

IN THE SUPREME COURT OF OHIO

State ex. rel. Ohio Civil Service) Supreme Court Case No. 2014-0319
 Employees Association, et al.,)
)
 Plaintiffs/Appellees/Cross-Appellants) On Appeal from the Franklin County Court of
) Appeals, Tenth Appellate District
 v.)
)
 State of Ohio, et al.,) Court of Appeals Case No. 12AP-1064
)
 Defendants/Appellants/Cross-Appellees)
)

MERIT BRIEF OF APPELLANT/CROSS-APPELLEE
 MANAGEMENT & TRAINING CORPORATION

Adam Martin, Esq. (0077722)
 Kevin W. Kita (0088029)
 Sutter O'Connell
 1301 East 9th Street
 Cleveland, OH 44114
amartin@sutter-law.com
kkita@sutter-law.com
 P: 216-928-2200
 F: 216-928-3636

*Attorneys for Defendants/Appellant/Cross-Appellee:
 Management & Training Corporation*

Michael Dewine (0009181)
 Attorney General of Ohio
 Eric E. Murphy (0083284)
 State Solicitor and Counsel of Record
 30 East Broad St. 16th Floor
 Columbus, OH 43215
Eric.murphy@ohioattorneygeneral.gov
 P: 614-466-8980
 F: 614-446-5087

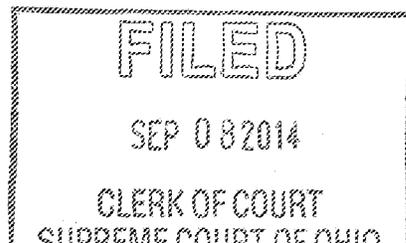
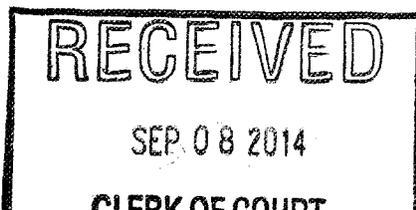
*Attorneys for Defendants/Appellants/Cross-Appellees:
 State of Ohio, Governor John R. Kasich,*

James E. Melle (0009493)
 167 Rustic Place
 Columbus, Ohio 43214
jimmelle43@msn.com
 P: 614-271-6180

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

Nicholas A. Iarocci, Esq. (0001937)
 Ashtabula County Prosecuting Attorney
 25 West Jefferson Street
 Jefferson, OH 44047
TLSartini@ashtabulacounty.us
 P: 440-576-3662
 F: 440-576-3600

*Attorney for Plaintiffs/Appellees/Cross-Appellants:
 Dawn M. Cragon, Roger A. Corlett and Judith
 A. Barta*



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, and the 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, OH 43215-3413
Rsaxbe@taftlae.com
Jabrams@taftlaw.com
Ckilgard@taftlaw.com
P: 614-221-2838
F: 614-221-2007

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

STATEMENT OF THE FACTS1

STATEMENT OF THE CASE.....3

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW.....7

PROPOSITION OF LAW I: Amendments to Established Cost Saving
Provisions in a Biennial Budget Bill Do Not Violate the Ohio Constitution’s
One-Subject Rule7

PROPOSITION OF LAW II: Provisions in a Biennial Budget Bill That
Authorize State Agencies to Raise Specific Types of Revenue Do Not
Violate the Ohio Constitution’s One-Subject Rule Merely Because They Set
the Terms By Which the Agencies May Do So.13

PROPOSITION OF LAW III: A Court Should Not Permit An Evidentiary
Hearing For a Provision-by-Provision Review of a Biennial Budget Bill
that, On Its Face, Has a Common Purpose17

CONCLUSION.....19

CERTIFICATE OF SERVICE21

TABLE OF AUTHORITIES

Cases

Beagle v. Walden, 78 Ohio St.3d 59, 676 N.E.2d 506.....8

Brady v. Safety-Kleen Corp., 61 Ohio St.3d 624, 576 N.E.2d 722 (1991).....18

Central Ohio Transit Auth. v. Transport Workers Union of America, Local 208, 37 Ohio St.3d 56, 524 N.E.2d 151 (1988).....18

Chambers v. St. Mary’s School, 82 Ohio St.3d 565, 697 N.E.2d 198 (1998)18

City of Riverside v. State, 190 Ohio App.3d 765, 2010-Ohio-5868, 944 N.E.2d 1089 (1991) ..13

City of Solon v. Martin, Cuyahoga App. No. 89586, 2008-Ohio-808 8-11

Comtech Systems, Inc. v. Limbach, 59 Ohio St.3d 96, 570 N.E.2d 1089 (1991) 13-14

Cuyahoga Cty. Veterans Servs. Comm. v. State, 159 Ohio App.3d 276, 2004 Ohio 6124, 571 N.E.2d 470 10-11

Fairview v. Giffie 73 Ohio St.183, 76 N.E. 865 (1905).....18

Hoover v. Bd. Of Cnty. Comm’rs, 19 Ohio St.3d 1, 482 N.E. 575 (1985).....8

In re Nowak, 104 Ohio St.3d 466, 2005-Ohio-6777, 820 N.E.2d 3358, 19

Simmons-Harris v. Goff, 86 Ohio St.3d 1, 1999-Ohio-77, 711 N.E.2d 203 (1999)
..... 12, 14, 16-17

S. Euclid v. Jemison 28 Ohio St.3d 157, 503 N.E.2d 136 (1986).....18

State v. Bloomer, 122 Ohio St.3d 200, 2009-Ohio-2462, 909 N.E.2d 1254.....7, 8

State v. Harmon 31 Ohio St.250 (1877)18

State v. Hinkle v. Franklin Cnty. Bd. Of Elecs., 62 Ohio St.3d 145, 580 N.E.2d 767 (1991)17

State v. Warner 55 Ohio St.3d 31, 564 N.E.2d 18 (1990)18

State ex rel. Clarke v. Cook, 103 Ohio St. 465, 134 N.E. 655 (1921)8, 12

<i>State ex rel. Dix v. Celeste</i> , 11 Ohio St.3d 141 464 N.E.2d 153 (1984).....	7
<i>State ex rel. Ohio Academy of Trial Lawyers v. Sheward</i> , 86 Ohio St.3d 451, 1999-Ohio-123, 751 N.E.2d 1062	7, 17, 18
<i>State ex rel. Ohio AFL-CIO v. Voinovich</i> , 69 Ohio St.3d 225, 631 N.E.2d 582 (1994)...	9, 11-12
<i>State ex rel. OCSEA, Local 11 v. State Empl. Rels. Bd.</i> , 104 Ohio St.3d 122, 2004-Ohio-6363, 818 N.E.2d 688	7, 8, 16
<i>State ex rel. Ohio Roundtable v. Taft</i> , Franklin App. No. 02AP-911, 2003-Ohio-3340	14-15, 17, 20
<i>UAW, Local Union 1112 v. Brunner</i> , 182 Ohio App.3d 1, 2009-Ohio-1750, 911 N.E.2d 327	8, 12, 19
<i>Weil v. Taxicabs of Cincinnati, Inc.</i> , 139 Ohio St. 198, 39 N.E.2d 148 (1942).....	13

Constitutional Sections

Article II, Section 1	4
Article II, Section 1c	4
Article II, Section 15(D)	3, 7
Article II, Section 16	4
Article VIII, Section 4.....	4

Statutes

O.R.C. 9.06	<i>Passim</i>
O.R.C. 4117.01	4
O.R.C. 4506.161	9-10
O.R.C. 5901.02	10
O.R.C. 5901.021	10
O.R.C. 5901.03	10

Rules

Civ. R. 8(A).....	6
Civ. R. 41(A).....	4

Other References

2012 Ohio Am.Sub.H.B. 153.....	<i>Passim</i>
1995 Ohio H.B. 117	1
1997 Ohio H.B. 215	11
1997 Ohio H.B. 293	11
1999 Ohio H.B. 283	11
2007 Ohio H.B. 130	11
2009 Ohio H.B. 1	11

APPENDIX:

Judgment Entry, Tenth Appellate District, January 22, 2014.....	Ex. 1
Opinion, Tenth Appellate District, January 16, 2014	Ex. 2
Judgment Entry, Tenth Appellate District, October 28, 2013	Ex. 3
Opinion, Tenth Appellate District, October 10, 2013.....	Ex. 4
Opinion, Franklin County Common Pleas Court, November 20, 2012.....	Ex. 5
Oh. Const. Art. II, § 15	Ex. 6
O.R.C. 9.06	Ex. 7

STATEMENT OF THE FACTS

On July 30, 2012, Governor John R. Kasich signed Am.Sub.H.B. 153 (“H.B. 153”), Ohio’s 2012-2013 budget bill. The bill was duly enacted to address Ohio’s looming eight *billion* dollar budget deficit by making “operating appropriations for the biennium” and providing “authorization and conditions for the operation of programs, including reforms for the efficient and effective operation of state and local government.” (*See Appellees 10th Dist. Merit Br., Appx 2., R. 61 at p.137*); H.B. 153. Pursuant to this title, H.B. 153 included, in part, biennial appropriations for the Department of Rehabilitation and Correction (“DRC”) to fund their institutional operations; prisoner compensation; mental health services; administrative operations; medical, education and recovery services; and lease payments. *See* H.B. 153 Section 373.10. H.B. 153 also contained several provisions aimed at reducing the amount of money required by the DRC and other agencies of government. *See generally* H.B. 153.

