

**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

\*

\* Supreme Court  
Case No: 2008-1069

\*

\*

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

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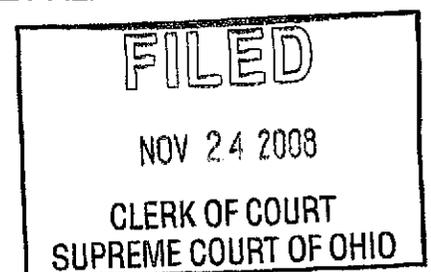
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**MERIT BRIEF OF APPELLANT STATE OF OHIO EX REL.  
NORTHWESTERN OHIO BUILDING & CONSTRUCTION TRADES  
COUNCIL, ET AL.**

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## **STATEMENT OF FACTS**

Respondent-Appellee Fellhauer Mechanical Systems, Inc. (“Fellhauer”) is a private, for-profit electrical, heating, and plumbing contractor.<sup>1</sup> Fellhauer is headquartered in Port Clinton, Ottawa County, Ohio.<sup>2</sup> Originally, Fellhauer leased its headquarters building, but in 2006 it began making plans to buy and renovate the building at an estimated cost of \$695,000.<sup>3</sup>

To pay for the acquisition and renovation, Fellhauer secured several loans from both private and public sources.<sup>4</sup> Public sources provided 48.5% of the funding.<sup>5</sup> Out of these public funds, Fellhauer received loans from Respondent-Appellee Ottawa County Board of Commissioners (“County Board”) and Respondent-Appellee Ottawa County Community Improvement Corporation (“OCIC”).<sup>6</sup>

The County Board loaned \$300,000 to Fellhauer.<sup>7</sup> The County Board received the money from the Ohio Department of Development (“ODOD”), Economic Development Program.<sup>8</sup> The ODOD received the money from the Federal Small Cities Community Development Block Grant (“CDBG”).<sup>9</sup> The grant

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<sup>1</sup> State ex rel. Northwestern Ohio Bldg. & Constr. Trades Council v. Ottawa Cty. Improvement Corp., 2008-Ohio-1852 at ¶2 (Appendix p. APPX 6).

<sup>2</sup> Id.

<sup>3</sup> Id.; See *CDBG Grant Agreement*, Verified Complaint for Preliminary and Permanent Injunctive Relief, Exhibit 2, Attachment A, REL0020 Sec. II. (Supplement p. SUPP0023).

<sup>4</sup> Id. at REL0021, Sec. IV (Supp. p. SUPP0024).

<sup>5</sup> See Id.

<sup>6</sup> State ex rel. Northwestern Ohio Bldg. & Constr. Trades Council, 2008-Ohio-1852 at ¶6 (Appx. p. APPX 7).

<sup>7</sup> Id. at ¶5 (Appx. p. APPX 5).

<sup>8</sup> Id. at ¶4 (Appx. p. APPX 5).

<sup>9</sup> Id. at ¶3 (Appx. p. APPX 5).

agreement governing this loan specifically requires the Project to be constructed in compliance with Ohio Prevailing Wage Law.<sup>10</sup>

In addition to the \$300,000 from the County Board, Fellhauer received \$36,750 from the OCIC.<sup>11</sup> The OCIC is a non-profit, community improvement corporation that is entirely publicly funded.<sup>12</sup> It was organized under R.C. Chapter 1724 for the sole purpose of “advanc[ing], encourag[ing], and promot[ing] the industrial, economic, commercial, and civic development of the County of Ottawa and the City of Port Clinton.”<sup>13</sup> The OCIC pursues these goals by “acting as the designated agency of the County of Ottawa and the City of Port Clinton, respectively, for the industrial, commercial, distribution, and research development in such political subdivisions \* \* \*.”<sup>14</sup>

Despite that nearly half of the Project’s funding was public, Respondents made no effort to comply with the Prevailing Wage Law. Specifically, they have failed to (1) appoint a prevailing wage coordinator; (2) request a determination of the applicable prevailing wage rates from the Director of the Department of Commerce; (3) attach the prevailing wage rates to the project’s work

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<sup>10</sup> *CDBG Grant Agreement, Verified Complaint for Preliminary and Permanent Injunctive Relief, Exhibit 2, REL0016* ¶13 (“In the event that the construction work to be undertaken does not lie within the purview of the Davis-Bacon Act, and neither the federal government nor any of its agencies prescribes predetermined minimum wages to be paid to mechanics and laborers to be employed in the construction work to be assisted by this Project, Grantee will comply with the provision of Ohio Revised Code Sections 4115.03 to 4115.16, inclusive, as applicable, with respect to the payment of all mechanics and laborers employed in such construction work.”) (Supp. p. SUPP0019).

<sup>11</sup> *State ex rel. Northwestern Ohio Bldg. & Constr. Trades Council, 2008-Ohio-1852* at ¶6 (Appx. p. APPX 7).

<sup>12</sup> *OCIC Articles of Incorporation, Trial Ex. 3* (Supp. p. SUPP0002), Trial Tr. at p. 48, lines 7-9.

<sup>13</sup> *OCIC Articles of Incorporation, Trial Ex. 3* (Supp. p. SUPP0013).

<sup>14</sup> *Id.*

specifications; and (4) print the prevailing wage rates on the bidding blanks for the project, all in violation of R.C. 4115.04(A). Respondents argue that the project is not subject to the Prevailing Wage Law.

When Relator-Appellants Northwestern Ohio Building and Construction Trades Council and Kevin Flagg (collectively “Building Trades”) learned of Respondents’ failure to comply with the prevailing wage requirements, they notified the Ottawa County Prosecutor and demanded that the Prosecutor ensure compliance with the Law.<sup>15</sup> The Prosecutor did not act. Having exhausted all of its options, the Building Trades sought an injunction in the Ottawa County Court of Common Pleas requiring Respondents to comply with the Prevailing Wage Law.<sup>16</sup> The Building Trades sued as taxpayers, under the common law and R.C. § 309.13. The court granted a Temporary Restraining Order to preserve the status quo pending the consolidated hearing.<sup>17</sup> The trial court ruled that: (1) both the OCIC and the County Board are “institutions,” and therefore “public authorities” as defined by 4115.03(A); (2) a project must be a “public improvement” under 4115.03(C) for the Prevailing Wage Law to apply; and (3) the Fellhauer project was not a public improvement.<sup>18</sup> Thus, the trial court held that Respondents were not bound by the Prevailing Wage Law. The Building Trades appealed.

The Court of Appeals affirmed the Trial Court’s decision, but for entirely different reasons. Unlike the Trial Court, the Court of Appeals agreed with the

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<sup>15</sup> *Letter to Ottawa County Prosecutor*, Verified Complaint for Preliminary and Permanent Injunctive Relief, Exhibit 4, REL0044-REL0045.

<sup>16</sup> *State ex rel. Northwestern Ohio Bldg. & Constr. Trades Council*, 2008-Ohio-1852 at ¶10 (Appx. p. APPX 8).

<sup>17</sup> *Id.* at ¶11 (Appx. p. APPX 11).

<sup>18</sup> *Id.* at ¶12 (Appx. pp. APPX 11-APPX 12).

