the “taint” of the public money entered Fellhauer’s general pool of funds, it is irrelevant how Fellhauer labeled the money it spent on the project, because the same funds were being expended, regardless of their label.

CONCLUSION

For the reasons discussed above, the case involves matters of public or great general interest. Appellant requests that this Court accept jurisdiction in this case so that these issues may be reviewed on the merits.

¹³ O.A.C. 4101:9-4-17(C).

¹⁴ R.C. 4115.033.

Respectfully Submitted,

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Certificate of Service

I certify that on this 30th day of May, 2008, a copy of this Notice of Appeal was sent by ordinary U.S. Mail to counsel for Appellees:

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APPENDIX

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OTTAWA COUNTY, OHIO

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
OTTAWA COUNTY

State of Ohio Ex Rel. Northwestern
Ohio Building & Construction Trades
Council, et al.

Court of Appeals No. OT-07-017

Trial Court No. 06CV637H

Appellants

v.

Ottawa County Improvement Corp., et al.

DECISION AND JUDGMENT ENTRY

Appellees

Decided: APR 18 2008

* * * * *

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Ottawa County Prosecuting Attorney, Gary A. Kohli, Nick A. Nykulak,
and Alan G. Ross, for appellees.

* * * * *

SKOW, J.

{¶ 1} Appellants, State of Ohio Ex Rel. Northwestern Ohio Building and
Construction Trades Council and State of Ohio Ex Rel. Kevin J. Flagg, appeal from an
entry of judgment by the Ottawa County Court of Common Pleas in favor of appellees,

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Ottawa County Improvement Corporation ("OCIC"), the Board of County Commissioners for Ottawa County ("the county"), and Fellhauer Mechanical Systems, Inc. ("Fellhauer"). For the reasons that follow, we affirm the judgment of the trial court.

{¶ 2} Appellee Fellhauer is a private company that provides plumbing, heating, and electrical services, and is a retailer of audio-visual and security systems. Fellhauer's business was located in a leased facility at 2435 Gill Road, Port Clinton, Ohio. When the opportunity arose for Fellhauer to purchase this leased facility and expand its operations, it applied for a loan under the county's Small Cities Community Development Block Grant ("CDBG") program to partially finance its acquisition of the land and building.

{¶ 3} CDBG program monies are federal dollars, which the United States Department of Housing and Urban Development provides to the state of Ohio for community and economic development. The Ohio Department of Development ("ODOD") disburses these federal block grant funds to units of general local government in nonentitlement areas in the state, which in turn may use such funds for economic development loans.

{¶ 4} Upon receipt of Fellhauer's CDBG loan application, Ottawa County applied to ODOD for the block grant funding. Ottawa County's grant application was approved in the amount of \$305,000, and ODOD and Ottawa County executed a written grant agreement, dated December 7, 2006, setting forth the terms of the grant.

{¶ 5} The county approved a loan to Fellhauer using these CDBG funds in the amount of \$300,000, to be repaid over a term of 15 years at an interest rate of four

percent per annum. The grant agreement expressly states, at Attachment A, that these "CDGB funds will be used for the acquisition of the land and building." In addition, paragraph number three of the grant agreement states that "[t]he Funds shall be used solely for the stated purposes set forth in this Agreement and Attachment A."

{¶ 6} In addition to the CDBG loan from the county, Fellhauer also applied for a revolving loan from appellee OCIC to further finance its acquisition of the building and property and to finance its acquisition of equipment. OCIC granted Fellhauer a revolving loan in the amount of \$36,750, to be repaid over a five-year term at an interest rate of 4.5 percent. This OCIC revolving loan was funded solely by conveyance fees on real estate transfers within Ottawa County.

{¶ 7} The total cost for the acquisition of real property for the project is estimated to be \$500,000, which, of course, is more than the amount provided by way of the CDBG loan and OCIC revolving loan combined.

{¶ 8} In addition to the acquisition of property, the Fellhauer project involves plans to renovate and improve that portion of the building containing Fellhauer's retail store. Attachment A of the grant agreement indicates that this portion of the project will cost approximately \$135,000. The evidence is undisputed that the renovation portion of the project will be funded with private monies, not connected with either the CDBG loan or the OCIC revolving loan.

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COURT OF APPEALS

{¶ 9} The total costs of the project are estimated to be \$695,000, and include in addition to the costs of real property acquisition and rehabilitation, the costs of machine and equipment acquisition and general administration.

{¶ 10} On December 14, 2006, appellants filed their verified complaint for preliminary and permanent injunctive relief and petition for temporary restraining order against appellees. By this action, appellants sought to enjoin appellees from going forward with the Fellhauer project. As grounds for the action, appellants alleged that appellees were acting in violation of the Ohio prevailing wage statute, as set forth at R.C. Chapter 4115.