The bill accomplished this goal, in part, by amending a pre-existing, 16 year-old prison privatization program. *See* R.C. 9.06. The program was originally established in 1995 through the creation of Ohio Revised Code Section 9.06 in 1995 Am.Sub.H.B. 117, a general appropriations bill whose stated subject – similar to H.B. 153 – was “to make appropriations for the biennium * * * and to provide for the authorization and conditions for the operation of state programs.” *See* 1995 H.B. 117; *see also* H.B. 153. Through its passage, R.C. 9.06 authorized the State of Ohio to enter into contracts with private companies for the purposes of operating and managing Ohio’s prisons so long as they realized a minimum of a 5% cost savings to the State budget. R.C. 9.06(A)(4). The law also set up a structure of rules and regulations for governing such transactions. *See* R.C. 9.06. Based on this authority, the State of Ohio began privatizing prisons in the year 2000. The program was revisited and amended on five (5) separate occasions

as needed; each time via an appropriations bill. *See* R.C. 9.06 (Legislative History). The constitutionality of the creation of the prison privatization program and its first five (5) amendments is unquestioned.

In order to address the immense budgetary issues Ohio faced in 2012, the General Assembly enacted H.B. 153, Section 753.10, (“Sec. 753.10”) which authorized the DRC to enter into contracts with private entities for the sale of prison facilities. Sec. 753.10(B)(1). The General Assembly also amended R.C. 9.06 to expand its rules to apply to any facility sold under Sec. 753.10. *See* R.C. 9.06(J)-(K).

These changes directly impact Ohio’s budget appropriations in many ways. First and most obviously, the sale of a prison facility immediately reduces the necessary funding the DRC requires to operate and maintain Ohio’s prison system. Second, Sec. 753.10 required all proceeds from the sale of prison facilities to be deposited into the state treasury to redeem or defease the Adult and Juvenile Correctional Facilities Bond Retirement Fund, with all remaining revenues to be deposited into the General Revenue Fund. *See* Sec. 753.10. Third, newly added R.C. 9.06(J)(3) ordered that all facilities sold under Sec. 753.10 would be taxable, as would the companies who profited from their operation:

(3) Upon the sale and conveyance of the facility, the facility shall be returned to the tax list and duplicate maintained by the county auditor, and the facility shall be subject to all real property taxes and assessments. No exemption from real property taxation pursuant to Chapter 5709 of the Revised Code shall apply to the facility conveyed. The gross receipts and income of the contractor to whom the facility is conveyed that are derived from operating and managing the facility under this section shall be subject to gross receipts and income taxes levied by the state and its subdivisions, including the taxes levied pursuant to Chapters 718, 5747, 5748., and 5751. of the Revised Code. Unless exempted under another section of the Revised Code, transactions involving a contractor as a consumer or purchaser are subject to any tax levied under Chapters 5739 and 5741 of the Revised Code.

Finally, H.B. 153 left unaltered the pre-existing requirement that any company seeking to operate and manage a prison realize a minimum five percent (5%) savings to the State's budget. R.C. 9.06(A)(4). Each item of law contained within H.B. 153 is severable, and the invalidity of any portion of the Act does not affect other items of law contained therein. *See* H.B. 153 Section 806.10.

Pursuant to the authority granted via Sec. 753.10, on December 19, 2011, the State sold Lake Erie Correctional Facility in Conneaut, Ohio (LECF) to Corrections Corporation of America ("CCA"), naming CCA Western Properties, Inc. as grantee. (*See Appellees 10th Dist. Merit Br., Appx.*, R. 60 at pp. 45-49). This sale included both the facility and the parcel of land upon which LECF is located. *Id.* As a result of the contract for LECF, CCA both owns and operates LECF. *Id.*

The State of Ohio also privatized a previously state-run correctional facility, North Central Correctional Institution (NCCI) in Marion, Ohio, by entering into an Operating and Management ("O&M") agreement with Management & Training Corporation ("MTC") pursuant to R.C. 9.06. (*See Appellees 10th Dist. Merit Br., Appx.*, R. 60 p. 5). As a result of this contract, just like the contracts created pursuant to the prior versions of R.C. 9.06 since the year 2000, the State retained ownership of the facility and the land upon which NCCI sits, but MTC now manages the operations of the facility. *Id.*

STATEMENT OF THE CASE

This is a re-filed case from a suit originally filed on August 25, 2011. (*See Appellees 10th Dist. Merit Br., Appx.*, R. 60. at p. 60). In the original case, Plaintiffs/Appellees/Cross-Appellants ("Appellees") alleged that H.B. 153 was unconstitutional because it violated the one-subject rule set forth in Article II Section 15(D) of the Ohio Constitution; the right of referendum

set forth in Article II, Sections 1 and 1c of the Ohio Constitution; and the Joinder of Property Rights provision set forth in Article VIII, Section 4 of the Ohio Constitution. (*See Appellees 10th Dist. Merit Br., Appx 2., R. 61 at pp. 136-151*). Appellees sought a Temporary Restraining Order (TRO) to prohibit the State of Ohio from acting under R.C. 9.06 and Sec. 753.10 to privatize any of the State's prisons. *Id.*

On August 31, 2011, the trial court denied Appellees' Motion for a TRO. *Id.* The trial court held, in pertinent part, that the challenged portions of H.B. 153 did not violate the one-subject rule; nor did they result in an improper joinder of property rights. *Id.* On December 5, 2011, the State defendants filed their Motion for Judgment on the Pleadings contemporaneously with their Motion for Summary Judgment. *See ProgressOhio.org et al v. State of Ohio, Franklin Ct. Com. Pls., No. 11-CV-10647, Dec. 5, 2011.* Rather than oppose these Motions, Appellees dismissed the case pursuant to Civ. R. 41(A). *Id.* at Dec. 21, 2011.

Appellees filed the Complaint underlying the present action on July 9, 2012, alleging: (1) that H.B. 153 violates the one-subject rule of the Ohio Constitution; (2) that the bill results in an unconstitutional joinder of public and private property; and (3) that uncodified section 812.20 of the bill violates Article II, Sections 1 and 16 of the Ohio Constitution because it made the amendments to R.C. 9.06 and the enactment of Sec. 753.10 take immediate effect. (*See Appellees 10th Dist. Merit Br., Appx., R. 60. at pp. 1-41*). All constitutional challenges were made both on the face of the statutes and as applied. (*Appellees 10th Dist. Merit Br., Appx., R. 60. at p. 6*). Appellees sought declaratory judgment relief, requesting that the Court void and cancel contracts between the State of Ohio and MTC made pursuant to R.C. 9.06, and the State of Ohio and CCA made pursuant to Sec. 753.10. (*See Appellees 10th Dist. Merit Br., Appx., R. 60*

at pp. 36-40). Appellees also sought declaratory relief in the form of a judgment that Appellees are “public employees” as defined under R.C. 4117. *Id.*

On September 7, 2012, the State Appellants filed their Motion to Dismiss Appellees’ Complaint on the basis that: (1) the Court lacked jurisdiction to hear Appellees’ claim for relief under R.C. 4117; (2) the Appellees lacked standing to bring their Complaint; and (3) failure to state a claim upon which relief can be granted. (*See Defs’ Mot. to Dismiss*, Sept. 7, 2012, R. 113). Appellees opposed this Motion on October 5, 2012, and the State Appellants filed their Reply in Support on October 19, 2012. (*Appellees Response in Opps’n*, R. 144; *State Appellant’s Repl. In Supp.*, R. at 164)

On November 20, 2012, the trial court granted the State Appellant’s Motion. (*Appellees 10th Dist. Merit Br., Appx.*, R. 60 at pp. 60-84; Ex. 5). In so doing, the court provided detailed rulings regarding the primary contentions in Appellees’ Complaint holding, in pertinent part:

- (1) The prison privatization portions of H.B. 153 are not in violation of the one-subject rule.
- (2) Whether the other sections of H.B. 153 cited by [Appellees] are actually in violation of the one-subject rule does not affect the outcome regarding the prison privatization portions of this bill (which is what [Appellees’] action is really about).
- (3) Neither R.C. 9.06, nor Sec. 753.10 violates Article VIII, Section 4 of the Constitution that prohibits joining of property rights between the state and private enterprise.
- (4) The initial [Appellees’] dismissal of the prior action, in addition to Appellees’ failure to seek, obtain or file referendum petitions at any time, and general inactivity is fatal to Appellees’ request for a referendum.

See id. The court further ruled on and dismissed all other claims in Appellees’ Complaint without opinion. *Id.* at p. 84.