Building Trades that a project need not be an R.C. 4115.03(C) public improvement for the Prevailing Wage Law to apply.<sup>19</sup> But the appellate court held that (1) the OCIC is not an “institution” as defined by O.A.C. 4101:9-4-02(P),<sup>20</sup> and (2) the public funds were expended only on the purchase of property and equipment, rather than construction.<sup>21</sup> Because no institution was associated with the project, the court ruled that the Respondents need not pay the prevailing wage, nor comply with the various requirements of R.C. Chapter 4115.<sup>22</sup>

### **ARGUMENT**

The Fellhauer Project is subject to the requirements of Ohio’s prevailing wage law. The Prevailing Wage Law applies to all structures and works constructed with public funds from an institution supported in whole or in part by public funds under R.C. 4115.03(A). In these circumstances, the project need not be constructed by or for a public authority under R.C. 4115.03(C). Therefore, the lower courts erred and should be reversed.

#### **Proposition of Law No. 1: A “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).**

R.C. 4115.03(A) provides that “public authority’ means \* \* \* any institution supported in whole or in part by public funds \* \* \*.”<sup>23</sup> An institution

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<sup>19</sup> Id. at ¶34 (Appx. pp. APPX 13-APPX 14).

<sup>20</sup> Id. at ¶31 (Appx. p. APPX 13).

<sup>21</sup> Id. at ¶33 (Appx. p. APPX 13).

<sup>22</sup> Id. at ¶32 (Appx. p. APPX 13).

<sup>23</sup> R.C. 4115.03(A).

can be of a for-profit, not-for profit, public or private character.<sup>24</sup> The important characteristic of an institution is that it is organized for a “beneficial purpose.”<sup>25</sup>

The OCIC satisfies all the requirements under Sections 3(A) and 02(P) of the statute and regulations, respectively. First, it is supported in whole or in part by public funds. An organization 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.”<sup>26</sup> The State, in turn, “means the state of Ohio or any of its instrumentalities or political subdivisions \* \* \*.”<sup>27</sup> The OCIC is funded by the County Board.<sup>28</sup> The County Board is a political subdivision of the state. As such, the OCIC is supported in whole or in part by public funds.

The OCIC is also established for a beneficial purpose. The Prevailing Wage Law does not define the phrase “beneficial purpose.” As a result, the Court should interpret the phrase according to its plain meaning.<sup>29</sup> Webster’s Dictionary defines “beneficial” as “conferring benefits: contributing to a good end.”<sup>30</sup> The OCIC easily meets this definition because, by law, its sole purpose is to advance, encourage, and promote the economic, industrial, and civic development of Ottawa County and Port Clinton. Thus, the OCIC is an institution under O.A.C. 4101:9-4-02(P); and a public authority under R.C. 4115.03(A).

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<sup>24</sup> O.A.C. 4101:9-4-02(P).

<sup>25</sup> *Id.*

<sup>26</sup> O.A.C. 4101:9-4-02(HH).

<sup>27</sup> O.A.C. 4101:9-4-02(EE).

<sup>28</sup> Trial Tr. 48:7-13.

<sup>29</sup> See *Goodyear Tire & Rubber Co. v. Aetna Casualty & Surety Co.* (2002), 95 Ohio St. 3d 512, 519.

<sup>30</sup> Webster’s Third New International Dictionary (2002), 203.

**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 public funds on the Fellhauer project. Thus, R.C. 4115.03(A) requires prevailing wage compliance as a matter of law. Section 3 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.

Section 3(A) automatically applies prevailing wage requirements to construction projects receiving expenditures from institutions. There is no further requirement that Section 3(C) be satisfied. Section 3(C) only defines public improvements constructed by the state or a political subdivision. If the General Assembly intended for Section 3(C) to apply to institutions supported in whole or in part by public funds, it would not have included the language "and said sections apply" in Section 3(A). Rather, it would have amended Section 3(C) to include institutions along with the state and its subdivisions.

This is made clear by the history of the enactments. As originally enacted, Section 3 defined "public authority" only with respect to the state and political subdivisions. General Code Section 17-3 (the predecessor to R.C. 4115.03) provided:

The term "public authority," as used in this act, shall mean any officer, board or commission of the state of Ohio, or any political subdivision thereof, authorized by law to enter in a contract for the construction of a public improvement. \* \* \* The term "public improvement," as used in this act, shall include all buildings, roads,

streets, alleys, sewers, ditches, sewage disposal plants, water works, and all other structures or works constructed by the state of Ohio or any political subdivision thereof. \* \* \*.<sup>31</sup>

Because “public authority” originally only included the state or political subdivisions, “public improvement” was appropriately limited to works constructed by the state or political subdivisions. But in 1935, the General Assembly expanded the application of the Prevailing Wage Law and amended G.C. 17-3. The amendment required that construction expenditures from institutions supported in whole or in part by public funds to comply with the Prevailing Wage Law. G.C. 17-3, as amended, provided:

\* \* \*. The 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.<sup>32</sup>

This statement of prevailing wage applicability was tacked on to the end of G.C. 17-3. It was separate from both the original definition of “public authority” and the definition of “public improvement.” As such, it was intended as an independent declaration of applicability that effectively created a second class of projects subject to the Prevailing Wage Law. That is, projects by publicly supported institutions.

It was not until 1953, with the adoption of the Revised Code, that Section 3 took on the familiar form seen today. The 1953 enactment partitioned G.C. 17-3 into four different subdivisions: (A) defining “public authority;” (B) defining “construction;” (C) defining “public improvement;” and (D) defining “locality.” Now codified as R.C. 4115.03(A), the “public authority” definition was changed to

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<sup>31</sup> G.C. 17-3 (1931).

<sup>32</sup> G.C. 17-3 (1935).

include the 1935 amendment expanding prevailing wage applicability to projects receiving expenditures from publicly supported institutions. This reorganization of G.C. 17-3 made the statute more readable, but had no legal significance, in terms of placement of the 1935 “institutions” amendment. This is confirmed by the fact that the wording of Section 3 remained largely unchanged from what it was in 1935. Because the 1953 amendments were merely cosmetic, public expenditures from publicly supported institutions still require compliance with the Prevailing Wage Law.

Reading the statute in a way that requires Section 3(C) to be satisfied, renders Section 3(A)’s “said sections apply” clause meaningless. “Statutory language ‘must be construed as will give effect to every word and clause in it. \* \* \* [T]he court should avoid that construction which renders a provision meaningless or inoperative.’”<sup>33</sup> The only way to “apply” said sections, as provided in Section 3(A), is to enforce prevailing wage compliance where an institution supported in whole or in part by public funds expends those funds on a construction project. Any other interpretation would void the final clause of Section 3(A).

Further, Section 3(C) explicitly only applies to work undertaken by or for the state or a political subdivision thereof. That section provides:

(C) “Public improvement” includes \* \* \* structures or works 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

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<sup>33</sup> *D.A.B.E., Inc. v. Toledo-Lucas County Bd. Or Health* (2002), 2002 Ohio 4172 at ¶26; 96 Ohio St. 3d 250, 256, 773 N.E.2d 536, 543 (quoting *State ex. Re. Myers v. Spencer Twp. School Dist. Bd. Of Edn.* (1917) 95 Ohio St. 367, 372-73, 116 N.E. 516).

structure ***for a public authority of the state or a political subdivision thereof.***<sup>34</sup>

A plain reading of the text shows that it applies only to the works of the state or political subdivisions. Any argument that the Fellhauer Project needs to meet Section 3(C)'s requirements is contrary to the wording and purpose of the statute. This is so because the Fellhauer Project does not involve a public authority of the state or political subdivision. Rather, this project involves a publicly supported institution. Section 3(C)'s strict requirements do not apply to expenditures by publicly supported institutions. Thus, those requirements do not apply to the Fellhauer Project.

