

ORIGINAL

In the Supreme Court of Ohio

State ex. rel. Ohio Civil Service :
 Employees Association et. al., : Supreme Court Case No. 14-319
 :
 Plaintiffs-Appellees/Cross-Appellants :
 :
 v. : On Appeal from the Franklin County
 : Court of Appeals, Tenth Appellate District
 :
 State of Ohio et. al., :
 :
 Defendants-Appellants/Cross-Appellees : Court of Appeals Case No.
 : 12 AP 1064
 :

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**PLAINTIFFS-APPELLEES/CROSS-APPELLANTS
 COMBINED MEMORANDUM IN RESPONSE TO
 DEFENDANTS-APPELLANTS/CROSS-APPELLEES MEMORANDUM
 AND IN SUPPORT OF JURISDICTION FOR ITS CROSS-APPEAL**

MICHAEL DEWINE (0009181)
 Attorney General of Ohio

ERIC MURPHY (0083284)
 State Solicitor

RICHARD COGLIANESE (0066830)
 WILLIAM L. COLE (0067778)
 ERIN BUTCHER-LYDEN (0087278)
 Assistant Attorneys General

MEGAN M. DILLFOFF (0090227)
 Deputy Solicitor

30 East Broad St, 17th Floor

JAMES E. MELLE (0009493)
 167 Rustic Place
 Columbus, Ohio 43214-2030
 614-271-6180; 419-332-1488 fax
Jimmelle43@msn.com

Attorney for Plaintiffs-Appellees/Cross-Appellants: Ohio Civil Service Employees Association, David Combs, Clair Crawford, Lori Leach Douce, Margo Hall, Sheila Herron, Daniel Karcher, Rebecca Sayers, Angela Schuster, Troy Tackett, Kathy Tinker, Lisa Zimmerman and ProgressOhio.org

Columbus, Oh 43215
614-466-8980; 614-466-5087 fax
Eric.murphy@ohioattorneygeneral.gov
Richard.coglianese@ohioattorneygeneral.gov
Erin.butcher-lyden@ohioattorneygeneral.gov
William.cole@ohioattorneygeneral.gov
Megan.dillhoff@ohioattorneygeneral.gov

Attorneys for Defendants-Appellants/Cross-Appellees: State of Ohio, Governor John R. Kasich, Attorney General Mike DeWine, Secretary of State Jon Husted, Auditor of State David Yost, Ohio Department of Rehabilitation and Correction, and Director Gary C. Mohr, Ohio Department of Administrative Services and Director Robert Blair, Treasurer Josh Mandel, Office of Budget and Management and Director Timothy S. Keen

CHARLES R. SAXBE (0021952)
JAMES D. ABRAMS (0075968)
CELIA M. KILGARD (0085207)
Taft, Stettinius & Hollister LLP
65 E. State St., Suite 1000
Columbus, Ohio 43215-3413
614-221-2838; 614-221-2007 fax
rsaxbe@taftlaw.com
jabrams@taftlaw.com
ckilgard@taftlaw.com

Attorneys for Appellees: Corrections Corporation of America and CCA Western Properties, Inc.

NICHOLAS A. IAROCCI (0042729)
Ashtabula County Prosecuting Attorney
25 West Jefferson Street
Jefferson, Ohio 44047
440-576-3662; 440-576-3600 fax
naiarocci@ashtabulacounty.us

Attorney for Appellees: Dawn M. Cragon, Roger A. Corlett and Judith A. Barta

ADAM W. MARTIN (0077722)
KEVIN W. KITNA (0088029)
Sutter O'Connell
3600 Erieview Tower
1301 East 9th Street
Cleveland, Ohio 44114
216-928-2200; 216-928-3636 fax
amartin@sutter-law.com

Attorneys for Defendant-Appellant/Cross-Appellee Management & Training Corporation

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I. A SUBSTANTIAL CONSTITUTIONAL QUESTION IS INVOLVED

There is a “substantial” constitutional question involved in this case. However, it is not the unanimous ruling of the Tenth District Court of Appeals which found that Plaintiffs’ complaint sufficiently stated a claim that the State Defendants violated the “One-Subject Rule” in Section 15(D), Article II, of the Ohio Constitution and remanded the case for further proceedings. That ruling is solidly based upon the face of the complaint, the disunity of multiple non-economic subjects shown on the face of Am. Sub. H. B. No. 153 (“H.B. No. 153”) and precedent from this Court. The “substantial” constitutional question is in Plaintiffs’ cross-appeal.

H. B. No. 153 is an Appropriations Bill adopted by the 129th Ohio General Assembly effective July 1, 2011. In that Bill, the General Assembly amended R.C. 9.06 and enacted new §753.10, the two statutes which are the sole authority for prison privatization in Ohio. Acting pursuant to those two statutes, the State Defendants sold a state-owned prison in Ashtabula County named Lake Erie Correctional Facility (“LECF”), together with 119 acres, to Defendant-Appellee Corrections Corporation of America (“CCA”) for \$72,770,260. As part of the transaction, the State Defendants promised to subsidize CCA’s ownership costs by paying to CCA from General Revenue Funds what it called an “Annual Ownership Fee.” This Annual Ownership Fee is not part of the cost of housing, feeding, clothing, providing programs and services etc. to the prisoners. Those separate payments are identified in the contract between the state and CCA as “Per Diem” payments. Annual Ownership Fees are paid to CCA for the “wear and tear” of the prison which the state no longer owns. The amount of this Annual Ownership Fee is \$3,800,000/year and it is to be paid by the state to CCA each year for 21 years. Total Annual Ownership Fee payments are \$79,800,000, an amount greater than the sale price of the prison. CCA and the State Defendants admit the annual payments. Further explanation can be found at <http://www.drc.ohio.gov/Public/privatizationfaqs.pdf>.

Plaintiffs' complaint alleged, in part, that these Annual Ownership Fee payments are a subsidy which violated Section 4, Article VIII of the Ohio Constitution which prohibits the state from lending credit to or in aid of any corporation and/or that the subsidy payments resulted in an unconstitutional joinder of CCA and the state's property rights. Research has disclosed no cases in Ohio or elsewhere discussing an Annual Ownership Fee or a state subsidizing the ownership costs of the purchaser of a state-sold prison. This is a first. The case should have been allowed to proceed beyond a motion to dismiss. A full record should have been developed on such an important constitutional and economic issue.

II. A SEPARATE QUESTION OF PUBLIC AND GREAT GENERAL INTEREST

Pursuant to R.C. 9.06, the State Defendants privatized another state-owned prison complex known as North Central Correctional Institution and the nearby North Central Correctional Institution Camp ("North Central Correctional Complex") situated in Marion County, together with approximately 258 acres. The State Defendants executed what they called an "Operation, Management and Maintenance Contract" ("O&M Contract") with Defendant-Appellee Management & Training Corporation ("MTC"). In this form of privatization MTC operates and manages the Marion prison with employees it hires while the state continues to own and retain ultimate jurisdiction and control over the entire prison operation.

Despite their employment by MTC, a private-sector employer who is operating and managing a privatized prison pursuant to a business contract which is not governed by the Ohio Collective Bargaining Law, the complaint alleged that the employees were nevertheless public employees. R.C. 4117.01(C) defines a public employee as "including any person working pursuant to a contract between a public employer and a private employer and over whom the national labor relations board has declined jurisdiction...." That statutory language is precisely

the fact in this case. There is no dispute that such a contract exists between the state and both CCA and MTC.