Appellees then timely filed a Notice of Appeal. Following briefing and oral argument, the Tenth District rejected all of Appellees' claims in a 3-0 decision, except the allegations regarding a violation of the one-subject rule. (*App. Op.*, R. 106 at ¶¶ 8-51; *see* Ex. 3, 4). Relying on a right-of-referendum case for its definition of "appropriations," *State ex rel. LetOhioVote.org v. Brunner, supra*, the court erroneously held that the amendments to R.C. 9.06 and enactment of Sec. 753.10 were unrelated to the purpose of H.B. 153. *Id.* at ¶15. Specifically, the court stated that while "the sale of state prisons no doubt impacts the state budget in some fashion," their inclusion in an appropriations bill would "render[] the one-subject rule meaningless in the context of appropriations bills because virtually any statute arguably impacts the state budget, even if only tenuously." *Id.* at ¶ 20 (internal citation omitted). The court further held that R.C. 9.06 and Sec. 753.10 were "significant and substantive," but were little more than "riders" to the bill as a whole. *Id.* at ¶ 21. Accordingly, the court stated it saw "no rational reason" for combining the prison-privatization measures in the budget bill. *Id.* at ¶ 22.

In addition to the foregoing, the court noted that Appellees' Complaint "listed several examples of provisions," separate from the prison-privatization program, that Appellees "alleged were violative of the one-subject rule," and on this basis Appellees claimed the entire bill must be invalidated. *Id.* at ¶23. Apparently ignoring the severability clause under Section 806.10, the court then held Appellees' allegations regarding these non-prison provisions "complied with the notice-pleading requirements in Civ.R. 8(A)." *Id.*

Accordingly, the Tenth District remanded the case, ordering the trial court to hold an evidentiary hearing to determine whether the bill had a single subject and, if so, to investigate evidence of "logrolling" on a section by section basis and to sever all offending provisions:

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.

(*App. Op.*, R. 106 at ¶24; Ex. 4). The Appellees' application for reconsideration of the other portions of the Tenth District's decision was denied on January 22, 2014. (*Journal Entry*, R. 125; Ex. 1, 2). MTC now seeks review of the Tenth District's reversal and remand of this case on the basis of a one-subject rule violation.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

PROPOSITION OF LAW I: Amendments to Established Cost Saving Provisions in a Biennial Budget Bill Do Not Violate the Ohio Constitution's One-Subject Rule.

Colloquially referred to as the "one-subject rule," Article II, Section 15(D) of the Ohio Constitution provides that "[n]o bill shall contain more than one subject, which shall be clearly expressed in its title." In this context, the "term 'subject' * * * is to be given a broad and extensive meaning so as to allow [the] legislature full scope to include in one act all matters having a logical or natural connection." *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 498, 1999-Ohio-123, 715 N.E.2d 1062 (quoting Black's Law Dictionary (6th ed.1990)). The purpose of the one-subject rule is merely to prevent "logrolling" – the improper attachment of unrelated provisions that may not find independent support to a bill that will assuredly pass. *State v. Bloomer*, 122 Ohio St.3d 200, 2009-Ohio-2462, 909 N.E.2d 1254, ¶48.

The Court's role in enforcing the one-subject rule, however, is limited. *Bloomer*, 2009 Ohio 2462, ¶48. "It must be strongly emphasized that the constitutional mandate that every bill shall have but one subject was imposed to facilitate orderly legislative procedure, not to hamper or impede it." *State ex rel. Dix v. Celeste*, 11 Ohio St.3d 141, 143, 464 N.E.2d 153 (1984). This

is especially true in the case of appropriations bills which, by necessity, contain numerous topics joined together. *State ex rel. OCSEA, Local 11 v. State Empl. Rel. Bd.*, 104 Ohio St.3d 122, 2004-Ohio-6363, 818 N.E.2d 688, ¶30. Thus, to avoid interfering with the legislative process, this Court held that courts must “afford the General Assembly ‘great latitude in enacting comprehensive legislation by not construing the one-subject provision so as to unnecessarily restrict the scope and operation of laws.’” *Bloomer*, 2009-Ohio-2462 at ¶47 (citing *State ex rel. OCSEA., Local 11*, 104 Ohio St.3d 122, 2004-Ohio-6363, ¶30).

When reviewing a one-subject rule challenge, the Court must look to the disunity of the subject matter, not the aggregation of topics. *In re Nowak*, 104 Ohio St.3d 466, 2004-Ohio-6777, 820 N.E.2d 335, ¶59. This is because, where there is legislation pertaining to a number of topics which are germane to a single subject, the combination may not be for purposes of logrolling, but rather, for the purposes of coordinating an improvement of the law’s substance. *City of Solon v. Martin*, 8th Dist. No. 89586, 2008-Ohio-808, ¶21. Accordingly, the Court must indulge “every presumption in favor of an enactment’s validity.” *State ex rel Dix*, 11 Ohio St.3d at 146; *Bloomer* at ¶48 (citing *Hoover v. Bd. Of Cnty. Comm’rs*, 19 Ohio St.3d 1, 6 482 N.E. 575, 580 (1985)). Only where “there is no discernible practical, rational or legitimate reason for combining the provisions in one act” will a one-subject violation be found. *Beagle v. Walden*, 78 Ohio St.3d 59, 62, 676 N.E.2d 506 (1997) (internal citations omitted). So long as there is any common purpose or relationship between topics, “the mere fact that a bill embraces more than one topic will not be fatal.” *Id.* Moreover, a violation must be “manifestly gross and fraudulent” before an enactment may be invalidated. *Bloomer*, 2009-Ohio-2462 at ¶49. Even then, a court must resolve the constitutional issue on the narrowest grounds necessary to resolve the

controversy. *Brunner*, 2009-Ohio-1750 at ¶37 (citing *State ex rel. Clarke v. Cook*, 103 Ohio St. 465, 470, 134 N.E. 655 (1921)).

When specifically analyzing an appropriations bill, the Ohio Supreme Court has held that an act may include amendments to existing programs and even create whole new agencies without violating the one-subject rule. See *State ex rel. Ohio AFL-CIO v. Voinovich*, 69 Ohio St.3d 225, 228-230, 631 N.E.2d 582 (1994). The Court in *Voinovich* analyzed a situation in which the General Assembly passed a law that included, in pertinent part, appropriations for the Bureau of Workers' Compensation; appropriations for the Industrial Commission; structural changes to both agencies; and changes to the substantive provisions of the workers' compensation law. *Id.* at 228. The relators in that case argued that the substantive changes proposed bore no relation to appropriations, and therefore violated the one-subject rule. *Id.* at 229. The Court disagreed, however, holding “[w]e cannot conclude these provisions are so unrelated that they constitute a ‘manifestly gross and fraudulent violation’ of the one-subject rule of the Ohio Constitution.” *Id.* The Court continued, stating that an appropriation is simply the means by which an act is carried out and, therefore, the inclusion of substantive provisions and structural changes to existing programs in the appropriations bill does not destroy the singleness of the subject. *Id.* (citing *Rudd, No Law Shall Embrace More Than One Subject* (1958), 42 Minn.L.Rev. 389, 441). Accordingly, the Court concluded that an appropriations bill can “establish an agency, set out the regulatory program, and make an appropriation for the agency without violating the one-subject rule.” *Voinovich*, 69 Ohio St.3d at 229.

In *City of Solon v. Martin*, 8th Dist. No. 89586, 2008-Ohio-808, the Eighth District likewise held that substantive amendments to existing regulatory programs that do not make any appropriation, or alter funding allotted to an affected agency, survive one-subject rule analysis.

In *Martin*, the defendant was cited for driving under the influence of alcohol and had his commercial driver's license suspended under R.C. 4506.161, which states, in pertinent part:

No court shall issue an order granting limited driving privileges for operation of a commercial motor vehicle to any person whose driver's license or commercial driver's license has been suspended or who has been disqualified from operating a commercial motor vehicle. * * *

Id. at ¶2; R.C. 4506.161. The defendant argued that the subject statute was unconstitutional under the one-subject rule because it was passed as part of Ohio's 2006-2007 biennial budget bill and was completely unrelated to the issue of appropriations or funding. *See id.* The defendant further argued that the subject bill contained more than one thousand sections, of which the subject law was merely a rider. *Id.* at ¶¶3, 22. The Eighth District, however, disagreed. It recognized that, by enacting R.C. 4506.161, the General Assembly was ensuring compliance with a related federal provision that, if it was not followed, would have cost Ohio five percent (5%) of its highway funding. *Id.* at ¶22. This connection to cost savings was "sufficient common thread with the budget bill that the one-subject rule [was] not violated." *Id.* at ¶23 (citing *State ex rel. Ohio Roundtable v. Taft*, 10th Dist. No. 02AP-911, 2003-Ohio-3340).