The OCIC is a publicly supported institution. And the OCIC expended public funds on the Fellhauer Project by loaning Fellhauer \$36,750. Under section 3(A), prevailing wage compliance is required, as a matter of law, on the Fellhauer Project.

**Proposition of Law No. 3: An Administrative Rule, O.A.C. 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) requires application of the Prevailing Wage Law to projects receiving expenditures of public funds from institutions. But, the Court of Appeals read a restriction into R.C. 4115.03(A) by interpreting O.A.C. 4101:9-4-02(BB)(1)(d) as requiring an institution's expenditure of public funds to be on actual construction. "However, an administrative rule may not add to or subtract

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<sup>34</sup> R.C. 4115.03 (emphasis added).

from a legislative enactment. If it does, the rule clearly conflicts with the statute, and the rule is invalid.”<sup>35</sup>

The appellate court’s interpretation conflicts with R.C. 4115.03(A) in three ways: (1) it is more restrictive than R.C. 4115.03(A); (2) its definition of “construction” is narrower than as defined in R.C. 4115.03(B); and (3) it subdivides the Fellhauer Project in violation of R.C. 4115.033. For these reasons, the standards of statutory interpretation require the reversal of the appellate court’s interpretation of O.A.C 4101:9-4-02(BB)(1)(d).

**(A) Limiting “expenditures” to include only “expenditures for physical construction” impermissibly restricts the application of R.C. 4115.03(A).**

Section 3(A) unconditionally requires prevailing wage compliance when institutions supported by public funds expend those funds on construction projects. The lower court’s interpretation requires compliance only when such expenditures are spent on actual construction. The appellate court’s interpretation of O.A.C. 4101:9-4-02(BB)(1)(d) imposes an additional element that is not required by Section 3(A). In this case, the appellate court’s “actual construction” element defeats prevailing wage applicability where it otherwise exists. In other words, the Court of Appeals’ interpretation of O.A.C. 4101:9-4-02(BB)(1)(d) restricts the application of R.C. 4115.03(A). Thus, the appellate court’s interpretation must be overturned.

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<sup>35</sup> *State ex rel. Am. Legion Post 25 v. Ohio Civil Rights Comm.*, 2008-Ohio-1262 ¶14.

**(B) Limiting “construction” from the total overall project cost under R.C. 4115.03(B) to include only physical construction work impermissibly restricts the application of R.C. 4115.03(B).**

In R.C. Chapter 4115, “construction” is a term of art. Section 3(B) defines “construction” in terms of “the total overall project cost.”<sup>36</sup> The O.A.C. mirrors the statutory definition in that it includes “total overall project cost” in its conception of “construction.”<sup>37</sup>

“Total overall project cost” includes all costs associated with the project. The Fellhauer Project was estimated to cost \$695,000. This estimate included costs for acquisition and renovation of the premises, as well as the purchase and installation of machinery and equipment.

The Court of Appeals understood “construction” as being only *actual physical construction work* on the Fellhauer building. The appellate court’s definition does not consider “construction” as the total project, as defined by R.C. 4115.03(B). The court’s narrower interpretation subtracts from the legislative enactment and must be overturned.

**(C) Interpreting O.A.C. 4101:9-4-02(BB)(1)(d) in a way that subdivides the total overall project cost into discrete component parts violates R.C. 4115.033.**

Construction projects must be taken as a whole. In other words, it is impermissible to subdivide a project into component parts in order to evade the application of the Prevailing Wage Law.<sup>38</sup> But, the appellate court’s interpretation of “construction” as actual construction work subdivides the Fellhauer Project

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<sup>36</sup> R.C. 4115.03(B).

<sup>37</sup> O.A.C. 4101:9-4-02(G).

<sup>38</sup> R.C. 4115.033; O.A.C. 4101:9-4-17(C).

into two component parts. One is the actual renovation work; and the other is the rest of the project.

When the project is subdivided in this way, it looks as if public funds are not expended on “construction.” And although Fellhauer did not plan on using public funds on actual construction work, Fellhauer did set aside public funds for the purchase of the property, machinery and equipment costs, and costs of general administration. If the Court were to focus solely on actual construction costs, it would effectively isolate necessary and substantial publicly funded portions of the project from privately funded portions. But, the Prevailing Wage Law prohibits such subdividing. Thus, the appellate court’s interpretation of construction as actual construction must be overturned.

**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).**

Just as the Court of Appeals cannot, through regulatory interpretation, subdivide the Fellhauer Project, Fellhauer and the OCIC cannot, in fact, subdivide the project. Rather, to determine prevailing wage applicability, the project as a whole must be considered.<sup>39</sup> A single project can exceed the threshold level, “regardless of how many separate contracts are included within the project.”<sup>40</sup>

Regardless, Fellhauer and the OCIC divided the project into four component parts. The components are: (1) acquisition of the property; (2)

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<sup>39</sup> R.C. 4115.033; O.A.C. 4101:9-4-17(C).

<sup>40</sup> O.A.C. 4101:9-4-17(C).

renovation of the building; (3) the purchase of machinery and equipment; and (4) the costs of general administration. Then, Fellhauer and the OCIC allocated spending across these components based on the source of the funding. Specifically, they diverted public money away from the actual construction costs.

By doing this, Fellhauer hoped to escape the prevailing wage requirements. But, all of these costs are project costs. To segregate actual construction costs from non-construction costs in order to avoid the application of the Prevailing Wage Law, is an impermissible subdivision of the project. R.C. 4115.033 provides that “no public authority shall subdivide a public improvement project into component parts or projects, the cost of which is fairly estimated to be less than the threshold levels \* \* \*.”<sup>41</sup> Fellhauer and the OCIC’s subdivision subverts the legislature’s intent by isolating public money and thereby rendering the threshold limits inapplicable.

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 finds 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 public funds entered Fellhauer’s general pool of funds, it is irrelevant how Fellhauer labeled the money it spent on the Project. Regardless of their label, the same funds were being expended.

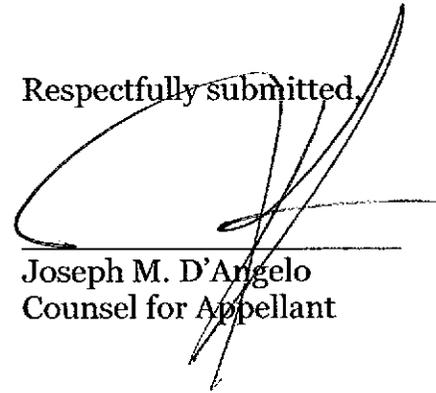
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<sup>41</sup> R.C. 4115.033; See O.A.C. 4101:9-4-17(C).

**CONCLUSION**

For all of the reasons discussed above, the decision of the Court of Appeals should be reversed.