The two lower courts ruled that the State Employment Relations Board (“SERB”) had exclusive jurisdiction to decide whether the individual Plaintiffs are public employees because it involved an interpretation of R.C. 4117.01(C). However, no statute vests jurisdiction in SERB over a private-employer-contractor who operates a prison pursuant to a business contract which privatized the prison and where the employees are hired as private-sector employees. The only condition for public employee status under R.C. 4117.01(C) is whether there is a contract between Defendant Ohio Department of Rehabilitation and Correction (“ODRC”) and MTC and CCA. That is a question well-within the jurisdiction of the common pleas court as are the remedies requested: declaratory, injunctive and mandamus relief.

Additionally, R.C. 9.06 (K), newly enacted in H.B. No. 153, says that any “action” (i) challenging the constitutionality of either R.C. 9.06 or §753.10 or (ii) any action taken pursuant to those statutes alleged to be unconstitutional must be filed in the Franklin County Common Pleas Court. Whether the statutes, the ensuing contracts and/or the actions taken pursuant thereto are found unconstitutional or not, three of Plaintiffs’ claims were based directly upon alleged violations of the Ohio Constitution. While the fourth claim involves statutory interpretation and/or application, the basis for the fourth claim originates in the statutes alleged to be unconstitutional and the actions taken pursuant to statutory authority. For that reason, Plaintiffs contend that R.C. 9.06(K) vested jurisdiction over the entire case in the Franklin County Common Pleas Court.

As a concluding point here, the State Defendants portrayal of the scope of the Court of Appeals’ decision on the One-Subject Rule is somewhat exaggerated and their Memorandum

includes some matters not on the face of the complaint. What is more, at times the Memorandum mentions two topics in one sentence and concludes the thought with a correct statement for only one of the topics leaving a wrong impression for the other. This Memorandum explains the reasoning and holding of the Court of Appeals.

This Court should deny the State Defendants and MTC's Discretionary Appeals because the Court of Appeals remanded the case and no proceedings have yet occurred there. But, it should accept for review Plaintiffs cross-appeal and reverse the Court of Appeals on the above-stated issues. Alternatively, if this Court accepts the State Defendants appeal for review, it should also accept the issues raised by Plaintiffs' cross-appeal so that a complete scenario is before the Court.

III. STATEMENT OF THE CASE

After the State of Ohio privatized LECF by selling it to CCA and privatized the North Central Prison Complex by executing an O&M Contract with MTC to manage and operate it, Plaintiffs-Appellees/Cross-Appellants, Ohio Civil Service Employees Association, 11 individuals who lost their jobs and ProgressOhio.org ("Plaintiffs") re-filed their complaint¹ in the Franklin County Common Pleas Court. They sued the State Defendants who participated in the challenged transactions, the corporations that had contracts with the state, the officials who held and/or accounted for the sale proceeds, those who had responsibilities regarding the deed and transfer of the property and others who may claim an interest in the subject matter of the action.

The complaint requested that the common pleas court void and cancel both contracts privatizing the two prisons and, additionally, order that the purchase price of \$72,770,260 paid by CCA to the state be returned to it and that LECF be returned to the state of Ohio. In the event

¹ Before the contracts were made, a temporary restraining order to prevent signing the contracts was denied. Plaintiffs voluntarily dismissed and re-filed this case.

the Court determined that no constitutional violation existed, then the complaint asked the Court to find that the employees working in the two privatized prisons are public employees as defined in R.C. 4117.01(C).

Dismissing the complaint, the trial court found that R.C. 9.06 and §753.10 “are not in violation of the Single Subject Rule.” (State Appx. 5, p. 19). Referring to the Section 4, Article VIII claim, the court wrote that it “cannot conclude that the legislation at issue is in violation of this prohibition. The State of Ohio simply does not become a joint owner.” (Id. p. 20). The trial court also rejected Plaintiffs contention that R.C. 9.06(K) vested jurisdiction over the entire action in the Franklin County Court ruling that only the constitutional claims were properly before it. (Id. p. 5-6).

Upon appeal, the Court of Appeals affirmed dismissal of Plaintiffs’ claim based upon Section 4, Article VIII of the Ohio Constitution because this provision ““does not forbid the employment of corporations, or individuals, associate or otherwise, as agents to perform public services; nor does it prescribe the mode of their compensation.”” *State ex rel. Ohio Civ. Serv. Emps. Assn. v. State*, 2013-Ohio-4505, 2 N.E.3d 304 (2013), ¶ 38 (“*OCSEA I*”).

Relying upon *Franklin County Law Enforcement Assn v. Fraternal Order of Police, Capital City Lodge No. 9*, 59 Ohio St.3d 167, 170, 572 N.E.2d 87 (1991) (“*FCLEA*”), the Court affirmed dismissal of Plaintiffs’ claim that the employees working at MTC and CCA were public employees. “[B]ecause resolution of plaintiffs’ alternative claim depends on interpretation of the scope of ‘public employer’ as defined by R.C. Chapter 4117, the trial court did not err in finding SERB has exclusive jurisdiction over such interpretation and dismissing plaintiffs’ complaint as to their alternative claim.” *OCSEA II, supra*, ¶49.

Relying upon *Hoover v. Board of County Commissioners of Franklin County*, 19 Ohio St.3d 1, 6-7, 482 N.E.2d 575 (1985), the Court reversed the dismissal of Plaintiffs' Section 15(D), Article II claim finding that Plaintiffs' complaint stated a claim that the One-Subject Rule was violated and remanded for further proceedings. *OCSEA II*, ¶24, 51. It previously observed that Plaintiffs' complaint alleged that R.C. 9.06 and §753.10 were unconstitutional and, additionally, that the entire Appropriations Bill, H.B. No. 153, was unconstitutional. Referring to Plaintiffs' complaint, the Court listed several examples of other provisions alleged to be violative of the One-Subject Rule. *OCSEA II*, ¶23. The trial court made a similar observation mentioning several unrelated provisions and saying that the "same language used in *Goff*² i e., 'appear unrelated' certainly appears to apply in reference to the instances Plaintiffs cite in H. B. 153." (State Appx. 5, p.18).

The Court also said that "H.B. No. 153 is over three thousand pages long, containing amendments to over one thousand sections, enacting over two hundred sections, and repealing over one hundred sections. H.B. No. 153 encompasses a variety of topics, some of which potentially having little or no connection with appropriations." *OCSEA II*, ¶12.

The Court summarized the parties' arguments. "Plaintiffs contend an appropriations bill containing statutory changes unrelated to appropriations violates the one-subject rule. Defendants respond that the single subject of appropriations unifies the topics in H.B. No. 153 and argue that although the Supreme Court of Ohio has provided a limited definition of appropriations for the purposes of the right of referendum, it does not violate the one-subject rule for an appropriations bill to include statutory changes not directly appropriating money. The trial court found the prison privatization provisions were not themselves appropriations, but

² *Simmons-Harris v. Goff*, 86 Ohio St.3d 1,711 N.E.2d 203 (1999).

concluded there was no disunity of subject since prison privatization was a ‘connected subject to an appropriations bill.’” *OCSEA II*, ¶14.