Even the appellate court below has previously recognized that amendments to existing regulatory laws that are aimed at restrictive funding are appropriate to include in an appropriations bill under one-subject rule analysis. *Cuyahoga Cty. Veterans Servs. Comm. v. State*, 159 Ohio App.3d 276, 2004-Ohio-6124, 571 N.E.2d 470 (10th Dist.). In *Cuyahoga Cty. Veterans Servs. Comm.*, the plaintiffs sought a declaratory judgment that amendments to R.C. 5901.02, 5901.03 and the enactment of 5901.021 – relating to membership in the Veterans' Service Commission and budget submission requirements to the board of county commissioners – via an appropriations bill violated the one-subject rule of the Ohio Constitution. *Id.* at ¶2. The plaintiffs argued that subject provisions related to local matters, not state appropriations, and

were merely a rider on a comprehensive budget bill aimed at giving the county commissioners power to control the veterans service commission. *Id.* at ¶14. Rejecting the plaintiff's arguments, the Tenth District held "[t]he subject of funding and budgeting by agencies and political subdivisions is implicated throughout the bill" including the substantive amendments to the existing program. *See id.* The court noted that "restricting funding is as much a part of an appropriations bill as granting funds," accordingly, the amendments to the existing program were sufficiently related to "funding and budgeting to pass constitutional muster under the one-subject rule." *Id.*

Applying this legal structure to the present action, none of H.B. 153's amendments to Ohio's well-established prison privatization program violate the one-subject rule. R.C. 9.06 has been a cost saving provision of Ohio law for the better part of two decades. The program was created by an appropriations bill in 1995 as a means of reducing the cost of housing inmates in the State of Ohio. *See* R.C. 9.05(A)(4) (requiring a contractor to conclusively demonstrate a minimum 5% savings to the state in order to qualify for private operation). Private contractors have been operating prisons under this program for 14 years, and the program has been substantively modified through appropriations bills on numerous occasions:

1. 1997 Ohio H.B. 215 – modified accreditation and budget requirements for contractors;
2. 1997 Ohio H.B. 293 – expanded the program to include the initial Intensive Program Prison;
3. 1999 Ohio H.B. 283 – modified reporting requirements and inmate clothing requirements;
4. 2007 Ohio H.B. 130 – removed restrictions on delegation of authority to contractors; and
5. 2009 Ohio H.B. 1 - made previously mandatory provisions optional.

Each of these amendments, like the amendments at issue in *Voinovich, Martin, and Cuyahoga Cty. Veterans Servs. Comm, supra*, while not appropriations *per se*, directly impacted the manner in which appropriations to the DRC were to be directed, and sought to improve an established cost savings program. The relationship of this program and these amendments to Ohio's budget bill's core subject of revenues and expenditures has never been challenged.

Likewise, the amendments to R.C. 9.06 contained in H.B. 153 relate directly to cost savings for the State of Ohio. Specifically as they relate to O&M contracts, like the one at issue between the State of Ohio and MTC, H.B. 153 increases the number of potential eligible bidders and potential duration of contracts. *See* H.B. 153 changes to R.C. 9.06 (A)(1), (A)(3)(a), (B)(1). Additional bidders and more flexible contractual terms serve to increase competition for State contracts and improve the State's ability to capitalize on the operational savings to the budget.

In reaching its contrary decision, the Tenth District failed to review Appellees' complaints on the narrowest possible grounds as required under Ohio law. *Brunner, 2009-Ohio-1750* at ¶37 (citing *Cook, 103 Ohio St. at 470*). The appellate court neither distinguished the amendments of R.C. 9.06 that relate to O&M contracts from those that relate to the sale of state prisons, nor did it provide any explanation as to how the O&M amendments failed to relate to the cost savings provisions passed five (5) times previously by appropriations bills. (*See generally App. Op., R. 106*). Instead, the Court grouped the challenged provisions together and relied on *Simmons-Harris v. Goff, 86 Ohio St.3d 1, 15, 1999-Ohio-77, 711 N.E.2d 203, 215 (1999)* to support its position that "arguably * * * authorizing the sale of several state prisons are similarly expansive in scope to the school voucher program." (*App. Op., R. 106* at ¶22). This analysis is wholly inapplicable to the O&M amendments which in no way create a substantive program. They provide important, necessary reforms to an established cost savings program and dictate the

manner in which the DRC can manage its budget. Accordingly, just like the amendments in *Voinovich*, they are properly included in Am.Sub.H.B. 153 and do not violate the one-subject rule.

Finally, even assuming the Tenth District performed the proper analysis, and further assuming it found the O&M amendments in violation of the one-subject rule, the appellate court failed to establish any basis for overturning the trial court's decision to dismiss Appellees' claims related to MTC's O&M contract. It is well established that, where an act is amended, the part of the original act which remains unchanged is to be considered as having continued in force as the law from the time of its original enactment, and new portions as having become the law only at the time of the amendment. *Weil v. Taxicabs of Cincinnati, Inc.*, 139 Ohio St. 198, 206, 39 N.E.2d 148, 152 (1942). In this case, nothing in Appellees' Complaint alleges that MTC's O&M contract would have been illegal or improper under an un-amended version of R.C. 9.06. (*See Appellees 10th Dist. Merit Br., Appx.*, R. 60. at pp. 1-41). Accordingly, even assuming Appellees' one-subject rule claims had merit, the trial court was still correct in dismissing Appellees' Complaint as it related to the contract with MTC.

PROPOSITION OF LAW II: Provisions in a Biennial Budget Bill That Authorize State Agencies to Raise Specific Types of Revenue Do Not Violate the Ohio Constitution's One-Subject Rule Merely Because They Set the Terms By Which the Agencies May Do So.

In addition to the foregoing, this Court has held that revenue-generating provisions have a common relationship with an appropriation and are appropriately included in biennial budget bills. *See ComTech Systems, Inc. v. Limbach*, 59 Ohio St.3d 96, 99, 570 N.E.2d 1089, (1991); *see also City of Riverside v. State*, 190 Ohio App.3d 765, 2010-Ohio-5868, 944 N.E.2d 281, ¶44 ("revenues and expenditures compose the core of an appropriations bill"). In *ComTech*, this Court analyzed a case in which the General Assembly passed an appropriations bill that levied a

sales tax on automatic data processing and computer services, and prescribed which types of transactions were to be considered sales and which were exempt. *Id.* at 97. Citing its prior holding in *Dix, supra*, this Court noted that provisions related to funding the operations of programs, agencies, and matters described elsewhere in the bill are appropriate for inclusion in an appropriations bill. *Id.* at 99. Because the new tax provided a new source of revenue, the provision did not violate the one-subject rule. *See id.*

The *ComTech* decision extends to other sources of revenue generation as well. *See Taft*, 2003-Ohio-3340. In *Taft*, the plaintiffs challenged the constitutionality of various provisions of an appropriations bill, 2002 Ohio H.B. 405, which authorized Ohio's participation in the Mega Millions lottery. *Id.* at ¶2. The specific provisions at issue authorized the director of the commission to enter into contracts to operate "statewide joint lottery games," amended statutory provisions of R.C. 3770.02 to define what qualified as a "statewide joint lottery game," regulated the manner in which the money was to be collected and allocated, and mandated the generation of \$41 million in additional revenue. *See id.* at ¶18; *see also* 2002 Ohio H.B. 405. The plaintiffs argued that these provisions were not appropriations and, thus, unconstitutional. *See generally id.* In rejecting the plaintiffs' position, the court recognized that, while 2002 Ohio H.B. 405 initially undertook to correct the distribution of funds for services from the general revenue fund, the State's financial situation worsened during the pendency of the bill, and it quickly became a vehicle for various other revenue and expenditure adjustments. *Id.* at ¶48. Thus, the bill came to include various new sources of revenue and enhancements covering "a multiplicity of Revised Code sections and other topics." *Id.* The court reasoned, however, that all of these topics "revolve around the 'common thread of appropriation' and revenue, particularly enhancements to revenue." *Id.* (citing *Simmons-Harris* 86 Ohio St.3d 1, 1999-Ohio-77). Accordingly, the court

held “the introduction of a stream of revenue [is] sufficiently related to the core subject of revenues and expenditures to justify inclusion in an appropriations bill.” *Id.* at ¶50. The fact that the bill further regulated the manner in which the funds were to be collected and allocated did not affect the Court’s analysis whatsoever. *See generally id.*

In this case, just as in *Taft*, H.B. 153 was passed during a time when Ohio’s financial situation was in great peril. The enactment of Sec. 753.10 authorizing the sale of prisons, along with amendments to R.C. 9.06 extending pre-existing regulations to cover contracts for such sales, not only created conditions for operational savings but also authorized the State to generate a new source of revenue to address the financial crisis the State was facing. First and foremost, the sale of state correctional institutions generates millions of dollars in instant revenue which is applied to defease an obligation that would otherwise fall upon the taxpayers. In fact, through the sale of LECI to CCA, this provision has already helped the State raise nearly \$73 million in new revenue. (*See e.g. Appellees 10th Dist. Merit Br., Appx.*, R. 60. at ¶1). Once the Juvenile Correctional Facilities Bond Retirement Fund has been defeased, the profits from the sale of additional facilities will go directly into the general revenue fund and appropriated as necessary. *See* Sec. 753.10. Moreover, the sale of prison facilities under 753.10 will produce additional property tax revenue from land that was previously exempt as well as income tax from the private entities that took over the prison operation. *See* R.C. 9.06(J)(3). These taxes are, in turn, made part of the general revenue fund and further ease the financial burden that would otherwise have fallen on the citizens of Ohio. Finally, it is axiomatic that, once sold, the State’s financial responsibility for owning and operating a prison facility is reduced. This reduction effectively alters the required appropriations to the department in future budgets and frees up funds for use by other agencies. Simply put, the provisions at issue bear far more than a “slight” connection to

appropriations. Sec. 753.10 bears a practical, logical, and rational connection to the subject of H.B. 153 – “providing operating appropriations for the biennium” and “authorization and conditions for the operation of programs, including reforms for the efficient and effective operation of state and local government.”- and is therefore constitutional under Article II, Section 15(D).