Respectfully submitted,

A large, stylized handwritten signature in black ink, appearing to be 'J. D'Angelo', is written over the typed name and title.

Joseph M. D'Angelo  
Counsel for Appellant

**Certificate of Service**

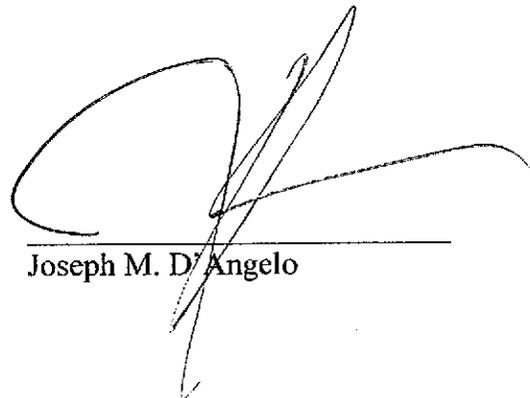
I certify that on this 21<sup>st</sup> day of November, 2008, a copy of this Merit Brief of Appellant State of Ohio ex rel. Northwestern Ohio Building and Construction Trades Council, et al. was sent by ordinary U.S. Mail to counsel for Appellees:

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Joseph M. D'Angelo

# **APPENDIX**

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IN THE SUPREME COURT OF OHIO

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

\*  
\*

08-1069

**And**

\*

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

**State of Ohio Ex Rel. Kevin J. Flagg**

\*

Relators-Appellant,

\*

v.

\*

**Ottawa County Improvement Corp.,**

\*

Court of Appeals  
Case No. OT-07-017

**And**

\*

**Board of County Commissioners,  
Ottawa County, Ohio**

\*

\*

**And**

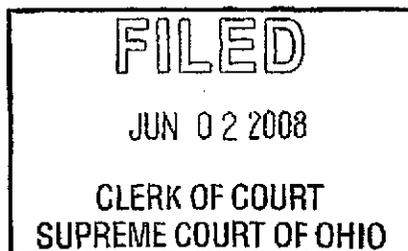
\*

**Fellhauer Mechanical Systems, Inc.**

\*

Respondents-Appellee.

\*



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NOTICE OF APPEAL OF APPELLANT STATE OF OHIO EX REL.  
NORTHWESTERN OHIO BUILDING & CONSTRUCTION TRADES COUNCIL, ET  
AL.

---

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OTTAWA COUNTY BOARD OF COMMISSIONERS**

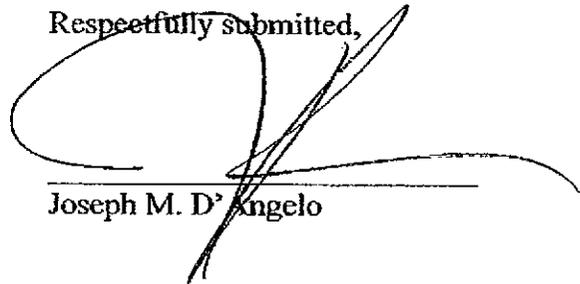
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Notice of Appeal of Appellant State of Ohio ex rel. Northwestern Building &  
Construction Trades Council, et al.

Appellant Northwestern Building & Construction Trades Council and Kevin Flagg hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Ottawa County Court of Appeals, Sixth Appellate District, entered in Court of Appeals case No. OT-07-017 on April 18, 2008.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Joseph M. D'Angelo', is written over a horizontal line. The signature is stylized with a large loop on the left and a long, sweeping tail on the right.

Joseph M. D'Angelo

Certificate of Service

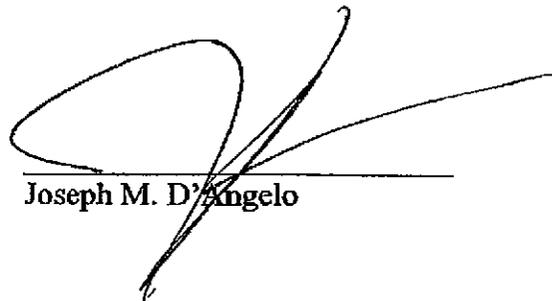
I certify that on this 30<sup>th</sup> day of May, 2008, a copy of this Notice of Appeal was sent by ordinary U.S. Mail to counsel for Appellees:

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Joseph M. D'Angelo

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APR 18 2008

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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

\*\*\*\*\*

Joseph M. D'Angelo, for appellants.

Vincent Atriano, David S. Farkas, Matthew L. Sagone, Mark E. Mulligan,  
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,

VOL 0296041

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.

VOL 029 PG 043

JOURNALIZED  
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."<sup>1</sup>

{¶ 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

---

<sup>1</sup>In 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.

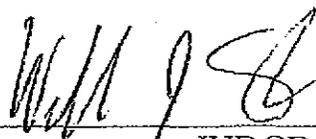
A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

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>.

LEXSTAT ORC ANN. 1724.01

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\*\*\* ANNOTATIONS CURRENT THROUGH SEPTEMBER 1, 2008 \*\*\*

\*\*\* OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH NOVEMBER 11, 2008 \*\*\*

TITLE 17. CORPORATIONS -- PARTNERSHIPS  
CORPORATIONS  
CHAPTER 1724. COMMUNITY IMPROVEMENT CORPORATIONS

**Go to the Ohio Code Archive Directory**

*ORC Ann. 1724.01 (2008)*

§ 1724.01. Community improvement corporations

A corporation not for profit may be organized in the manner provided in *section 1702.04 of the Revised Code*, and as provided in sections 1724.01 to 1724.09, inclusive, of the Revised Code, for the sole purpose of advancing, encouraging, and promoting the industrial, economic, commercial, and civic development of a community or area.

**HISTORY:**

129 v 377. Eff 8-17-61.

## LEXSTAT ORC 4115.03

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TITLE 41. LABOR AND INDUSTRY  
 CHAPTER 4115. WAGES AND HOURS ON PUBLIC WORKS  
 PREVAILING WAGE LAW

**Go to the Ohio Code Archive Directory**

*ORC Ann. 4115.03 (2008)*

§ 4115.03. Definitions

As used in *sections 4115.03 to 4115.16 of the Revised Code*:

(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.

(B) "Construction" means either of the following:

(1) Any new construction of any public improvement, the total overall project cost of which is fairly estimated to be more than fifty thousand dollars adjusted biennially by the director of commerce pursuant to *section 4115.034 [4115.03.4] of the Revised Code* and performed by other than full-time employees who have completed their probationary periods in the classified service of a public authority;

(2) Any reconstruction, enlargement, alteration, repair, remodeling, renovation, or painting of any public improvement, the total overall project cost of which is fairly estimated to be more than fifteen thousand dollars adjusted biennially by the administrator \* pursuant to *section 4115.034 [4115.03.4] of the Revised Code* and performed by other than full-time employees who have completed their probationary period in the classified civil service of a public authority.