Citing *LetOhioVote.Org v. Brunner*, 123 Ohio St.3d 322, 2009-Ohio-4900, ¶28-29, the Court of Appeals disagreed: “The challenged prison privatization provisions of H.B. No. 153 ‘are not themselves appropriations for state expenses because they do not set aside a sum of money for a public purpose’ and neither R.C. 9.06 nor section 753.10 as amended by H.B. No. 153 ‘makes expenditures and incurs obligations.’” (*OCSEA II* ¶15). The fact was so clear that the unanimous Court of Appeals noted this a second time in its opinion. (*Id.* ¶29).

After saying that the Supreme Court of Ohio expressly rejected the notion that a provision which impacts the state budget, even if only slightly, may be lawfully included in an appropriations bill merely because other provisions in the bill also impact the budget, the Court of Appeals citing ¶34 of *Ohio Civ. Serv. Emps. Assn., AFSCME, Local 11, AFL-CIO v. State Employment Relations Board*, 104 Ohio St.3d 122, 818 N.E.2d 688 (“*OCSEA I*”), said of the challenged prison privatization provisions:

Here, the subject of the various provisions in section 753.10 does not concern the acquisition of a revenue stream, but, instead, the contractual requirements for prison privatization. Because the record lacks guidance regarding the way in which the challenged provisions ‘will clarify or alter the appropriation of state funds,’ there appears to be no common purpose or relationship between the budget-related items in H.B. No. 153 and the prison privatization provisions.

Relying again upon *Hoover, supra*, the Court ruled: “Therefore, the trial court must continue proceedings consistent with this decision, including holding an evidentiary hearing to determine whether the bill in question had only one subject pursuant to Ohio Constitution, Article II, Section 15(D).” (*Id.*). Then, citing *State ex rel. Hinkle v. Franklin County Bd. Of Elections*, 62 Ohio St.3d 145,149, 580 N.E.2d 767 (1991), the Court concluded by saying: “If, after holding an evidentiary hearing, the trial court finds any provisions constitute a manifestly

gross or fraudulent violation of the one-subject rule, such that the provisions bear no common purpose or relationship with the budget-related items and give rise to an inference of logrolling, the court must sever the offending provisions.” *OCSEA II*, ¶24.

Notices of Appeal were filed by the State Defendants and MTC raising the One-Subject Rule issue. Plaintiffs-Appellees/Cross-Appellants’ issues are summarized above.

IV. STATEMENT OF FACTS

Pursuant to amended R.C. 9.06 and newly enacted §753.10, the State Defendants offered five prisons for sale. LECF in Ashtabula County was sold to CCA. The Property was conveyed by a Governor’s Deed to Appellee CCA Western Properties, Inc., a subsidiary of CCA. (Collectively “CCA”). As part of the privatization process, the state also contracted with CCA to house 1,798 Ohio inmates for a Per Diem Fee of \$44.25/inmate/day. (§753.10(C)(1) and (10); R.C. 9.06(A)(1) and (I)(1) and exhibit attached to the complaint).

Although an O & M Contract was signed for the North Central Correctional Complex, it was offered for sale. No contractor made a proposal to purchase it at that time. However, pursuant to §753.10 (F), R.C. 9.06(J) and the terms of the Request For Proposals issued on April 6, 2011,³ the State Defendants are authorized to sell and convey this property by Governor’s Deed to MTC at any future date as long as the O & M Contract with MTC remains in effect. Although H.B. 153 also authorized the Grafton Correctional Institution and the North Coast Correctional Treatment Facility in Lorain County to be privatized, they were not.

An examination of H.B. No. 153 shows that it created major substantive programs and/or enacts several controversial subjects unrelated to appropriations or to each other. For example,

³ The RFP states: “At the time of award or any time thereafter, of the O&M contracts ... a Purchase Contract for the sale of the real estate for the [five prisons] which are subject to those O&M contracts may be awarded authorizing the Governor ... to execute a deed conveying all of the State’s right, title, and interest in real estate ... to that Purchase Contractor.”

for the first time in Ohio history, R.C. 9.06 and §753.10 authorize the sale of five state-owned prisons. For the first time since it was opened in 1955, R.C. 126.60 through R.C. 126.605 authorize the sale or lease of the 241 mile Ohio Turnpike. (H.B. No. 153, pp. 228-232). For the first time in Ohio history, R.C. 187.01, R.C. 4313.01 and R.C. 4313.02 actually transfer the state-regulated liquor distribution system and the state's merchandising operations including all of its capital and assets to JobsOhio, a private entity not subject to the laws applicable to other state agencies. (Id. pp. 1818-1822).

Selling, or privatizing by O & M Contracts, five prisons is unrelated to transferring liquor profits and the entire liquor operation to JobsOhio. Privatizing five prisons is likewise unrelated to selling the Ohio Turnpike. The transfer of the liquor operation and profits to JobsOhio is unrelated to appropriations. Selling or leasing the Turnpike is also unrelated to appropriations. Moreover, not one word of these three monumental and historic changes is discernible from the Title of H. B. 153. Not only does Section 15(D) of the Ohio Constitution provide that "no bill shall contain more than one subject," it also requires that the subject of the bill "shall be clearly expressed in its title." Those three are not "clearly expressed" in the Title of H.B. No. 153.

The presence of those three subjects shows the violation of the One-Subject Rule. H.B. No. 153 also enacts or amends other unrelated non-economic laws. For example, H.B. No. 153:

- Modifies the rules of evidence in civil cases to change the requirements for the expert testimony of a coroner or deputy coroner. R.C. 2335.061, 2335.05, 2335.06.
- Prohibits nontherapeutic abortions in public hospitals and clinics, state universities, state medical colleges, health districts and joint hospitals. R.C. 5101.57(A)(3) and (B).
- Enacts a prohibition on the use of political subdivision funds for the purpose of procuring insurance policies which provide nontherapeutic abortions. R.C. 124.85 and R.C. 9.04.
- Authorized the sale or lease of the Turnpike and in that event eliminates all collective bargaining rights for Turnpike employees. R.C. 126.602(F).
- Requires the Chancellor of the Board of Regents to develop a plan for charter universities (R.C. 3345.81)
- Requires school districts to implement merit-based pay regulations. R.C. 3319.111 and R.C. 3319.112.

- Weakens and in some cases eliminates the merit standards in civil service testing for appointment and promotion of state employees; (R.C. 124.23; R.C. 124.31); allows the DAS director to privatize civil service testing (R.C. 124.23); eliminates the authority of DAS to test for gas storage well inspectors.
- Requires the executive director of the Ohio Casino Control Commission to establish a problem gambling hotline. R.C. 3772.062.
- Creates in the Department of Education a college preparatory boarding school program for at-risk youth. R.C. 3328.01-3328.45.
- Revised requirements and process for obtaining a certificate for practice of a limited branch of medicine. R.C. 4731.19.
- Eliminates a prior felony conviction as a bar to the issuance or renewal of a barber's license. R.C. 4709.13(A).
- Limits liability for violations of the public records laws. R.C. 149.351.

The State Defendants and MTC attempt to justify the clear constitutional violation by giving the impression that the 5% cost savings requirement in R.C. 9.06(A)(4) was added by H. B. 153. It wasn't. The provision was a part of R.C. 9.06 before H. B. 153 was enacted. They do, however, correctly observe that the 5% savings requirement is related to prison operating costs.⁴ Notably, they do not explain where the 5% savings comes from.