The Tenth District erred in its decision by relying substantially on *State ex rel. OCSEA*, *Local 11* and *Simmons-Harris*, *supra*. Both of these cases are inapposite to the case at bar. In *OCSEA, Local 11*, (10 Ohio St.3d at 122-123) the subject law directly excluded certain employees from the collective bargaining process by changing the definition of “public employee”. The provisions promised no new revenue sources, nor had a direct impact on appropriations to State programs. Rather, the only articulable connection between the *OCSEA, Local 11* provisions and the state budget was that removing plaintiffs from collective bargaining could impact their future pay schedules.

Likewise, in *Simmons-Harris*, (86 Ohio St.3d at 15-16) the appropriations bill at issue sought to establish a “leading-edge” school voucher program wherein the State Superintendent of Public Instruction would be required to provide scholarships to needy students within Cleveland City School District. Nothing in the school voucher provision discussed taxes or revenue needed to fund this program or otherwise tied into the issue of appropriations.

Despite these important distinguishing facts, the Tenth District followed these cases and held that Sec. 753.10 does “not concern the acquisition of a revenue stream, but, instead, the contractual requirements for prison privatization.” (*App. Op.*, R. 106 at ¶ 20). This is simply not accurate. Sec. 753.10 and 9.06 (J) specifically provide for the generation of new revenue and cost savings to the State of Ohio. The case at bar is a materially different scenario than the one

addressed in either *OCSEA, Local 11* or *Simmons-Harris*, and the challenged provisions of H.B. 153 are practically, rationally and legitimately related to the “core subject of revenues and expenditures” such that they were properly included in H.B. 153.

PROPOSITION OF LAW III: A Court Should Not Permit An Evidentiary Hearing For a Provision-by-Provision Review of a Biennial Budget Bill that, On Its Face, Has a Common Purpose.

A bill should not be invalidated *in its entirety* under the one-subject rule so long as it has a “primary” subject. *Sheward*, 86 Ohio St.3d 451, 500 (1999) (citing *State v. Hinkle v. Franklin Cnty. Bd. Of Elecs.*, 62 Ohio St.3d 145, 149 (1991)). That rule will almost always be met for biennial budget bills – which will always have a “core subject of revenues and expenditures.” (*Com. Pls. Op.*, R. 183, at p. 19 (citing *Taft*, 2003-Ohio-3340 ¶50). Thus, when determining whether the provisions contained in an appropriations bill meet the one-subject rule, courts have traditionally limited the scope of their inquiry to the text of the specific provisions for which the challenger has alleged an injury. *See e.g. Simmons-Harris*, 86 Ohio St.3d at 16. Following this analysis, this Court in *Simmons-Harris* and *OCSEA, Local 11* invalidated only the provisions found to be manifestly gross or fraudulently in violation of the one-subject rule (the school voucher program and collective bargaining provisions, respectively) and left the remainder of the act in force. *Simmons-Harris*, 86 Ohio St.3d at 17; *OCSEA, Local 11*, 2004-Ohio-6363 at ¶36.

In light of the foregoing, Appellees’ challenge to H.B. 153 *in its entirety* should have been dismissed outright. Not only does controlling Ohio law mandate the Court limit its review to the narrowest grounds necessary to address Appellees’ Complaint, but the severability clause in H.B. 153 Section 806.10 explicitly dictates that the validity of each provision be addressed separately. The trial court recognized that, as a biennial appropriations bill, H.B. 153 has a “core subject of revenues and expenditures.” (*Com. Pls. Op.*, R. 183, at p. 19 (citing *Taft*, 2003-Ohio-

3340, ¶50)). Whether or not the bill contains other provisions that allegedly do not relate to this core subject is no basis for invalidating the entire act. *Sheward*, 86 Ohio St.3d at 500.

The Tenth District further erred in ordering the trial court to hold an evidentiary hearing to conduct a provision-by-provision analysis of the bill to determine whether H.B. 153 has only one subject. Such a hearing is unprecedented in Ohio case law regarding one-subject challenges, for obvious reasons. The principle of separation of powers is embedded in the constitutional framework of our state government. *Sheward*, 86 Ohio St.3d at 475. The Ohio Constitution applies the principle in defining the nature and scope of powers designated to the three branches of the government. *State v. Warner*, 55 Ohio St.3d 31, 43-44, 564 N.E.2d 18 (1990). *See State v. Harmon*, 31 Ohio St. 250, 258 (1877). It is inherent in our theory of government “that each of the three grand divisions of the government, must be protected from the encroachments of the others, so far that its integrity and independence may be preserved. * * *” *S. Euclid v. Jemison*, 28 Ohio St.3d 157, 159, 503 N.E.2d 136, (1986) (quoting *Fairview v. Giffie*, 73 Ohio St. 183, 187, 76 N.E. 865 (1905)). It is also for this reason that courts are required to presume the constitutionality of legislative enactments. *Brady v. Safety-Kleen Corp.*, 61 Ohio St.3d 624, 649, 576 N.E.2d 722 (1991). This presumption, which can be overcome only in the most extreme cases, works to protect the domain of the legislature from encroachment by the judiciary. *Central Ohio Transit Auth. v. Transport Workers Union of America, Local 208*, 37 Ohio St.3d 56, 62 524 N.E.2d 151 (1988).

In light of the foregoing, it is well established that “[a]ll bills are subject to debate, discussion, and amendment prior to being put to a vote.” *Chambers v. St. Mary’s School*, 82 Ohio St.3d 563, 566, 697 N.E.2d 198 (1998) (citing Section 15, Article II of the Ohio Constitution.) There is an important distinction between “logrolling” and the typical and

necessary debate, compromise, and amendment of bills during the legislative process. *Sheward*, 86 Ohio St.3d at 533 (JJ. Cook and Lundberg dissenting). Thus, in reviewing a bill under the one-subject rule, courts are limited to a review of the “four corners” of the document and must address the issue only on the narrowest grounds necessary to resolve the controversy. *In Re Nowak*, 2004-Ohio-6777 ¶ 72; *Brunner*, 2009-Ohio-1750 at ¶37.

Performing a provision-by-provision evidentiary inquiry regarding which provisions are the product of “logrolling,” threatens separation-of-powers principles. *See Nowak*, at ¶ 72. The only “evidence” of logrolling, beyond that which the Court must otherwise determine from manifestly gross disunity of subject matter in the text, would be testimony from the legislators themselves regarding their reason and purpose for compromising on the inclusion of the subject amendments to the prison privatization program. Such an inquiry would “require[] [the Court to] perform the inherently legislative function of gauging the extent to which particular proposals are likely to generate political controversy or invoke political opposition.” *Id.* This “is a kind of entanglement with the legislative process that far exceeds any legitimate judicial function.” *Id.*

Simply stated, Appellees’ broad challenge to the *entire* budget bill fails as a matter of law because the bill has a common budgetary purpose and severable provisions, and trial courts have no authority to expand a one-subject inquiry beyond the four corners of the document for purposes of questioning the propriety of statutory provisions in an appropriations bill. *See Nowak* at ¶ 72; *Brunner*, 2009-Ohio-1750 at ¶37.

CONCLUSION

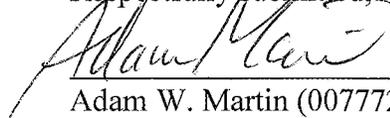
The Tenth District decided this case based on an erroneous application of the one-subject rule (Section 15(D), Article II) of Ohio’s Constitution. The challenged provisions, amendments to, and expansion of, Ohio’s long-standing prison privatization program are directly related to

generating new sources of revenue and reducing the economic burden of the prison system on the taxpayers. It is well established that provisions related to the subject of revenues and expenditures justify inclusion in an appropriations bill like H.B. 153. *Taft*, 2003-Ohio-3340 at ¶50.

Moreover, the Tenth District's decision threatens to cause an unprecedented entanglement between the judicial and legislative branch by expanding the inquiry of one-subject rule analysis beyond the four corners of the bill and the explicit language of the complaint and into the hearts and minds of the legislators during their deliberations.

For the reasons stated herein, MTC respectfully requests that this Court reverse the Court of Appeals decision regarding Plaintiffs'/Appellees'/Cross-Appellants' one-subject rule claim and affirm the decision of the trial court, dismissing Plaintiffs' Complaint.

Respectfully submitted,



Adam W. Martin (0077722)
Kevin W. Kita (0088029)
Sutter O'Connell
1301 East 9th Street
Cleveland, OH 44114
(216) 928-4536 - direct
amartin@sutter-law.com
kkita@sutter-law.com
(216) 928-3636 – facsimile

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

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing Merit Brief of Appellant/Cross-Appellee Management & Training Corporation was served via U.S. mail upon the following this 4th day of September, 2014:

Michael Dewine (0009181)
Attorney General of Ohio

Eric E. Murphy (0083284)
State Solicitor and Counsel of Record
30 East Broad St. 16th Floor
Columbus, OH 43215
Eric.murphy@ohioattorneygeneral.gov
P: 614-466-8980
F: 614-446-5087

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, and the Office of Budget and Management and Director Timothy S. Keen.