(C) "Public improvement" includes all buildings, roads, streets, alleys, sewers, ditches, sewage disposal plants, water works, and all other structures or works 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. When a public authority rents or leases a newly constructed structure within six months after completion of such construction, all work performed on such structure to suit it for occupancy by a public authority is a "public improvement." "Public improvement" does not include an improvement authorized by *section 1515.08 of the Revised Code* that is constructed pursuant to a contract with a soil and water conservation district, as defined in *section 1515.01 of the Revised Code*, or performed as a result of a petition filed pursuant to Chapter 6131., 6133., or 6135. of the Revised Code, wherein no less than seventy-five per cent of the project is located on private land and no less than seventy-five per cent of the cost of the improvement is paid for by private property owners pursuant to Chapter 1515., 6131., 6133., or 6135. of the Revised Code.

(D) "Locality" means the county wherein the physical work upon any public improvement is being performed.

(E) "Prevailing wages" means the sum of the following:

- (1) The basic hourly rate of pay;
- (2) The rate of contribution irrevocably made by a contractor or subcontractor to a trustee or to a third person pursuant to a fund, plan, or program;
- (3) The rate of costs to the contractor or subcontractor which may be reasonably anticipated in providing the following fringe benefits to laborers and mechanics pursuant to an enforceable commitment to carry out a financially responsible plan or program which was communicated in writing to the laborers and mechanics affected:
  - (a) Medical or hospital care or insurance to provide such;
  - (b) Pensions on retirement or death or insurance to provide such;
  - (c) Compensation for injuries or illnesses resulting from occupational activities if it is in addition to that coverage required by Chapters 4121. and 4123. of the Revised Code;
  - (d) Supplemental unemployment benefits that are in addition to those required by Chapter 4141. of the Revised Code;
  - (e) Life insurance;
  - (f) Disability and sickness insurance;
  - (g) Accident insurance;
  - (h) Vacation and holiday pay;
  - (i) Defraying of costs for apprenticeship or other similar training programs which are beneficial only to the laborers and mechanics affected;
  - (j) Other bona fide fringe benefits.

None of the benefits enumerated in division (E)(3) of this section may be considered in the determination of prevailing wages if federal, state, or local law requires contractors or subcontractors to provide any of such benefits.

(F) "Interested party," with respect to a particular public improvement, means:

- (1) Any person who submits a bid for the purpose of securing the award of a contract for construction of the public improvement;
- (2) Any person acting as a subcontractor of a person mentioned in division (F)(1) of this section;
- (3) Any bona fide organization of labor which has as members or is authorized to represent employees of a person mentioned in division (F)(1) or (2) of this section and which exists, in whole or in part, for the purpose of negotiating with employers concerning the wages, hours, or terms and conditions of employment of employees;
- (4) Any association having as members any of the persons mentioned in division (F)(1) or (2) of this section.

(G) Except as used in division (A) of this section, "officer" means an individual who has an ownership interest or holds an office of trust, command, or authority in a corporation, business trust, partnership, or association.

**HISTORY:**

GC § 17-3; 114 v 116; 116 v 206; Bureau of Code Revision, 10-1-53; 131 v 990 (Eff 11-3-65); 132 v S 225 (Eff 11-24-67); 133 v H 436 (Eff 10-14-69); 136 v H 1304 (Eff 8-25-76); 137 v H 1129 (Eff 9-25-78); 145 v H 350 (Eff 6-21-94); 146 v S 162 (Eff 10-29-95); 148 v H 471. Eff 7-1-2000.

LEXSTAT ORC ANN. 4115.033

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TITLE 41. LABOR AND INDUSTRY  
CHAPTER 4115. WAGES AND HOURS ON PUBLIC WORKS  
PREVAILING WAGE LAW

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*ORC Ann. 4115.033 (2008)*

§ 4115.033. Restrictions on subdividing projects

No public authority shall subdivide a public improvement project into component parts or projects, the cost of which is fairly estimated to be less than the threshold levels set forth in divisions (B)(1) and (2) of *section 4115.03 of the Revised Code*, unless the projects are conceptually separate and unrelated to each other, or encompass independent and unrelated needs of the public authority.

**HISTORY:**

145 v H 350. Eff 6-21-94.

## LEXSTAT OAC 4101:9-4-02

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\* THIS DOCUMENT IS CURRENT THROUGH OHIO REGISTER FOR THE WEEK OF OCTOBER 13-17, 2008 \*

4101:9 Wage and Hour  
Chapter 4101:9-4 Prevailing Wage Regulations

*OAC Ann. 4101:9-4-02 (2008)*

**4101:9-4-02. Definitions.**

The following definitions are provided for the purposes of clarifying the meaning of certain terms as they appear in sections 4115.03 to 4115.16 of the Revised Code and division-level 4101:9 rules of the Administrative Code.

**(A)** "Apprentice" means any employee who is enrolled or indentured per trade occupation as a member of a bona fide apprenticeship program, or a person in the first ninety days of probationary employment as an apprentice in such an apprenticeship program who has been certified by the Ohio apprenticeship council or registered with the Ohio apprenticeship council through those states with which Ohio holds reciprocal apprenticeship agreements to be eligible for probationary employment as an apprentice.

**(B)** "Basic hourly rate of pay" means that portion of the prevailing wage, excluding fringe benefits, paid directly to the employee before deductions.

**(C)** "Bona fide apprenticeship program" means a comprehensive training program registered with the Ohio apprenticeship council, or certified by those with which Ohio holds reciprocal apprenticeship agreements.

**(D)** "Business association" means a business in any form including, but not limited to, a sole proprietorship, partnership or corporation.

**(E)** "Classification" means the level of experience within an occupation, trade or craft.

**(F)** "Common labor" means the classification for unskilled employees.

**(G)** "Construction" means:

**(1)** Any new construction of any public improvement, the total overall project cost of which is fairly estimated to be more than fifty thousand dollars ("threshold") adjusted biennially by the administrator and performed by other than full-time employees who have completed their probationary period in the classified service of a public authority.

**(2)** Any construction, reconstruction, improvement, enlargement, alteration, repair, painting, or decorating of any public improvement the total overall project cost of which is fairly estimated to be more than fifteen thousand dollars ("threshold") adjusted biennially by the administrator and performed by other than full-time employees who have completed their probationary period in the classified service of a public authority. Construction includes, but is not limited to, dredging, shoring, demolition, drilling, blasting, excavating, clearing, clean up, landscaping, scaffolding, installation and any other change to the physical structure of a public improvement.

**(H)** "Contractor" means any business association that is involved in construction of a public improvement. Contractor includes an owner, developer, recipients of publicly issued funds, and any person to the extent he participates in whole or in part in the construction of a public improvement by himself, through the use of employees, or by awarding subcontracts to subcontractors as defined in paragraph (GG) of this rule. Contractor also includes any business association that administers, conducts, and oversees construction of a public improvement by directing contractors and subcontractors on a specific project, but is not physically performing work on the project.

**(I)** "Commerce" means the Ohio department of commerce.

**(J)** "Director" means the director of the Ohio department of commerce.

**(K)** "Employee" means any person in the employment of an employer who performs labor or work of the type performed by a laborer, workman, or mechanic in the construction, prosecution, completion or repair of a public improvement and includes owners, partners, supervisors, and working foremen who devote more than twenty per cent of their time during a work week to such labor or work for the time so spent. Employee does not include an individual who is a sole proprietor. Employee also does not include full-time employees of a public authority who have completed their probationary periods in the classified civil service of the public authority, except such persons are employees if performing work outside the classification specifications of the civil service position for which the probationary period has been served. Employee does not include any person in a program administered by a public authority approved at the discretion of the director in writing prior to work on any project or program, including, but not limited to, local workfare or community action programs.