Shamefully, it comes directly from reducing the pensions of the state employees who also suffered the loss of their jobs. Negligible, if any, money is saved from any other source. That is the reality. State employee participation in the Ohio Public Employees Retirement System ("OPERS") is compulsory. R.C. 145.03(A). State employers contribute 14% to OPERS for each employee. When the prison is privatized, the employees become private-sector employees. Participation in social security is compulsory even for those working under the contract described in R.C. 4117.01(C), and it cannot be waived. 26 U.S.C. § 3121(a). Private-sector employers pay FICA (social security). These FICA contributions are 6.2% per employee. By

⁴ R.C. 9.06(A)(4) provides: "the contractor shall convincingly demonstrate to the public entity that it can operate the facility with the inmate capacity required by the public entity and provide the services required in this section and realize at least a five per cent savings over the projected cost to the public entity of providing these same services to operate the facility that is the subject of the contract."

forcing employees out of OPERS and into social security, the employer saves 7.8% on pension costs alone. Even if the employer has a 3% match to its pension plan (a usual amount), it still saves 4.8% without doing a thing different than the state when it owned or operated the prisons.

The State Defendants may argue that the employees could stay in OPERS even after the layoffs. This is true-but unrealistic. State employees pay 10% into OPERS. They must also pay 6.2% into the non-waivable social security System. These employees simply cannot pay 16.2% of their pay into two retirement systems and CCA and MTC know this. Thus, the employees who lost their jobs are forced to waive participation in OPERS because they cannot waive it in social security.

Adding to their harm, Congress amended the Social Security Act in the 1980s by enacting the Windfall Elimination Provision (WEP) which is also referred to as the Government Pension Offset (“GPO”). 42 U.S.C. § 415(a)(7) decrees that individuals who participate in both OPERS and social security but do not accumulate 30 years of contributions in social security will have the GPO offset applied to decrease a percentage of their future social security benefit. 42 U.S.C. § 415(a)(7)(B)(ii)(1-5). Thus, an employee with 15 years of state service who lost his/her state job and was hired by MTC and waived continued OPERS participation cannot work 30 years under social security because he or she will not live long enough. Thus, they will be harmed again by the future loss of social security benefits when they retire.

V. APPELLEES PROPOSITION OF LAW NO. 1

A. The Amendment Of R.C.9.06 And The Enactment Of §753.10 In Am. Sub. H. B. No. 153 By The 129th General Assembly Violated Section 15(D) Article II Of The Ohio Constitution Because They Are Not Appropriations

In their memorandum, the State Defendants urge this Court to accept this case and rule that authorization in an Appropriations Bill to sell LECF and the other prisons (or any state assets) is rationally related to an Appropriations Bill because the sales generate revenue which

will be placed in the General Revenue Fund and help balance the budget. (Mem. 12). Those are not the facts in this case.

H.B. No. 153 enacted R.C. 5120.092 which is the “Adult and Juvenile Correctional Facilities Bond Retirement Fund” (“Bond Retirement Fund”). As then written, it provided in part “There is hereby created in the state treasury the adult and juvenile correctional facilities bond retirement fund. The fund shall receive proceeds derived from the sale of state adult or juvenile correctional facilities.”⁵ The statutes authorizing the sale of each of the five prisons also contained a requirement that all sale proceeds must be deposited in the Bond Retirement Fund and may be expended only to pay off previously sold bonds. (See, H.B. No. 153, pp. 3222-3228; R.C. 753.10 (C)(8), (D)(8), (E)(8), (F)(8) and (G)(8). The restrictive language in R.C. 753.10(C)(8), quoted below, is identical for each prison to be sold:

The proceeds of the conveyance of the real estate shall be deposited into the state treasury to the credit of the Adult and Juvenile Correctional Facilities Bond Retirement Fund and shall be used to redeem or defease bonds in accordance with section 5120.092 of the Revised Code, and any remaining moneys after such redemption or defeasance shall be transferred in accordance with that section to the General Revenue Fund. (Emphasis Added).

R.C. 5120.092 contains even more restrictions which must be satisfied before prison sale proceeds may be transferred out of the segregated fund. For example, no transfer of money from the fund shall be made until an opinion from bond counsel is delivered to the State saying that all bonds were defeased or redeemed. No proceeds could be transferred from the Bond Retirement Fund until the directors of DAS and ODRC certified that all prison and juvenile sales

⁵ R.C. 5120.092 has since been amended. As Section 15(D) challenges to legislation are challenges on its face, resort to extrinsic evidence such as the amendment to R.C. 5120.092 is unnecessary. *Global Knowledge Training, L.L.C. v. Levin*, 127 Ohio St. 3d 34, 936 N.E.2d 463 (2010)¶17. In any event, the amendment has also been challenged as another violation of the One-Subject Rule. *OCSEA II*, ¶3.

contemplated by R.C. 753.10 have been completed or that no further sales will be undertaken. There is no proof in the record that any of the conditions have been satisfied.

The LECF sale proceeds were in the Bond Retirement Fund at the time the complaint was filed and an exhibit attached to the complaint showed this. Thus, contrary to the State Defendants argument that over a year and one-half ago, the \$72 million dollars was distributed to the General Revenue Fund (Mem. 2, 8), no prison sale proceeds could be transferred from the Bond Retirement Fund to help balance the budget, cover the daily operating expenses of ODRC or be placed directly in the General Revenue Fund until all conditions were satisfied.

If the funds were transferred after R.C. 5120.092 was amended, this fact is irrelevant because the constitutionality of H.B. No. 153 is judged on its face and from the four corners of the bill. “In other words, the one-subject provision does not require evidence of fraud or logrolling beyond the unnatural combinations themselves. Instead, ‘an analysis of any particular enactment is dependent upon the particular language and subject matter of the proposal,’ rather than upon extrinsic evidence of logrolling, and thus ‘an act which contains such unrelated provisions must necessarily be held to be invalid in order to effectuate the purposes of the rule.’” *In re Nowak*, 104 Ohio St. 3d 466, 481, 820 N.E.2d 335 (2004).

The argument pressed by the State Defendants, that revenue-raising statutes are appropriate in Appropriations Bills, contradicts the clear prohibition in Section 15(D), Article II of the Ohio Constitution which states: “No bill shall contain more than one subject, which shall be clearly expressed in its title.” Statutes which raise revenue are different than statutes which appropriate revenue. This Court ruled in *LetOhioVote.Org v. Brunner*, *supra*, ¶28:

An appropriation is ‘an authorization granted by the general assembly to make expenditures and to incur obligations for specific purposes.’ R.C. 131.01(F). Similarly, in *State ex rel. Akron Edn. Assn. v. Essex* (1976), 47 Ohio St.2d 47, 49, 1 O.O.3d 28, 351 N.E.2d 118, we explained that the ordinary and common

meaning of the phrase ‘appropriation bill’ is a “measure before a legislative body which authorizes ‘the expenditure of public moneys and stipulating the amount, manner, and purpose of the various items of expenditure.’ Id. at 49, 1 O.O.3d 28, 351 N.E.2d 118, quoting Webster's New International Dictionary (2d Ed.). See also Black's Law Dictionary (9th Ed.2009) 117–118 *330 (defining ‘appropriation’ to mean ‘[a] legislative body's act of setting aside a sum of money for a public purpose’).