{¶ 11} On January 10, 2007, a magistrate issued a temporary restraining order "to preserve the status quo between the parties pending trial on the merits." In the same order, the magistrate held that appellants appeared able to state a claim for injunctive relief because, although the project was not a public improvement as defined by R.C. 4115.03(C), it was "deemed to be construction of a public improvement within R.C. 4115.03," by operation of R.C. 166.02, and, as such, prevailing wage law would apply thereto. Appellees timely filed objections to the magistrate's decision.

{¶ 12} On January 24, 2007, a consolidated hearing on appellants' request for preliminary and permanent injunction was held before the trial court. In a judgment entry dated March 26, 2007, the trial court ruled that Ohio's prevailing wage law does not apply to the Fellhauer project. As grounds for this decision, the court found that: (1) R.C. 166 does not apply in this case; and (2) the Fellhauer project does not constitute a "public

improvement" under R.C. 4115.03(C), because it does not involve construction "by" or "for" a public authority. Accordingly, the trial court entered judgment in appellees' favor and denied appellants' request for injunctive relief. Appellants timely filed an appeal from this judgment entry, raising the following assignments of error:

{¶ 13} I. "THE TRIAL COURT ERRED IN GRANTING JUDGMENT FOR RESPONDENTS AND DENYING JUDGMENT FOR RELATORS."

{¶ 14} II. "THE TRIAL COURT ERRED IN REFUSING TO HOLD THAT THE OHIO PREVAILING WAGE LAW APPLIED TO THE PROJECT BY APPLICATION OF R.C. 4115.03(A) BECAUSE WHERE AN INSTITUTION SUPPORTED IN PART BY PUBLIC FUNDS EXPENDS PUBLIC FUNDS, THE PREVAILING WAGE IS DEEMED APPLICABLE AS A MATTER OF LAW."

{¶ 15} III. "THE TRIAL COURT ERRED IN REQUIRING THAT R.C. 4115.03(C) BE MET BY AN INSTITUTION SUPPORTED IN PART BY PUBLIC FUNDS BECAUSE BY ITS EXPRESS TERMS THAT SECTION ONLY APPLIES TO THE STATE AND ITS POLITICAL SUBDIVISIONS."¹

{¶ 16} All of the assignments of error involve the essential issue of whether the Fellhauer project is subject to Ohio prevailing wage law. Therefore, we will consider them together in this analysis. Further, because the operative facts are undisputed in this case, our review is limited to consideration of the trial court's interpretation and

¹In their reply brief, appellants withdrew a fourth assignment of error which stated: "The trial court erred in finding that Fellhauer's was not a public authority for the Project even though it was supported in part by public funds."

application of the law as applied to those facts. Such review is conducted de novo. See *Akron v. Frazier* (2001), 142 Ohio App.3d 718, 721.

{¶ 17} Ohio's prevailing wage law, which appears at R.C. 4115.03 to 4115.16, "evidences a legislative intent to provide a comprehensive, uniform framework for, *inter alia*, worker rights and remedies vis-à-vis private contractors, sub-contractors and materialmen engaged in the construction of public improvements in this state." *State ex rel. Evans v. Moore* (1982), 69 Ohio St.2d 88, 91; see, also, *Internatl. Brotherhood of Electrical Workers, Local Union No. 8 v. Vaughn Industries, Inc.*, 156 Ohio App.3d 644, 2004-Ohio-1655, ¶ 7. The primary purpose of the prevailing wage law "is to support the integrity of the collective bargaining process by preventing the undercutting of employee wages in the private construction sector." *Id.*

{¶ 18} By its terms, Ohio's prevailing wage law applies to all construction projects that qualify as "public improvements." See R.C. 4115.10(A); see, also, Ohio Adm.Code 4101:9-4-02(BB) (containing an amplified definition of "public improvement"); *Episcopal Retirement Homes, Inc. v. Ohio Dept. of Indus. Relations* (1991), 61 Ohio St.3d 366, 369; *Taylor v. Douglas Co.*, 130 Ohio Misc.2d 4, 2004-Ohio-7348, ¶ 10. In addition, in most cases a "public authority" must be associated with the project. See R.C. 4115.03(A).

{¶ 19} As applied to the instant case, R.C. 4115.03(A), relevantly provides:

{¶ 20} "(A) 'Public authority' means any officer, board, or commission of the state, or any political subdivision of the state, authorized to enter into a contract for the

construction of a public improvement or to construct the same by the direct employment of labor, or any institution supported in whole or in part by public funds and said sections apply to expenditures of such institutions made in whole or in part from public funds."

{¶ 21} Thus, under R.C. 4115.03(A), the definition of "public authority" includes, in addition to the state, political subdivisions thereof, and other units of government, "any institution supported in whole or in part by public funds."

{¶ 22} An "institution," within the meaning of the Ohio prevailing wage law, is "any society or corporation of a for-profit, not-for-profit, public, or private character established or organized for any charitable, educational or other beneficial purpose." Ohio Adm.Code 4101:9-4-02(P). An institution is "supported in whole or in part by public funds" if it receives "payment or partial payment directly or indirectly from funds provided by loans, grants, taxes, or any other type of payment from public funds of the federal government or of the state as defined in division level 4101:9 rules of the Administrative Code." Ohio Adm.Code 4101:9-4-02(H)(H).