James E. Melle (0009493)
167 Rustic Place
Columbus, Ohio 43214-2030
Jimmelle43@msn.com
614-271-6180
Attorney for Plaintiff/Appellees/Cross-Appellants

Nicholas A. Iarocci, Esq. (0001937)
Ashtabula County Prosecuting Attorney
25 West Jefferson Street
Jefferson, OH 44047
TLSartini@ashtabulacounty.us
P: 440-576-3662
F: 440-576-3600

Attorney for Plaintiff/Appellees/Cross-Appellants: Dawn M. Cragon, Roger A. Corlett and Judith A. Barta

Charles R. Saxbe (0021952)
James D. Abrams (0075968)
Celia M. Kilgard (0085207)
Taft, Stettinius & Hollister, LLP
65 E. State St., Suite 1000
Columbus, OH 43215-3413
Rsaxbe@taftlae.com
Jabrams@taftlaw.com
Ckilgard@taftlaw.com
P: 614-221-2838
F: 614-221-2007

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



Adam W. Martin (0077722)
Kevin W. Kita (0088029)

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State ex rel. Ohio Civil Service :
Employees Association et al., :

Plaintiffs-Relators :
-Appellants, :

v. :

State of Ohio c/o Mike DeWine et al., :

Defendants-Respondents :
-Appellees. :

No. 12AP-1064
(C.P.C. No. 12CV-8716)

(REGULAR CALENDAR)

JOURNAL ENTRY

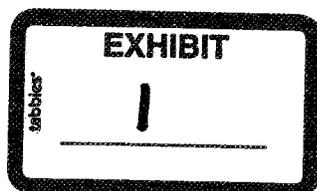
For the reasons stated in the memorandum decision of this court rendered herein on January 16, 2014, it is the order of this court that the application for reconsideration is denied.

McCORMAC, J., SADLER, P.J., and CONNOR, J.

By: _____

John W. McCormac

Judge John W. McCormac, retired, of the Tenth Appellate District, assigned to active duty under authority of the Ohio Constitution, Article IV, Section 6(C).



IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State ex rel. Ohio Civil Service :
Employees Association et al., :
 :
Plaintiffs-Relators :
-Appellants, :
 :
v. :
 :
State of Ohio c/o Mike DeWine et al., :
 :
Defendants-Respondents :
-Appellees. :
 :

No. 12AP-1064
(C.P.C. No. 12CV-8716)

(REGULAR CALENDAR)

MEMORANDUM DECISION

Rendered on January 16, 2014

James E. Melle, for appellants.

Michael DeWine, Attorney General, *Richard N. Coglianesi* and *Erin Butcher-Lyden*, for appellees Governor John R. Kasich, the State of Ohio, Attorney General Mike DeWine, Secretary of State Jon Husted, Auditor David Yost, The Ohio Department of Rehabilitation and Correction and Director Gary Mohr, Treasurer of State Josh Mandel, Office of Budget and Management and Director Timothy S. Keen; *Michael DeWine*, Attorney General, and *William J. Cole*, for appellees Ohio Department of Administrative Services and Director Robert Blair.

Taft Stettinius & Hollister LLP, *Charles R. Saxbe*, *James D. Abrams* and *Celia M. Kilgard*, for appellees Corrections Corporation of America and CCA Western Properties, Inc.

Buckley King LPA, *Robert J. Walter*, *Thomas I. Blackburn* and *Diem N. Kaelber*, for Amicus Curiae Ohio Association of Public School Employees (OAPSE)/AFSCME Local 4, AFL-CIO, Fraternal Order of Police of Ohio, Incorporated, and American Federation of State, County, Municipal Employees Ohio Counsel 8.



*Adam W. Martin, Sutter O'Connell, and Kevin W. Kita, for
appellee Management & Training Corporation.*

ON APPLICATION FOR RECONSIDERATION

MCCORMAC, J.

{¶ 1} Plaintiffs-appellants, Ohio Civil Service Employees Association et al., filed an application for reconsideration, pursuant to App.R. 26(A), of our October 10, 2013 decision in *State ex rel. Ohio Civ. Serv. Emps. Assn. v. State*, 10th Dist. No. 12AP-1064, 2013-Ohio-4505. In that decision, we affirmed in part and reversed in part the judgment of the Franklin County Court of Common Pleas granting the motion to dismiss of defendants-appellees, State of Ohio c/o Mike DeWine et al.

{¶ 2} The test generally applied to an application for reconsideration is whether the application calls to the court's attention "an obvious error in its decision or raises an issue for our consideration that was either not considered at all or was not fully considered by us when it should have been." *Matthews v. Matthews*, 5 Ohio App.3d 140 (10th Dist.1981), paragraph two of the syllabus. "An application for reconsideration is not designed for use in instances where a party simply disagrees with the conclusions reached and the logic used by an appellate court." *State v. Owens*, 112 Ohio App.3d 334, 336 (11th Dist.1996).

{¶ 3} In their application for reconsideration, plaintiffs argue this court did not fully consider whether plaintiffs' complaint stated a claim upon which relief could be granted that the challenged provisions of 2011 Am.Sub.H.B. No. 153 violate Ohio Constitution, Article VIII, Section 4. Plaintiffs additionally assert this court failed to consider whether the alternative claim in plaintiffs' complaint stated a claim upon which relief could be granted that the employees of the North Central Correctional Complex are public employees as defined in R.C. 4117.01(C).

{¶ 4} Contrary to plaintiffs' contentions, we do not find we inappropriately analyzed or failed to properly consider plaintiffs' claims. The October 10, 2013 decision reflects a discussion of both the Ohio Constitution, Article VIII, Section 4 claim, and the alternative claim. *Ohio Civ. Serv. Emps. Assn.* at ¶ 33-39, 41, 49. Although plaintiffs apparently disagree with the analysis used and conclusions reached by this court, such

disagreement is an insufficient basis for granting an application for reconsideration. *Owens* at 336.

{¶ 5} Plaintiffs' application for reconsideration fails to demonstrate an obvious error in our prior decision or to raise an issue that we failed to consider or to fully consider in reaching our prior decision. Accordingly, we deny plaintiffs' application for reconsideration.

Application for reconsideration denied.

SADLER, P.J., and CONNOR, J., concur.

McCORMAC, J., retired, of the Tenth Appellate District,
assigned to active duty under authority of the Ohio
Constitution, Article IV, Section 6(C).

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State ex rel. Ohio Civil Service :
Employees Association et al., :

Plaintiffs-Relators :
-Appellants, :

v. :

State of Ohio c/o Mike DeWine et al., :

Defendants-Respondents :
-Appellees. :

No. 12AP-1064
(C.P.C. No. 12CV-8716)

(REGULAR CALENDAR)

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on October 10, 2013, plaintiffs' first assignment of error is sustained in part and overruled in part and the second assignment of error is overruled, and it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed in part and reversed in part and this cause is remanded to that court in accordance with law and consistent with this decision. Plaintiffs' motion to strike is rendered moot. Costs assessed equally.

McCORMAC, SADLER & CONNOR, JJ.

By John W. McCormac
Judge John W. McCormac

McCORMAC, J., retired, formerly of the Tenth Appellate District, assigned to active duty under authority of the Ohio Constitution, Article IV, Section 6(C).



IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Ohio Civil Service :
Employees Association et al., :
 :
Plaintiffs-Relators :
-Appellants, : No. 12AP-1064
 : (C.P.C. No. 12CV-8716)
v. :
 : (REGULAR CALENDAR)
State of Ohio c/o Mike DeWine et al., :
 :
Defendants-Respondents :
-Appellees. :
 :

D E C I S I O N

Rendered on October 10, 2013

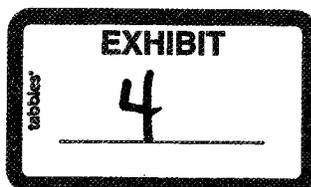
James E. Melle, for appellants.

Michael DeWine, Attorney General, *Richard N. Coglianesse* and *Erin Butcher-Lyden*, for appellees the State of Ohio, Attorney General Mike DeWine, Secretary of State Jon Husted, Auditor David Yost, The Ohio Department of Rehabilitation and Correction and Director Gary Mohr; *Michael DeWine*, Attorney General, and *Pearl M. Chin*, for appellee Governor John Kasich; *Michael DeWine*, Attorney General, and *William J. Cole*, for appellees Ohio Department of Administrative Services and Director Robert Blair.

Taft Stettinius & Hollister LLP, *Charles R. Saxbe*, *James D. Abrams* and *Celia M. Kilgard*, for appellees Corrections Corporation of America and CCA Western Properties, Inc.

Buckley King LPA, *Robert J. Walter*, *Thomas I. Blackburn* and *Diem N. Kaelber*, for Amicus Curiae Ohio Association of Public School Employees (OAPSE)/AFSCME Local 4, AFL-CIO, Fraternal Order of Police of Ohio, Incorporated, and American Federation of State, County, Municipal Employees Ohio Counsel 8.

APPEAL from the Franklin County Court of Common Pleas



MCCORMAC, J.