Setting aside and authorizing the expenditure of money is vastly different than raising money by the sale of assets or the exercise of the taxing power. Depositing your paycheck in a bank account is a different thing than withdrawing funds from the account. The state argues for judicial approval to change Section 15(D) by allowing the General Assembly to raise revenue in an Appropriations Bill. This would open the door to tax and fee increases hidden in 3,000 page Appropriations Bills. Or, as was done here, authorize in the hidden recesses of an Appropriations Bill the sale or lease of the Turnpike and the transfer of billions of state-generated revenue to a private entity such as JobsOhio.

To accomplish this end-around Section 15(D), the state avoids using the true name, Appropriations Bill, and misnames H.B. No. 153 a “Budget Bill.” Then, relying upon this false premise, it argues that a bill which addresses both revenues and expenditures has a common relationship-the budget. Were this Court to view the matter otherwise, they contend, would fundamentally alter how Ohio balances the budget. (Mem. 10-11).

The first flaw, of course, is that the Title of H.B. No. 153 says on p. 11, it is “to make operating appropriations.” It is not a Budget Bill. Second, Section 15(D) prohibits two unrelated subjects in the same bill and appropriations and revenues are two different subjects. Third, this Court has already rejected the State Defendants’ “inextricably linked” argument in *LetOhioVote.Org, supra*, ¶31-34 saying appropriations are different than laws relating to appropriations; and, laws designed to generate revenue are not appropriations. Laws written to

sell an asset are not laws making an appropriation. Fourth, nothing prevents the General Assembly from matching expenses in an Appropriations Bill with a separate bill raising additional revenue, if that is needed, and doing it in a transparent manner. And, that can be done in a bill with a Title such as “A bill to increase taxes, fees, sell assets etc.” Moreover, many revenue-raising laws are already in effect. It would be a simple matter to introduce a bill amending one of those statutes and, thus, balance income and expenses.

The state’s dishonorable goal of seeking judicial approval of its argument is that there are no constitutional restrictions to raising revenue in an Appropriations Bill. That would make the One-Subject Rule meaningless. It would open the floodgates to tax and fee increases buried in 3,000 page Appropriations Bills. This Court has already seen that danger and ruled that Section 15(D) is mandatory. *In re Nowak, supra*, ¶1 syllabus; *OCSEA II*, ¶10.

Regarding the lower Court’s One-Subject ruling, this Court in *Hoover, supra*, at 6-7 reversed the dismissal of a complaint which alleged no more than that a Bill contained two subjects whose combination defied rationality saying that, if proved, the Plaintiff would be entitled to a hearing on the issue and to relief. Although it cannot be attached hereto, Plaintiffs filed a 41 page complaint with 4 exhibits and averred more than enough facts to overcome a motion to dismiss as the Court of Appeals found.

This Court has already set the precedent. Where an Appropriations Bill creates a new program which is substantive and controversial, where it has no common purpose or relationship to other provisions in the bill, and no rational reason can be discerned from the bill, it may be inferred that the provisions are the result of logrolling. *Simmons-Harris, supra*, at 16. The Court below found the legislative facts are much more aligned with *Simmons-Harris, supra*, than the cases cited by the state. *Simmons-Harris*, at p.16, which is the case later in time, finds the One

Subject Rule most significant and “particularly relevant when the subject matter is inherently controversial and of significant constitutional importance.” The Court of Appeals correctly concluded that the challenged provisions were significant, substantive, controversial and of significant constitutional importance. *OCSEA II*, ¶21-22. That is why it said: “[G]iven that such provisions amount to approximately twenty of over three thousand pages in H.B. No. 153, they are ‘in essence little more than a rider attached to an appropriations bill.’” (*OCSEA II*, ¶21).

Attempts by legislatures in other states to sell state prisons by burying the authorization in other bills have been rejected. The Circuit Court in Florida, in *Baiardi v. Tucker*, Case No. 2011 CA 1838 (Second Judicial Circuit, Leon County 2011, appeal dismissed *Bondi v. Tucker*, 93 So.3d 1106, rejected as unconstitutional a very similar approach to prison privatization used by the Florida Legislature. That Legislature in an Appropriations Bill authorized the Florida Department of Correction to privatize 29 prisons. Its Constitution in Article III, Section 6 states “Every law shall embrace but one subject and matter properly connected therewith, and the subject shall be briefly expressed in the title.” The court found that the Title of the Bill did not indicate that the Bill was changing the process or standards for privatizing prisons. If such substantive changes to general law were desired, the court said that the Legislature cannot use “the hidden recesses of the General Appropriations Act.” The Legislature must use the general law. It also ruled that prison privatization legislation is not rationally related to an Appropriations Bill and “such indirect enactment of law is contrary to our principles of representative government.”

The Illinois Supreme Court in *People v. Cervantes* (2000), 189 Ill.2d 80, 723 N.E.2d 265, 270-73 (1999) likewise applied that state’s Single Subject Rule and found unconstitutional a rider which allowed its DRC youth detention facilities to be owned, operated and managed by

private contractors. The court found no natural and logical connection between neighborhood safety (the main bill) and the privatization of juvenile detention facilities. That legislation's requirement of a 7% savings was immaterial.

Further demonstrating the multiple One-Subject Rule violations in H.B. No. 153, the Court of Appeals in *City of Cleveland v. State*, 2013-Ohio-1186, 989 N.E.2d 1072 (2013) ¶44-54 also found unconstitutional on One-Subject Rule grounds the enactment of R.C. 3717.53 in H.B. No. 153. Addressing the state's argument there, which is very much like the argument it makes here, that Court said at ¶51:

We are deeply concerned with the broad scope of the state's argument here. Under the state's logic, every subject matter statewide that conceivably can be connected to a dollar of not merely state funding but also municipal spending could be substantively regulated in a single appropriations bill. We are reminded of the Ohio Supreme Court's concern for such broad logical connections expressed in *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 715 N.E.2d 1062 (1999). In that case, the court struck down a bill broadly addressing topics under the umbrella of 'laws pertaining to tort and other civil actions.' *Id.* at 494, 715 N.E.2d 1062. The court addressed its concern for bills covering a vast scope of topics all tenuously tied together, stating, '[i]f we accept this notion, the General Assembly could conceivably revamp all Ohio law in two strokes of the legislative pen—writing once on civil law and again on criminal law. The thought of it is staggering.'

The state's last jab hits the Court of Appeals ruling at ¶23 allowing Plaintiffs to challenge various other provisions in H.B. No. 153 such as the Turnpike and JobsOhio which were alleged in the complaint to violate the One-Subject Rule. This case is not the first instance where Plaintiffs who challenged both specific statutes and an entire bill as violative of the One-Subject Rule could proceed. In *Akron Metropolitan Housing Authority v. State of Ohio*, 2008-Ohio-2836, 2008 WL 2390802, another unanimous Tenth District Court said at ¶14:

Plaintiffs, however, did not limit their constitutional challenge to one or more specific provisions of the bill. Rather, plaintiffs challenged the enactment of Am.Sub.S.B. No. 18 in its entirety. Because they alleged injury resulting from the enactment of the legislation, they have a direct interest in the challenged

legislation that is adverse to the legal interests of the state and gives rise to an actual controversy for the courts to decide. Moreover, they properly framed the issues and presented them with ‘the necessary adversarial zeal.’ Indeed, to deny plaintiffs standing would insulate legislation from one-subject constitutional scrutiny unless a coalition of plaintiffs could be assembled to cover the wide variety of subjects amassed in a single piece of legislation. The trial court did not err in determining plaintiffs have standing to challenge the constitutionality of Am.Sub.S.B. No. 18 in its entirety

This Court has also recognized that challenges to the entire bill are appropriate if pleaded as Plaintiffs did here. See, *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 484, 880 N.E.2d 420 (2007), ¶79.