{¶ 23} The definition of "public improvement" as applied to "institutions supported in whole or in part by public funds" is set forth as follows at Ohio Adm.Code 4101:9-4-02 (BB)(1)(d):

{¶ 24} "(B)(B) 'Public improvement' means:

{¶ 25} "(1) All buildings, roads, streets, alleys, sewers, ditches, sewage disposal plants, water works, and all other structures or works which are:

{¶ 26} "* * *

{¶ 27} "(d) Constructed in whole or in part from public funds by an institution supported in whole or in part by public funds."

{¶ 28} Thus, pursuant to Ohio Adm.Code 4101:9-4-02 (BB)(1)(d), in order for there to be a "public improvement" by an institution supported in whole or in part by public funds, there must be: (1) some kind of construction; and (2) that construction must be paid for, in whole or in part, from public funds.

{¶ 29} Appellant argues that the Fellhauer project involved "an expenditure of an institution supported in whole or in part by public funds (OCIC)" which "triggers the application of the prevailing wage law." To determine whether Ohio prevailing wage law applies to a project where a publicly funded institution expends public funds on construction, we must consider whether: (1) the entity in question is an "institution" as defined by Ohio Adm.Code 4101:9-4-02(P); (2) the institution is supported in whole or in part by public funds; and (3) the institution will make expenditures in whole or in part from public funds toward a construction project. If the answer to any of these questions is no, the prevailing wage law does not apply.

{¶ 30} To determine whether Ohio prevailing wage law applies to the Fellhauer project, we begin by asking whether Fellhauer is an institution. As stated above, an institution is defined as "any society or corporation of a for-profit, not-for-profit, public, or private character established or organized for any charitable, educational or other beneficial purpose." Ohio Adm.Code 4101:9-4-02(P). Fellhauer, as a private, for-profit

business, which was clearly not established for any charitable, educational or other beneficial purpose, simply does not meet the definition of an institution. See *id.*

{¶ 31} We note that appellants' argument, as written, is ambiguous inasmuch as it leaves unclear whether Fellhauer or OCIC is to be considered the applicable "institution" in this case. Even assuming, *arguendo*, OCIC is the purported institution, it fails to meet the definition of the term as set forth at Ohio Adm.Code 4101:9-4-02(P). Appellants, in their initial brief, refer to OCIC as a "charity." However, the evidence at trial clearly demonstrated that OCIC is a statutorily-defined "community improvement corporation" under R.C. Chapter 1724 and was created "for the sole purpose of advancing, encouraging, and promoting the industrial, economic, commercial, and civic development of a community or area." See R.C. 1724.01.

{¶ 32} As appellants have failed to establish that there was an "institution" associated with the Fellhauer project, we find, on this basis alone, that prevailing wage law does not apply.

{¶ 33} Moreover, even assuming, *arguendo*, the existence of an institution supported in whole or in part by public funds, there is nothing to suggest that either Fellhauer or OCIC expended public funds on construction. At trial, the evidence was uncontroverted that any monies for construction were going to come from Fellhauer's private resources, and not the CDBG loan or the OCIC revolving loan.

{¶ 34} Appellants argue in their third assignment of error that the trial court erred in requiring that R.C. 4115.03(C) be met by an institution supported in part by public

funds, because by its express terms that section only applies to the state and its political subdivisions. Because R.C. 4115.03(C) deals specifically with public improvements "constructed by a public authority of the state or any political subdivision thereof or by any person who, pursuant to a contract with a public authority, constructs any structure for a public authority of the state or a political subdivision thereof," appellants are presumably correct with respect to this assignment of error. Unfortunately for appellants, their success with regard to this assignment of error does nothing to alter the result in this case.

{¶ 35} For all of the foregoing reasons, appellants' first and second assignments of error are found not well-taken, and appellants' third assignment of error is found to be moot.

{¶ 36} The judgment of the Ottawa County Court of Common Pleas is affirmed. Appellants are ordered to pay the costs of this appeal pursuant to App.R. 24. Judgment for the clerk's expense incurred in preparation of the record, fees allowed by law, and the fee for filing the appeal is awarded to Ottawa County.

JUDGMENT AFFIRMED.

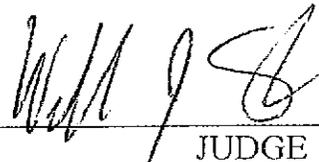
A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

State ex rel. Northwestern Ohio
Bldg. & Constr. Trades Council
v. Ottawa Cty. Improvement Corp.
C.A. No. OT-07-017

William J. Skow, J.

Thomas J. Osowik, J.
CONCUR.

Arlene Singer, J.,
DISSENTS.



JUDGE



JUDGE

SINGER, J.

{¶ 37} I would find that prevailing wage law applies.

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.