**(L)** "Employer" means any public authority, contractor, or subcontractor.

**(M)** "Enforceable commitment" means a legally binding contractual obligation of an employer.

**(N)** "Fringe benefits" means:

**(1)** Medical or hospital care or insurance to provide such;

**(2)** Pensions on retirement or death or insurance to provide such;

**(3)** Compensation for injuries or illnesses resulting from occupational activities if it is in addition to that coverage required by Chapter 4121. and 4123. of the Revised Code;

**(4)** Supplemental unemployment benefits that are in addition to those required by Chapter 4141. of the Revised Code;

**(5)** Life insurance;

**(6)** Disability and sickness insurance;

**(7)** Accident insurance;

**(8)** Vacation and holiday pay;

**(9)** Defraying of costs for apprenticeship or other similar training programs which are beneficial only to the employees affected;

**(10)** Other bona fide fringe benefits.

None of the benefits enumerated in this rule may be considered in the determination of prevailing wages if federal, state, or local law requires contractors or subcontractors to provide any such benefits.

**(O)** "Fringe benefits credit" means payment made by an employer on behalf of an employee for fringe benefits. The amount of a contribution made by the employee to a fringe benefit, as described in rule 4101:9-4-07 of the Administrative Code, shall not constitute a fringe benefits credit.

**(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.

**(Q)** "Interested party," with respect to a particular public improvement, means:

**(1)** Pursuant to division (F)(1) of *section 4115.03 of the Revised Code*, any person who submits a bid for the purpose of securing the award of a contract for construction of the public improvement;

**(2)** Any person acting as a subcontractor of a person mentioned in division (F)(1) of *section 4115.03 of the Revised Code*;

**(3)** Any bona fide organization of labor which has as members or is authorized to represent employees of a person mentioned in division (F)(1) or (F)(2) of *section 4115.03 of the Revised Code* and which exists in whole or in part for the purpose of negotiating with employers concerning the wages, hours, or terms and conditions of employment of employees.

**(4)** Any association having as members any of the persons mentioned in division (F)(1) or (F)(2) of *section 4115.03 of the Revised Code*.

**(R)** "Laborer, workman, or mechanic" means a person who performs manual labor, or labor of a particular occupation, trade or craft, or who uses tools of a particular occupation, trade or craft, or who otherwise performs physical work in such occupation, trade or craft which has been approved in writing by the director through issuance of prevailing wage rate schedules for such occupations, trades or crafts.

**(S)** "Legal day's work" means that portion of any twenty-four-hour time period during which an employee may work consistent with all applicable state or federal laws.

**(T)** "Locality" means the county in Ohio wherein the physical work upon any public improvement is being performed.

**(U)** "Materialman" means any supplier or furnisher of materials to be used in the construction of any public improvement.

**(V)** "Nonpublic user beneficiary" means any nongovernmental person who is the recipient of funds generated by the issuance of public obligations for such person's construction, use, occupancy, or enjoyment of a public improvement.

**(W)** "Occupation," "trade" or "craft" means the functional nature of work performed by an individual. The director may use the U.S. department of labor's "Dictionary of Occupational Titles" as a guide in determining an occupation, trade or craft.

**(X)** "Person" means any individual, institution, business association, or governmental agency.

**(Y)** "Prevailing wage" means the sum of the following:

**(1)** The basic hourly rate of pay;

**(2)** The rate of contribution irrevocably made by an employer to a trustee or to a third person pursuant to a fund, plan, or program which is communicated in writing to the employees affected prior to completion of any project to which *sections 4115.03 to 4115.16 of the Revised Code* apply;

**(3)** The rate of costs to the employer which may be reasonably anticipated in providing fringe benefits to employees pursuant to an enforceable commitment to carry out a financially responsible plan or program which is communicated in writing to the employees affected prior to completion of any project to which *sections 4115.03 to 4115.16 of the Revised Code* apply.

**(Z)** "Prevailing wage rate schedule" means the determination of the department of the prevailing rates of wages to be paid to employees in applicable occupations and the ratios of helpers, apprentices, trainees, serving laborers, and assistants to skilled workers; it includes any subsequent modifications, corrections, escalations or reductions to any wage rates or ratios.

**(AA)** "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. *Sections 4115.03 to 4115.16 of the Revised Code* and division level 4101:9 rules of the Administrative Code apply to expenditures of such institutions made in whole or in part from public funds.

**(BB)** "Public improvement" means:

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

**(a)** Constructed by a public authority of the state or any political subdivision, including, but not limited to, a municipality thereof;

**(b)** Constructed by any person for a public authority of the state or a political subdivision, including, but not limited to, a municipality thereof, pursuant to a contract with such public authority;

**(c)** Constructed pursuant to any statute of the Revised Code requiring payment of prevailing wage; or

**(d)** Constructed in whole or in part from public funds by an institution supported in whole or in part by public funds.

**(2)** All work performed on a newly constructed structure or work to suit it for occupancy by a public authority when a public authority rents or leases such a structure or work within six months after completion of such construction.

**(3)** Any construction where the federal government or any of its agencies furnishes all or any part of the funds used in constructing such improvement except where the federal government or any of its agencies provides the funds by loan or grant and prescribes predetermined minimum wages to be paid to employees in the construction of such projects or where federal statute or regulation explicitly preempts the application of state prevailing wage law. Loan or grant does not include federal government insurance of state financing on the project nor a loan guarantee of private funds. To be predetermined the rates must be set according to the procedures of the U.S. department of labor, prior to the beginning of construction, and specifications of the project must reference the application of federal wage requirements.

**(CC)** "Rate of contribution" means the hourly credit of the amount irrevocably made by an employer to a fund, plan or program pursuant to division (E)(2) of *section 4115.03 of the Revised Code*.

**(DD)** "Rate of costs" means the hourly credit of the amount reasonably anticipated to be paid by an employer in providing fringe benefits to employees pursuant to an enforceable commitment to carry out a financially responsible plan or program pursuant to division (E)(3) of *section 4115.03 of the Revised Code*.

**(EE)** "State" means the state of Ohio or any of its instrumentalities or political subdivisions, and the departments, agencies, boards, or commissions thereof.

**(FF)** "Structures and works" means, to the extent not specifically stated in the definition of public improvement, all construction activity, including, but not limited to, improvements of all types, such as bridges, dams, plants, highways, parkways, streets, streetscapes, subways, tunnels, mains, power lines pumping stations, railways, airports, terminals, docks, piers, wharves, ways, lighthouses, buoys, jetties, breakwaters, levees, and canals.

**(GG)** "Subcontractor" means any business association hired by a contractor to perform construction on a public improvement or any business association hired by such subcontractor, or any subcontractor whose subcontract derives from the chain of contracts from the original subcontractor.

**(HH)** "Supported in whole or in part by public funds" means any 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.

**(II)** "Third person" means a person responsible for safeguarding contributions to a fund, plan, or program pursuant to division (E)(2) of *section 4115.03 of the Revised Code* or fringe benefits provided pursuant to division (E)(3) of *section 4115.03 of the Revised Code*, or both. A third person must act in a fiduciary capacity and must assume the usual fiduciary responsibilities imposed upon trustees by applicable state or federal law.