In the final analysis, the issue presented by the State Defendants is subject to the doctrine of *stare decisis* which imposes an obligation on the Court to follow its precedents. *Stare decisis* avoids allegations of favoritism and engenders in the populace respect for the judiciary. Like cases will be decided alike regardless of the status of the party standing before the Court. The rule of law advocated by the State Defendants has been rejected by this Court in *LetOhioVote.Org*, *Simmons-Harris*, *Hoover*, *OCSEA I*, and *State, ex rel. Hinkle supra*. Therefore, the State Defendants and the appeal of MTC should not be accepted for review.

VI. CROSS-APPELLANTS PROPOSITION OF LAW NO. 1

- A. Where The State Sells A Prison And By Deed Transfers Ownership Of The Prison To The Purchaser And The State Additionally Contracts With The Purchaser To Subsidize For 21 Years Thereafter The Purchaser’s Costs Of Owning The Prison In The Amount Of \$3,800,000 Per Year A Claim For Violation Of Section 4 Article VIII Of The Ohio Constitution Is Stated Upon Which Relief May Be Granted**

Plaintiffs previously described the Annual Ownership Fee. Additional facts concerning CCA’s purchase of the prison and the entanglement of the state’s interest with that of CCA include the obligation imposed by R.C. 753.10(B)(2)(d) that CCA, and all successors in title, grant to the state an irrevocable right to repurchase the prison and transferred land. If the State does not exercise its right of first refusal, the contractor has the right to sell the prison and all

acreage to anyone. R.C. 753.10(B)(2)(d)(i) and (ii) and R.C. 9.06(J)(4)(a). The contractor may charge the state any amount it chooses upon repurchase. R.C. 753.10(B)(2)(d)(i) originally restricted the repurchase price to that which was paid; but the language was vetoed by the Governor. (H.B. No. 153 p. 3221).

Additionally, R.C. 753.10(C)(4)(a) and (b) allowed the state to place restrictions in the Governor's Deed regarding the resale, use and development of the property surrounding the prison. The deed's sole restriction for LECF is that "The grantee shall not use, develop or sell the Property such that it will interfere with the quiet enjoyment of the neighboring State-owned land." The Governor's Deed for LECF (attached to the complaint) shows that the state sold all 119 acres to CCA. Thus, there are no neighboring State-owned lands which would restrict CCA from doing as it pleases with the land. CCA, or its successor, could develop the surrounding 119 acres in any manner it chose without legal concern that a prison existed next door. If developed, and the state desires to exercise its right to get LECF back, the state could be forced to pay CCA for the cost of the prison and, because of the vetoed language in R.C. 753.10(B)(2)(d)(i), CCA has the ability to make the state pay for all of its development costs.

The Annual Ownership Fee, CCA's right to recover for possible development costs, the statutes in H.B. No. 153 allowing the any use of the property and the 5 page Governor's Deed attached to the complaint form the basis for Plaintiffs Article VIII, Section 4 claim. Because the trial court dismissed the claim, no discovery occurred.

When the trial court wrote that it "cannot conclude that the legislation at issue is in violation of this prohibition [] the State of Ohio simply does not become a joint owner" (State Appx. 5, p. 20), it never ruled upon Plaintiffs claim that the actions taken pursuant to the challenged legislation violated Article VIII, Section 4. When the Court of Appeals ruled that "no

set of facts in plaintiffs complaint, if proven, would entitle them to relief” that Article VIII, Section 4 of the Ohio Constitution was violated (*OCSEA II, supra*, ¶39), it relied upon *Grendell v. Ohio Envtl. Prot. Agency*, 146 Ohio App. 3d 1, 764 N.E.2d 1067 (2001) which, in turn, relied upon *Taylor v. Ross Cty. Commrs.*, 23 Ohio St. 22, 78 (1872).

The two cases are inapposite and the Court of Appeals opinion lacks separate reasoning on this very important constitutional issue wherein a significant state asset was sold under questionable constitutional statutes. Dismissal of this claim was contrary to the standard for review of motions to dismiss. Dismissal is appropriate only where it appears beyond doubt from the complaint that Plaintiffs can prove no set of facts entitling them to recovery. *O'Brien v. University Community Tenants Union, Inc.*, 42 Ohio St.2d 242, 327 N.E.2d 753 (1975), syllabus. The court must accept all factual allegations in the complaint as true and make all reasonable inferences in favor of the Plaintiffs. *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 192, 532 N.E.2d 753 (1988). A motion to dismiss is procedural and tests only the sufficiency of the complaint. *State ex. rel. Hanson v. Guernsey County Board of Commissioners*, 65 Ohio St.3d 545, 548, 605 N.E.2d 378 (1992). As long as there is a set of facts consistent with the Plaintiffs' complaint which would allow the Plaintiffs to recover, the court may not grant a defendant's motion to dismiss. *York v. Ohio State Highway Patrol*, 60 Ohio St.3d 143, 144-45, 573 N.E.2d 1063(1991). Plaintiffs must only show that the complaint alleges a claim which is not frivolous. *Mason Theatrical, Inc. v. Federal Exp. Corp.*, 89 F.3d 1244, 1248 (6th Cir. 1998).

The Court below relied upon language in *Taylor* regarding the purchase of services:

Finally, payment of the annual ownership fee by the state to the prison operators does not violate Article VIII, Section 4 because the Ohio Constitution ‘does not forbid the employment of corporations, or individuals, associate or otherwise, as agents to perform public services; nor does it prescribe the mode of their compensation.’ *OCSEA II* ¶38.

The Annual Ownership Fee payments are not for services. They are annual payments adding up to \$79,800,000 paid by the state to defray CCA's ownership costs, a cost which the state of Ohio does not have because it does not own the prison. A subsidy has been defined as direct financial aid furnished by a government, as to a private commercial enterprise, an individual, or another government or any grant or contribution of money. *State Defender Union Employees v. Legal Aid & Defender Ass'n of Detroit*, 230 Mich. App. 426, 432, 584 N.W.2d 359 (1998). *Taylor* is inapposite.

Grendell v. Ohio Environmental Protection Agency, 146 Ohio App.3d 1, 764 N.E.2d 1067 (2001) is not an appropriate precedent either. *Grendell* was decided on joint motions for summary judgment after discovery was completed. *Grendell* turned on the joint venture part of Article VIII, Section 4. It did not consider or apply the credit portion of Section 4. Moreover, the facts are so different that *Grendell* is not a precedent here at all. In *Grendell*, at p. 8, no state asset was sold or conveyed to the contractor. The contractor there was required to lease the land and buildings from another and all of the "initial capital investment costs of the program" were borne by the contractor. Here, the state owned the prison and it was paid for by tax dollars. Second, ODRC pays an Annual Ownership Fee subsidy to CCA. In *Grendell*, the contractor paid a portion of the commission to the OEPA. The situations are reversed. In *Grendell* the state received money. Here, the state pays the money.