{¶ 1} Plaintiffs-appellants, Ohio Civil Service Employees Association et al., appeal from a judgment of the Franklin County Court of Common Pleas granting the motion to dismiss of defendants-appellees, State of Ohio c/o Mike DeWine et al. Because the trial court erred in granting the motion to dismiss, we reverse.

I. Procedural History

{¶ 2} Plaintiffs filed a complaint on July 9, 2012, alleging 2011 Am.Sub.H.B. No. 153 ("H.B. No. 153") as it related to section 753.10, section 812.20, and R.C. 9.06 violated three provisions of the Ohio Constitution: (1) the one-subject rule contained in Article II, Section 15(D); (2) the joint venture rule in Article VIII, Section 4 both on its face and as applied; and (3) the right to referendum in Article II, Section 1(C) because it stated R.C. 9.06 and section 753.10 as enacted were effective immediately and not subject to referendum. Plaintiffs additionally alleged H.B. No. 153 in its entirety was unconstitutional because it violated the one-subject rule. Finally, the individual plaintiffs sought declarations that they were "public employees" as defined in R.C. 4117.01(C).

{¶ 3} Plaintiffs filed an amended complaint on September 6, 2012, adding additional defendants and arguing that 2012 Am.Sub.S.B. No. 312 also unconstitutionally violated the one-subject rule. Plaintiffs sought relief in the form of a declaratory judgment, a preliminary and permanent injunction, and a writ of mandamus.

{¶ 4} Defendants filed a motion to dismiss, on September 7, 2012, arguing: (1) the trial court lacked jurisdiction under Civ.R. 12(B)(1); (2) plaintiffs lacked standing to bring the complaint; and (3) the complaint failed to state a claim upon which relief could be granted under Civ.R. 12(B)(6). After the parties fully briefed the issues, the trial court, on November 20, 2012, granted defendants' motion to dismiss, finding: (1) the court had jurisdiction over constitutional challenges to H.B. No. 153 but lacked jurisdiction over individual employee rights, including whether named individual plaintiffs were public employees under R.C. 4117.01(C); (2) plaintiffs had standing to pursue their constitutional claims; and (3) plaintiffs failed to state a claim that H.B. No. 153 violated the Ohio Constitution.

II. Assignments of Error

{¶ 5} Plaintiffs appeal, assigning two errors:

1. The trial court erred in dismissing Plaintiffs' First Amended Complaint because it stated a claim that:

A. R.C. 9.06 As Amended And R.C. 753.10 [sic] As Enacted In Am. Sub. H. B. No. 153 By The 129th General Assembly Violated Section 15(D), Article II Of The Ohio Constitution And Could Be Severed.

B. H. B. No. 153 Violated Section 15(D), Article II Of The Ohio Constitution Because Of The Many Unrelated Non-Economic Provisions And If Not Found Unconstitutional They Must Be Severed.

C. Section 4, Article VIII Of The Ohio Constitution Was Violated.

D. Section 812.20 Enacted in H. B. 153 Unlawfully Declared R.C. 9.06 And R.C. 753.10 [sic] Exempt From Referendum And Made Them Immediately Effective Thereby Precluding Any Referendum Effort In Violation Of Section 1c, Article II Of The Ohio Constitution.

E. Despite Inaction By The Plaintiffs A Violation Of The Right Of Referendum Could Be Remedied By Severance Of The Offending Provisions.

2. The trial court erred in dismissing Plaintiffs' First Amended Complaint because:

A. Record Evidence Is Required To Decide Whether Challenged Legislation And The Actions Taken Thereunder Are Unconstitutional As Applied And The Court May Not Consider Such Evidence On A Motion To Dismiss.

B. The Court Failed To Rule Whether Section 4, Article VIII Of The Ohio Constitution Was Unconstitutional As Applied And Whether Plaintiffs Alternative Claim That They Were Public Employees As Defined In R.C. 4117.01(C) Stated A Claim Upon Which Relief Could Be Granted.

For ease of discussion, we consolidate and consider plaintiffs' assignments of error out of order.

III. Constitutional Challenges

{¶ 6} Appellate review of the dismissal of a complaint under Civ.R. 12(B)(6) is de novo. *Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, ¶ 5.

{¶ 7} "A motion to dismiss for failure to state a claim upon which relief can be granted tests the sufficiency of the complaint." *Volbers-Klarich v. Middletown Mgt., Inc.*, 125 Ohio St.3d 494, 2010-Ohio-2057, ¶ 11. To dismiss a complaint under Civ.R. 12(B)(6) for failing to state a claim upon which relief can be granted, it must be beyond doubt from the complaint that the plaintiffs can prove no set of facts entitling them to recovery. *O'Brien v. Univ. Community Tenants Union, Inc.*, 42 Ohio St.2d 242 (1975), syllabus, following *Conley v. Gibson*, 355 U.S. 41 (1957). The allegations of the complaint must be construed as true; the allegations and any reasonable inferences drawn from them must be construed in the nonmoving party's favor. *Ohio Bur. of Workers' Comp. v. McKinley*, 130 Ohio St.3d 156, 2011-Ohio-4432, ¶ 12, citing *LeRoy v. Allen, Yurasek & Merklin*, 114 Ohio St.3d 323, 2007-Ohio-3608, ¶ 14.

A. *One-Subject Rule*

{¶ 8} Ohio Constitution, Article II, Section 15(D) provides: "No bill shall contain more than one subject, which shall be clearly expressed in its title." The one-subject rule exists to prevent the legislature from engaging in logrolling, which "occurs when legislators combine disharmonious proposals in a single bill to consolidate votes and pass provisions that may not have been acceptable to a majority on their own merits." *Riverside v. State*, 190 Ohio App.3d 765, 2010-Ohio-5868, ¶ 36 (10th Dist.), citing *State ex rel. Dix v. Celeste*, 11 Ohio St.3d 141, 142-43 (1984). "The one-subject provision attacks logrolling by disallowing unnatural combinations of provisions in acts, *i.e.*, those dealing with more than one subject, on the theory that the best explanation for the unnatural combination is a tactical one—logrolling." *Dix* at 143.

{¶ 9} The one-subject rule also operates to prevent the attachment of riders to bills that are " 'so certain of adoption that the rider will secure adoption not on its own merits, but on the measure to which it is attached.' " *Dix* at 143, quoting Ruud, *No Law Shall Embrace More Than One Subject*, 42 Minn.L.Rev. 389, 391 (1958). "The danger of riders is particularly evident when a bill as important and likely of passage as an appropriations bill is at issue." *Simmons-Harris v. Goff*, 86 Ohio St.3d 1, 16 (1999), citing Ruud at 413.

{¶ 10} "The one-subject rule is mandatory." *Riverside* at ¶ 37. *See In re Nowak*, 104 Ohio St.3d 466, 2004-Ohio-6777, ¶ 54 ("Since the one-subject provision is capable of invalidating an enactment, it cannot be considered merely directory in nature.").

However, enforcement of the one-subject provision remains limited by affording the General Assembly "great latitude in enacting comprehensive legislation" and beginning with the presumption that statutes are constitutional. *Dix* at 145. See *Hoover v. Franklin Cty. Bd. of Commrs.*, 19 Ohio St.3d 1, 6 (1985); *State ex rel. Ohio Civ. Serv. Emps. Assn., AFSCME, Local 11, AFL-CIO v. State Emp. Relations Bd.*, 104 Ohio St.3d 122, 2004-Ohio-6363, ¶ 27.

{¶ 11} The constitutionality of an enactment depends "primarily, if not exclusively, on a case-by-case, semantic and contextual analysis." *Dix* at 145. Disunity of subject matter, not the mere aggregation of topics, causes a bill to violate the one-subject rule. *Nowak* at ¶ 59. Where the topics of a bill share a common purpose or relationship, the fact that the bill includes more than one topic is not fatal. *Ohio Civ. Serv. Emps. Assn.* at ¶ 28, citing *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 496 (1999), and *Hoover* at 6. "A manifestly gross and fraudulent violation" of the one-subject rule will cause an enactment to be invalidated. *Nowak* at paragraph one of the syllabus, modifying *Dix* at syllabus.

{¶ 12} H.B. No. 153 provides that its purpose is "to make operating appropriations for the biennium beginning July 1, 2011, and ending June 30, 2013; and to provide authorization and conditions for the operation of programs, including reforms for the efficient and effective operation of state and local government." (Text of Bill, at 11-12.) 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.

{¶ 13} Whereas plaintiffs challenge the constitutionality of the entire bill, they specifically allege R.C. 9.06 as amended by H.B. No. 153 and section 753.10 as enacted by H.B. No. 153 violate the one-subject rule. The amendments to R.C. 9.06 in H.B. No. 153 contain various provisions effective upon the execution of a contract for the operation and management of a prison, including, but not limited to: subjecting the prison to real property tax, subjecting the gross receipts and income of the prison operator to gross receipt and income taxes of the state and its subdivisions, providing conditions before the contractor may resell or transfer the prison or terminate the contract, and providing that any action asserting R.C. 9.06 or section 753.10 of H.B. No. 153 violates the Ohio

Constitution must be brought in the Franklin County Court of Common Pleas. Section 753.10 similarly contains provisions effective upon the execution of a prison contract including: requiring the contractor to provide preferential hiring to employees of the Ohio Department of Rehabilitation and Correction, granting an irrevocable right to the state to re-purchase the prison upon specified triggering events, requiring the real estate to be sold as an entire tract and not in parcels, and requiring the proceeds of the sale of a prison be deposited in the state treasury to the credit of the Adult and Juvenile Correctional Facilities Bond Retirement Fund.