**(JJ)** "Trainee" is one who is employed pursuant to and individually registered in a program which has received prior approval by the employment and training administration (ETA), U.S. department of labor. Each occupation in which trainees are to be trained must be one commonly recognized throughout the construction industry.

**(KK)** "Trustee" means a person responsible for safeguarding contributions to a fund, plan, or program pursuant to division (E)(2) of *section 4115.03 of the Revised Code* or fringe benefits provided pursuant to division (E)(3) of *section 4115.03 of the Revised Code*, or both. A trustee must act in a fiduciary capacity and must assume the usual fiduciary responsibilities imposed upon trustees by applicable state or federal law. The terms used in these rules are to be construed according to the purposes of the prevailing wage law, general principles of Ohio law, custom and usage in the construction industry, the context of their usage, and the use of similar words therein.

**History:** Eff 2-15-90; 6-23-97; 6-3-04.

Rule promulgated under: *RC 119.03*.

Rule authorized by: *RC 4115.12*.

Rule amplifies: *RC 4115.03*.

*R.C. 119.032* review dates: 03/03/2004 and 06/03/2009.

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*OAC Ann. 4101:9-4-17 (2008)*

**4101:9-4-17. Scope of project.**

(A) The construction of a public improvement shall be "fairly estimated to be more than the threshold," based on the prevailing wage rates in the locality at the time the project is to be let out for bidding, whether done at one time or in phases.

(B) Whenever a contract for the construction of a public improvement project exceeding the threshold in value is awarded to a contractor by a public authority, and the contractor begins performance but is unable to complete the project, and it therefore becomes necessary for the public authority to contract with a new contractor to complete the project, any new contractor shall be required to pay the prevailing rates of wages regardless of whether the contract awarded to the succeeding contractor for completing the project is worth less than the threshold.

(C) A public authority may not subdivide a project into component parts or projects of less than the threshold unless such projects under the threshold are conceptually separate and unrelated to each other, or encompass independent and unrelated needs of the public authority. Phases may be considered as separate projects only where the public authority has proposed construction of the project in separate and distinct phases, the proposal to construct in phases is based upon lack of adequate funding necessary to award the contract as a whole, and a period of six months or longer of construction inactivity will occur between each phase. 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 within the project.

**History:** Eff 2-15-90; 6-23-97; 6-3-04.

Rule promulgated under: *RC 119.03*.

Rule authorized by: *RC 4112.12*.

Rule amplifies: *RC 4115.03, 4115.10*.

*R.C. 119.032* review dates: 03/03/2004 and 06/03/2009.

tion of executive secretary of a commission created by that body because the position is a civil office under O. Const., Art. II, § 10: 1933 A.G.Opns.No. 1012.

#### SEC. 17-1.

See opinions of attorney general (1927), p. 201; (1929), p. 600.

#### SEC. 17-3. Definitions of terms.

The term "public authority," as used in this act, shall mean any officer, board or commission of the state of Ohio, or any political subdivision thereof, authorized by law to enter into a contract for the construction of a public improvement. The term construction, as used in this act shall mean any construction, re-construction, improvement, enlargement or repair of any public improvement. The term "public improvement," as used in this act, shall include all buildings, roads, streets, alleys, sewers, ditches, sewage disposal plants, water works, and all other structures or works constructed by the state of Ohio or any political subdivision thereof. The term "locality," as used in this act, shall mean the county wherein the physical work upon any public improvement is being performed.

**HISTORY.—114 v. 116, § 1. ER. 7-27-31.**

See note, G.C. § 17-6, citing Clymer v. Zane.

**SEC. 17-4. Public authority may determine wages to be paid by successful bidder, when.**

Any public authority authorized to contract for a public improvement may, before advertising for bids for the construction thereof, fix and determine a fair rate of wages to be paid by the successful bidder to the employees in the various branches or classes of the work, which shall not be less than the prevailing rate of wages paid for each such branch or class in the locality wherein the physical work upon such improvement is to be performed. The rate of wages so fixed shall be printed on the bidding blanks.

**HISTORY.—114 v. 116, § 2. ER. 7-27-31.**

See note, G.C. § 17-6, citing Clymer v. Zane.

Where a person or firm furnishes materials to a contractor or subcontractor to be used in the construction of a public improvement and such person or firm has nothing to do with the installation or fabrication of such materials into such improvement, G.C. §§ 17-4 to 17-6, do not operate to empower the public authority authorized to contract for such improvement to provide in the contract with the successful bidder a minimum rate of wages to be paid to the men employed and paid by such person or firm furnishing such materials when engaged in the delivery of such materials to the site of improvement: 1932 A.G.Opns.No.4836.

**SEC. 17-5. Contract to contain provision relative to rate of wages to be paid.**

In all cases where any public authority shall fix a fair rate or rates of wages as herein provided, the contract executed between the public authority and the successful bidder shall contain a provision requiring the successful bidder and all his sub-contractors to pay a rate or rates of

wages which shall not be less than the rate or rates of wages so fixed. It shall be the duty of the successful bidder and all his sub-contractors to strictly comply with such provisions of the contract.

**HISTORY.—114 v. 116, § 3. ER. 7-27-31.**

See note, G.C. § 17-6, citing Clymer v. Zane.

#### SEC. 17-6. Penalty for violation.

Any contractor or sub-contractor who shall violate the wage provisions of such contract, or who shall suffer, permit or require any employee to work for less than the rate of wages so fixed, shall be fined not less than \$50.00 or more than \$500.00. Any employee upon any public improvement who is paid less than the fixed rate of wages applicable thereto may recover from the contractor or sub-contractor the difference between the fixed rate of wages and the amount paid to him, and in addition thereto a penalty equal in amount to such difference.

**HISTORY.—114 v. 116, § 4. ER. 7-27-31.**

General Code §§ 17-3, 17-4, 17-5 and 17-6, and any contract made in compliance therewith, must be construed together, and their scope cannot be extended beyond the ordinary intentment of § 17-6 which imposes the penalty and gives the right of recovery: Clymer v. Zane, 128 O.S. 359, 191 N.E. 123.

#### SEC. 18.

See note, G.C. § 6886, citing 1931 A.G.Opns.2981.

See opinions of attorney general (1927), p. 1004; (1927), p. 1210.

There is no authority in law to accept popular subscriptions for salaries and expenses of state library: 1927 A. G. Opns. 1002.

#### SEC. 24.

See G.C. §§ 24-4, 433, 6064-10, 6212-53, which refer to this section.

See opinions of attorney general (1926), p. 266; (1927), pp. 227, 1683; (1928), p. 1946.

Funds of department must be deposited weekly with the state treasurer and are not subject to re-use without appropriation. Rotary funds are automatically re-appropriated: 1927 A. G. Opns. 227.

Refunds of over-payments of franchise tax cannot be made in the absence of specific appropriation therefor: 1927 A. G. Opns. 1682.

**SEC. 24-3. State depository trust fund created.**

For the purpose of providing a method of properly collecting, depositing and auditing of contingent receipts, received by various state departments, there is hereby created the state depository trust fund of which the treasurer of state shall be the custodian.