Grendell, at p. 12, citing *Taylor, supra*, pointed out the very difference which the Court of Appeals missed and Plaintiffs rely on. *Taylor* said at p. 78, that contracting with a corporation to perform a service "is a different thing from investing public money in the enterprises of others, or from aiding them with money or credit." This court, in *State ex rel. Tomino v. Brown*, 47 Ohio St.3d 119, 122, 549 N.E.2d 505 (1989), in language apropos here said "Historically,

Sections 4 and 6 of Article VIII have not been applied to programs undertaken for public welfare. Rather, these sections have been uniformly held to prohibit governmental involvement only in ventures that subsidize commerce or industry.” (Emphasis Added).

Section 4, Article VIII of the Ohio Constitution provides “The credit of the state shall not, in any manner, be given or loaned to, or in aid of, any individual association or corporation whatever; nor shall the state ever hereafter become a joint owner, or stockholder, in any company or association, in this state, or elsewhere, formed for any purpose whatever.” *State ex rel. Saxbe v. Brand* (1964), 176 Ohio St. 44, 48, 197 N.E.2d 328 (1964) and ¶5 syllabus explain there can be a giving or loaning of the credit of the state even where no debts of the state, either direct or contingent, are incurred. That there is a public purpose does not affect the outcome. Here, there is a debt of the state. The Annual Ownership Fee of \$3,800,000 must be paid for 21 years.

Cases involving Section 6, Article VIII of the Ohio Constitution also assist in interpreting and applying Section 4 because the prohibitions are “nearly identical.” *State ex rel. Eichenberger v. Neff*, 42 Ohio App.2d 69, 74, 330 N.E.2d 454 (1974). In *Neff*, Ohio University leased unused land to the Kroger Company to be developed as a shopping center. Plaintiffs’ challenged the lease in part under Article VIII, Section 4. Although acknowledging that public and private properties were not actually joined as one and that OU was not a joint entrepreneur with Kroger, the court nonetheless found a Section 4 violation. The terms of the lease provided that the improvements remained Kroger’s property and may be encumbered. The court held that where the land of the state is joined with improvements placed thereon by a contractor such joinder produces an integral whole in violation of Section 4 and “such an arrangement “results in a

lending of the credit of the state of Ohio.” At 75-76. Compare with CCA’s right to develop the LECF lands and, if repurchased, the state will pay for the improvements.

In *C.I.V.I.C. Grp. v. Warren*, 88 Ohio St. 3d 37, 40, 723 N.E.2d 106 (2000), three ordinances authorized the construction of streets, sewer and water lines, the issuance of bonds with the proceeds used to pay for development of private property and tax revenue pledged to pay off the bonds. The developer would reimburse the City for 80% of the payments made, the City would pay 20% of the construction costs and 100% of other sales costs but the City would end up owning the streets, sewer and water lines. This Court ruled: “These actions by the City ‘raise money for’ and ‘loan its credit to or in aid of’ private corporations.” “The ordinances and agreement in question clearly violate Section 6, Article VIII.” “Accordingly, we hold that where a city contributes to the payment for and financing of a residential subdivision development project, the city is taking action ‘to raise money for’ and ‘loan its credit to, or in aid of’ private corporations in violation of Section 6, Article VIII of the Ohio Constitution. (Id. 42).

This is the first time in Ohio’s history that the state has sold a prison. This highly unusual type of financial arrangement should not be given a stamp of approval by the court on a motion to dismiss especially where, as here, no Defendant has presented a single authority on point approving this scheme. Nor did the court cite any authority in making its ruling of first impression in the entire country. Counsel’s “all states” research has also disclosed no such cases. The lower Court’s affirmance sets the standard for these types of sales, indeed the sale of all of the state’s assets, in the future. In this instance, cumulatively, the Annual Ownership Fee payments will exceed the price paid by CCA for LECF. It cannot be said as a matter of law that this financial scheme where the state spends more money in subsidizing its sale of the prison to CCA (\$79,000,000) than it received from the sale of the prison to CCA (\$72,000,000) and where

CCA will end up owning this prison and acreage at no cost is a facially constitutional transaction. Moreover, if LECF is repurchased by the state, the sale and resale will likely be a wash. However, CCA will walk away with \$79,800,000 in Annual Ownership Fee payments in addition to all of the Per Diem payments made by the state to it. The lower courts erred in dismissing this claim.

VII. CROSS-APPELLANTS PROPOSITION OF LAW NO. 2

A. The Franklin County Court Of Common Pleas Possessed Jurisdiction And The State Employment Relations Board Lacked Jurisdiction To Determine Whether The Employees Working For The Private Contractor Pursuant To A Contract With The State Are Public Employees As Defined In R.C. 4117.01(C)

A fact most courts misunderstand is that SERB does not have an all-encompassing statute vesting jurisdiction in it over any matter which involves a public employer or public employee. No Defendant identified a statute which vests SERB with jurisdiction over this claim. Nor did the Common Pleas Court or the Court of Appeals identify such a jurisdictional statute applying to the facts of this case. *FCLEA, supra*, in paragraph one of the syllabus states that SERB “has exclusive jurisdiction to decide matters committed to it pursuant to R.C. Chapter 4117.”

There are two ways that SERB may exercise jurisdiction. The first occurs when a specific statute enables SERB to exercise jurisdiction and a party utilizes that statutory authority. These statutes are: R.C. 4117.05, where SERB certifies exclusive bargaining representatives and approves requests for voluntary recognition; R.C. 4117.06(A) and R.C. 4117.07 where SERB determines the appropriateness or clarification of a bargaining unit, petitions for representation elections and decertification matters; R.C. 4117.11 and R.C. 4117.12 whereby SERB decides unfair labor practices and awards ULP remedies. SERB also has jurisdiction under R.C. 4117.19 to require certain reports from and regulate the bylaws of labor organizations.

No party to this case filed anything with SERB pursuant to those statutes or invoked its

jurisdiction. Nor, are those statutes cited in Plaintiffs' complaint. Thus, nothing expressly vested jurisdiction in SERB over the subject matter of Plaintiffs' claim which is whether the individuals working for MTC and CCA pursuant to a contract with the state are public employees as defined in R.C. 4117.01(C).

Secondly, a claim is within SERB's jurisdiction where a complaint filed in Court contains language which may fairly be construed as conduct or activity which is equivalent to one of SERB's express jurisdictional statutes. *FCLEA, supra*, 171; *E. Cleveland v. E. Cleveland Firefighters Local 500, I.A.F.F.*, 70 Ohio St. 3d 125, 127, 637 N.E.2d 878 (1994). In this circumstance the court must analyze the complaint and find that the conduct or activity alleged therein is equivalent to one of SERB's express jurisdictional statutes. Neither Court has made such a finding in this case and the undisputed facts would not support it.

This Court in *FCLEA*, at p. 171, explained how it determines whether the conduct or activity alleged in the complaint is within SERB's jurisdiction.

Plaintiffs asserted essentially three claims. First, the FOP did not 'fairly and adequately represent' the sheriff's department employees. Second, the tentative partial agreement between the FOP and the board of county commissioners was invalid because the sheriff had not approved it. Third, the FOP was acting 'in its own self-interest and against the interests of' the sheriff's department employees by scheduling a vote on the partial agreement without allowing the employees to study the agreement beforehand.

In every respect, plaintiffs were asserting collective bargaining rights created by R.C. Chapter 4117. The first claim depended on the FOP's duty under R.C. 4117.11(B)(6) to fairly represent all employees in the bargaining unit. Although plaintiffs attempted to characterize their second claim as one arising under R.C. 325.17, that claim clearly was premised on the allegation that the partial agreement served to 'defeat' the employees' right to a fair vote under the auspices of SERB. It therefore ultimately depended on the right to vote on union representation established in R.C. 4117.07.

Plaintiffs' third claim expressly relied on R.C. 4117.19(C)(4).

In *FCLEA*, this Court found that the conduct or activity alleged in that complaint was equivalent to one of the express statutory grants of O.R.C. Chapter 4117 authority mentioned above. By contrast, there is no conduct or activity alleged in this complaint which may be found to be within SERB's express statutory jurisdiction. *FCLEA* recognizes that SERB does not have jurisdiction over every situation.⁶ It says this at p. 171 and ¶2 of the syllabus:

That Chapter [4117] was meant to regulate in a comprehensive manner the labor relations between public employees and employers. Necessarily, then, it was not meant to give SERB exclusive jurisdiction over claims that a party might have in a capacity other than as a public employee, employer, or union asserting collective bargaining rights. Thus, as a matter of jurisdiction, if a party asserts rights that are independent of R.C. Chapter 4117, then the party's complaint may properly be heard in common pleas court. (Emphasis Added).

Plaintiffs' complaint asserted independent rights and they are in a capacity other than public employee, public employer or union asserting collective bargaining rights. The O & M Contract between MTC and the state is not a labor agreement and SERB does not have jurisdiction over it. No labor agreement between OCSEA and MTC exists. OCSEA no longer is the bargaining representative for the employees at the North Central Correctional Complex because federal law prohibits a labor organization such as OCSEA from representing both "rank and file" workers and guards. 29 U.S.C. §159(b)(3). And, National Labor Relations Act issues are outside SERB's jurisdiction. In the words of *FCLEA*, OCSEA is not asserting collective bargaining rights. MTC, by definition, is not a public employer. R.C. 4117.01(B). Therefore, SERB does not have jurisdiction over it. Thus, SERB lacked jurisdiction over the parties and the subject matter.

⁶ *State ex rel. Rootstown Local Sch. Dist. Bd. of Educ. v. Portage Cnty. Court of Common Pleas*, 78 Ohio St. 3d 489 (1997) is an example.

Additionally, one Plaintiff was a supervisor at Marion Correctional Institution (MCI) when privatization caused his job loss. Only public employees may be members of a bargaining unit. Supervisors are not public employees. R.C. 4117.01(C)(10) excludes them from public employee status. Thus, the rights of supervisors are not governed by O.R.C. Chapter 4117 or by any CBA and this Plaintiff had no rights thereunder and he could not file any charge with SERB. SERB totally lacked jurisdiction over him and his claims.

Doctors Professional Assn. v. SERB, 2004-Ohio-5839, 2004 WL 2474422, ¶13 states: “persons who are not public employees are not subject to the provisions of R.C. Chapter 4117.” In *Ohio Historical Society v. SERB*, 66 Ohio St.3d 466, 479, 613 N.E.2d 591 (1993) this Court ruled that the employer involved in that case was not a public employer and, thus, SERB lacked jurisdiction over the petition for representation election filed by the union. Although no such petition was filed in this case, the ruling that SERB lacks jurisdiction over private employers is good law to this day.

The Court of Appeals read the *FCLEA* case much too broadly and followed language in the opinion which does not apply here because, unlike *FCLEA*, no matter how the complaint is read there is no statutory basis for jurisdiction in SERB. “[W]here jurisdiction is dependent upon a statutory grant, this Court is without the authority to create jurisdiction when the statutory language does not. That power resides in the General Assembly.” *Waltco Truck Equip. Co. v. City of Tallmadge Bd. of Zoning Appeals*, 40 Ohio St. 3d 41, 43, 531 N.E.2d 685 (1988).

The court’s Decision did not fully consider (i) those undisputed facts and (ii) the exclusion of these matters from SERB’s jurisdiction as *FCLEA* explains. In construing a statute, the court must be careful not to add or insert words which were not included by the General Assembly. *State ex rel. Carna v. Teays Valley Local Sch. Dist. Bd. of Edn.*, 131 Ohio St. 3d 478,

967 N.E.2d 193 (2012), ¶18. Although this Court's Decision does so unintentionally, it has legislated jurisdiction in SERB by reliance on language, not from any statute, but excerpted from an opinion from this Court which it misread. The court cannot create jurisdiction in any administrative body. Nor can it substitute language from a court opinion as statutory authority for expanding SERB's jurisdiction. "The reason the legislative, executive, and judicial powers are separate and balanced is to protect the people, not to protect the various branches of government." *State ex rel. Bray v. Russell*, 89 Ohio St. 3d 132, 135, 729 N.E.2d 359 (2000).

Additionally, H. B. 153 also enacted R.C. 9.06(K) which provided that in the event suit was brought alleging a constitutional violation, Plaintiffs could only file suit in the Franklin County Common Pleas Court. (See, previous discussion). The General Assembly has expressly vested the Franklin County Common Pleas Court with jurisdiction over all issues in this case. "It is well established that statutes establishing subject matter jurisdiction, which create and define the rights of parties to sue and be sued in certain jurisdictions, are substantive law." As substantive law, R.C. 9.06(K) prevails over language in the *FCLEA* opinion from this Court, taken out of context, that SERB has jurisdiction to decide ultimately the question of who is the public employer. *Proctor v. Kardassilaris*, 115 Ohio St. 3d 71, 74-75, 873 N.E.2d 872 (2007).

In the final analysis, when the matter is fully considered, the *FCLEA* reference is not even on point. We all know who the employer is. It is MTC and CCA. That fact is undisputed. The issue is whether the employees have public employee status under R.C. 4117.01(C). Part of the reason this is such a significant issue is that if they are, they can participate in OPERS without also being forced to participate in the non-waivable Social Security System. Public employees are excluded from mandatory participation in social security. The employees simply cannot afford both retirement systems. Thus, the Franklin County Common Pleas Court had

jurisdiction over this issue and it was error to dismiss this claim.

VIII. CONCLUSION

For the foregoing reasons, Plaintiffs-Appellees/Cross-Appellants respectfully request that this Court deny the State Defendants and MTC's Discretionary Appeals because the Court of Appeals remanded the case and no proceedings have yet occurred there. But, it should accept for review Plaintiffs cross-appeal and reverse the Court of Appeals on the above-stated issues. Alternatively, if this Court accepts the State Defendants and MTC's appeal for review, it should also accept the issues raised by Plaintiffs' cross-appeal so that a complete picture is before the Court.

Respectfully submitted,



James E. Melle (0009493)
167 Rustic Place
Columbus, Ohio 43214-2030
(614) 271-6180; 419-332-1488 fax
Jimmelle43@msn.com

Attorney for Plaintiffs-Appellees/Cross-Appellants: Ohio Civil Service Employees Association, David Combs, Clair Crawford, Lori Leach Douce, Margo Hall, Sheila Herron, Daniel Karcher, Rebecca Sayers, Angela Schuster, Troy Tackett, Kathy Tinker, Lisa Zimmerman and ProgressOhio.org