**HISTORY.—115 v. 533, § 1. ER. 10-18-33.**

See G.C. § 6064-10, which refers to G.C. §§ 24-3 to 24-5.

#### SEC. 24-4. Receipts deposited, when.

Every state officer, state institution, department, board, commission, college or university, receiving fees or advances of money, or who, under the provisions of section 24 of the General Code, collect or receive fees, advances, or money,

(Amended Senate Bill No. 294)

## AN ACT

To amend sections 17-3, 17-4 and 17-5 of the General Code and to enact supplementary sections 17-4a and 17-5a pertaining to prevailing rate of wages on public improvements.

*Be it enacted by the General Assembly of the State of Ohio:*

SECTION I. That sections 17-3, 17-4 and 17-5 of the General Code be amended and that supplemental sections 17-4a and 17-5a be enacted to read as follows:

**Definitions of terms.**

Sec. 17-3. The term "public authority", as used in this act, shall mean any officer, board, or commission of the state of Ohio, or any political subdivision thereof, authorized by law to enter into a contract for the construction of a public improvement *or to construct the same by the direct employment of labor*. The term "construction", as used in this act, shall mean any construction, reconstruction, improvement, enlargement, *alteration* or repair of any public improvement *fairly estimated to cost more than three hundred dollars*. The term "public improvement", as used in this act, shall include all buildings, roads, streets, alleys, sewers, ditches, sewage disposal plants, water works and all other structures or works constructed by the state of Ohio or any political subdivision thereof. The term "locality", as used in this act, shall mean the county wherein the physical work upon any public improvement is being performed. *The 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.*

**Prevailing rate of wages, how determined.**

Sec. 17-4. *It shall be the duty of every public authority authorized to contract for or construct with its own forces for a public improvement, before advertising for bids or undertaking such construction with its own forces, to have the department of industrial relations ascertain and determine the prevailing rates of wages of mechanics and laborers for the class of work called for by the public improvement, in the locality where the work is to be performed; and such schedule of wages shall be attached to and made part of the specifications for the work, and shall be printed on the bidding blanks where the work is done by contract. But a minimum rate of wages for common laborers, on work coming under the jurisdiction of the state department of highways, shall be fixed in each county of the state by said department of highways, in accordance with the provisions of section 17-4a of this act. This act shall not apply to public improvements in any case where the federal government or any of its agencies furnishes by loan or grant all or any part of the funds used in constructing such improvements, provided the federal government or any of its agencies prescribes predetermined minimum wages to be paid to*

apply thereto": Taylor v. Cleveland, 87 App 132, 42 OO 348, 93 NE(2d) 594.

6. Where firemen work under the so-called platoon system, provided for under this section, the hours worked under such system constitute a regular work day or work week within the purview of an ordinance providing for overtime pay for work performed "beyond the number of hours regularly constituting a work day or work week in the division or department concerned": Taylor v. Cleveland, 87 App 132, 42 OO 348, 93 NE(2d) 594.

7. A duly appointed and active member of a fire department, operating under the two-platoon system, who regularly works during recurring duty hours and who is subject to call while off duty during regularly recurring rest hours, is in actual service during said rest hours: 1937 OAG No.55.

8. The chief of such fire department may call a substitute fireman to duty in the place of a regular fireman and such substitute fireman should be paid for the actual time served by him. He is not entitled to pay for a corresponding rest period on the following day: 1937 OAG No.55.

9. Under the provisions of this section (118 v 666), city firemen who are employed on a schedule of twenty-four consecutive hours on duty followed by a period of twenty-four consecutive hours off duty, may in every fourteen-day period be kept on duty for only twenty-four-hour periods: 1939 OAG No.1622.

10. There is nothing in the language of this section, as relating to vacations for employees of a municipal fire department which defines the word "annually" used therein, but the provisions of said section are supplemented and clarified by ordinance section 2-47 of the city of Painesville which provides that nine months' service in a calendar year shall be considered a year's service for the purpose of entitling every employee of said city to a two weeks' vacation: 1951 OAG No.436.

11. Said ordinance is not in conflict with this section: 1951 OAG No.436.

12. The department of industrial relations has the authority to institute action to compel the chief of the fire department of a city which has not adopted the eight-hour regulation for its fire department, to divide the uniform force into not less than two platoons as provided in this section. But said department of industrial relations has no responsibility for the enforcement of the other provisions of this section: 1951 OAG No.436.

#### § 4115.03 Definitions. (GC § 17-3)

As used in sections 4115.03 to 4115.10, inclusive, of the Revised Code:

(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.

(B) "Construction" means any construction, reconstruction, improvement, enlargement, alteration, or repair of any public improvement fairly estimated to cost more than three hundred dollars.

(C) "Public improvement" includes all buildings, roads, streets, alleys, sewers, ditches, sewage

disposal plants, water works, and all other structures or works constructed by the state or any political subdivision thereof.

(D) "Locality" means the county wherein the physical work upon any public improvement is being performed.

HISTORY: GC § 17-3; 114 v 116, § 1; 116 v 206, § 1 EF 10-1-53.

#### Cross-References to Related Sections

See RC §§ 4115.04, 4115.05, 4115.07 which refer to RC § 4115.03 et seq.

#### Research Aids

Definitions of terms:

O-Jur: Labor § 14, Public Works § 1

#### CASE NOTES

See also case note 1 under RC § 4115.06; 1 under RC § 4115.10.

1. The validity of a public construction contract is not affected by any noncompliance with the provisions of the act relative to prevailing wage rates: Horvitz v. Sours, 74 App 467, 30 OO 102, 58 NE(2d) 405.

2. Ordinary maintenance operations performed by municipalities which do not include repair work do not come under the regulatory provisions of GC § 17-3 (RC § 4115.03) et seq; however, such activities which may be defined as "construction, reconstruction, improvement, enlargement, alteration or repair" do come under these provisions, regardless of whether the work is performed on new improvements or old ones: 1938 OAG No.2161.

3. The term "maintenance" means such acts as will preserve the improvement in its completed condition against wear and deterioration, as distinguished from the restoration to their original state after having been damaged by wear or deterioration, which is usually referred to as "repair": 1939 OAG No.1494.

4. This section has no application to the fixing of a minimum wage to be paid to mechanics and laborers employed in the maintenance of county highways: 1939 OAG No.1494.

5. The department of industrial relations has no duties under the provisions of GC §§ 17-3 to 17-6 (RC § 4115.03 et seq), inclusive, except to furnish to public authorities, when requested, the prevailing rates of wages for the mechanics and laborers for the class of work called for by a proposed public improvement, and the said department of industrial relations has no duty or responsibility in the enforcement of said GC §§ 17-3 to 17-6 (RC § 4115.03 et seq): 1951 OAG No.436.

#### § 4115.04 Determination of prevailing wage rate. (GC § 17-4)

Every public authority authorized to contract for or construct with its own forces a public improvement, before advertising for bids or undertaking such construction with its own forces, shall have the department of industrial relations determine the prevailing rates of wages of mechanics and laborers for the class of work called for by the public improvement, in the locality where the work is to be performed. Such schedule of wages shall be attached to and made part of the specifications for the work, and shall be printed on the