{¶ 14} 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 concluded there was no disunity of subject since prison privatization was a "connected subject to an appropriations bill." (Decision, at 19.)

{¶ 15} 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). "[T]he 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." ' " *State ex rel. LetOhioVote.Org v. Brunner*, 123 Ohio St.3d 322, 2009-Ohio-4900, ¶ 28, quoting *State ex rel. Akron Edn. Assn. v. Essex*, 47 Ohio St.2d 47, 49 (1976), quoting Webster's New International Dictionary (2d Ed.). Appropriations bills are "different from other Acts of the General Assembly" because they "of necessity, encompass many items, all bound by the thread of appropriations." *Simmons-Harris* at 16. 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 or incurs obligations." *LetOhioVote.Org* at ¶ 29.

{¶ 16} In *State ex rel. Ohio AFL-CIO v. Voinovich*, 69 Ohio St.3d 225 (1994), the court addressed whether a bill violated the one-subject rule by making structural changes to the Industrial Commission of Ohio and Ohio Bureau of Workers' Compensation, appropriating funds for those administrative bodies, altering workers' compensation claims procedures, creating an employment intentional tort, and creating a child labor exception for the entertainment industry. *Id.* at 225-26. The court rejected the claim that the appropriation provision of the bill violated the one-subject rule, finding the inclusion of the appropriation was " 'simply the means by which the act is carried out, and the inclusion of such an appropriation does not destroy the singleness of the subject.' " *Id.* at 229, quoting *Dix* at 146. Nevertheless, the court severed the intentional tort and child labor provisions from the bill, finding a violation of the one-subject rule because the provisions "cannot be related to the common purpose of the bill." *Id.* at 230.

{¶ 17} In *Simmons-Harris*, the court examined provisions establishing the Pilot Project Scholarship Program, commonly known as the "School Voucher Program," included within a biennial appropriations bill. *Id.* at 1, 4. Because the school voucher program was a "significant, substantive program" comprising "only ten pages" of an appropriations bill totaling "over one thousand pages," the court found the program was "in essence little more than a rider attached to an appropriations bill." *Id.* at 16. Although the bill appropriated funds for the school voucher program, the court found the "creation of a substantive program in a general appropriations bill violates the one-subject rule." *Id.* at 17.

{¶ 18} In *Ohio Civ. Serv. Employees Assn.*, the court concluded the inclusion of a provision excluding certain employees from the collective bargaining process in a bill that was "loosely described as an appropriations bill" violated the one-subject rule. *Id.* at ¶ 32. The court rejected the contention that the single subject of appropriations bound the budget-related items and the exclusion of employees from the collective bargaining process, finding such a proposition "stretch[ed] the one-subject concept to the point of breaking." *Id.* at ¶ 33. Because the record did not contain an explanation for how the exclusion of Ohio School Facilities Commission employees from the collective bargaining process would "clarify or alter the appropriation of state funds," the court determined the challenged provision lacked a "common purpose or relationship" with the budget-related items in the appropriations bill. *Id.* at ¶ 34.

{¶ 19} Here, although the trial court noted "some parallels" between *Simmons-Harris* and the instant matter, it declined to find *Simmons-Harris* controlling with regard to the prison privatization aspects of H.B. No. 153. (R. 182-83; Decision, at 17.) Instead, the court applied *State ex rel. Ohio Roundtable v. Taft*, 10th Dist. No. 02AP-911, 2003-Ohio-3340, concluding that H.B. No. 153 did not violate the one-subject rule. In *Ohio Roundtable*, we found the inclusion in a "budget correction" bill of a provision authorizing the governor to enter into an agreement to operate statewide joint lottery games did not violate the one-subject rule. *Id.* at ¶ 17-18. In conducting a contextual analysis of the bill's history, we discussed the bill's "long and frequently amended history," noting that "[t]he state's financial situation worsened during the pendency of the bill, and it quickly became a vehicle for various other revenue and expenditure adjustments." *Id.* at ¶ 48. Because the lottery provisions were expected to generate a stream of revenue allocated to the funding of Ohio schools, the bill was "sufficiently related to the core subject of revenues and expenditures to justify inclusion in an appropriations bill" and therefore did not violate the one-subject rule. *Id.* at 50-51, citing *ComTech Sys., Inc. v. Limbach*, 59 Ohio St.3d 96 (1991).

{¶ 20} Following *Ohio Roundtable*, the Supreme Court of Ohio expressly rejected the "notion that a provision that 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." *Ohio Civ. Serv. Emps. Assn.* at ¶ 33. 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. *Ohio Civ. Serv. Emps. Assn.* at ¶ 34. Although the sale of state prisons no doubt impacts the state budget in some fashion, allowing them to lawfully be included in an appropriations bill would "render[] the one-subject rule meaningless in the context of appropriations bills because virtually any statute arguably impacts the state budget, even if only tenuously." *Id.* at ¶ 33. See also *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 499 (1999) (explaining that "[t]here comes a point past

which a denominated subject becomes so strained in its effort to cohere diverse matter as to lose its legitimacy as such").

{¶ 21} Recognizing that appropriations bills as a matter of course tie disparate topics together, the bill's provisions must nevertheless meet the test of an appropriation. A bill may " 'establish an agency, set out the regulatory program, and make an appropriation for the agency without violating the one-subject rule,' " but a general appropriations bill cannot constitutionally establish a substantive program related to the subject of appropriations only insofar as it impacts the budget. *Ohio AFL-CIO* at 229, quoting Rudd at 441; see *Ohio Civ. Serv. Emps. Assn.* at ¶ 33; *Simmons-Harris* at 17;. The prison privatization provisions contained in R.C. 9.06 and section 753.10 are significant and substantive. However, given 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." *Simmons-Harris* at 16.

{¶ 22} Other factors to consider in determining whether disunity exists between provisions of a bill include whether the challenged provisions are "inherently controversial" or "of significant constitutional importance." *Simmons-Harris* at 16. Arguably, the provisions in H.B. No. 153 authorizing the sale of several state prisons are similarly expansive in scope to the school voucher program rendered unconstitutional in *Simmons-Harris* and more expansive than the collective bargaining amendment in *Ohio Civ. Serv. Emps. Assn.* See *Ohio Civ. Serv. Emps. Assn.* at ¶ 35. Indeed, the importance of the prison privatization provisions "to those affected by it, however few, cannot be doubted." *Id.* Finally, no rational reason for the combination of the prison privatization provisions and the budget-related appropriations exists in the record, suggesting that the combination was for tactical reasons. See *Simmons-Harris* at 16-17, citing *Dix* at 145.

{¶ 23} Beyond the two sections relating to the privatization of prisons, plaintiffs assert other provisions in H.B. No. 153 violate the one-subject rule. The trial court, while noting that "a number of provisions of H.B. 153, as cited by Plaintiffs, 'appear' to clearly be at odds with the Single Subject Rule," declined to address those provisions, stating "[w]hether the other sections of H.B. 153 that are cited by Plaintiffs are actually in violation of the Single Subject Rule does not affect the outcome regarding the prison privatization portions of this bill (which is what Plaintiffs' action is really about)." (Decision, at 19.) Plaintiffs' amended complaint, however, claimed the entire bill was

unconstitutional and, as the trial court noted, listed several examples of provisions they alleged were violative of the one-subject rule. At the very least, the amended complaint thereby complied with the notice-pleading requirements in Civ.R. 8(A). *See Smith v. Kamberling*, 10th Dist. No. 12AP-693, 2013-Ohio-1211, ¶ 8-9; *Ford v. Brooks*, 10th Dist. No. 11AP-664, 2012-Ohio-943, ¶ 13.

{¶ 24} Because plaintiffs alleged a set of facts that if proved would entitle them to relief, the trial court erred in granting defendants' motion to dismiss the complaint for failing to state a claim upon which relief can be granted. *Hoover* at 6-7. 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.* 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. *State ex rel. Hinkle v. Franklin Cty. Bd. of Elections*, 62 Ohio St.3d 145, 149 (1991) (concluding severance to be the appropriate remedy where possible to cure the defect and save those sections relating to a single subject). *See also Ohio Civ. Serv. Emps. Assn.* at ¶ 36.

B. Right of Referendum

{¶ 25} Ohio Constitution, Article II, Section 1 provides in pertinent part: "The legislative power of the state shall be vested in a General Assembly consisting of a senate and house of representatives but the people reserve to themselves the power to propose to the General Assembly laws and amendments to the constitution, and to adopt or reject the same at the polls on a referendum vote as hereinafter provided." The right of referendum "applies to every law passed in this state and provides an important check on actions taken by the government." *State ex rel. Ohio Gen. Assembly v. Brunner*, 115 Ohio St.3d 103, 2007-Ohio-4460, ¶ 9.

{¶ 26} Subject to specified exceptions, laws do not take effect until 90 days after having been filed with the governor and the secretary of state in order to allow for the filing of a petition for referendum. Ohio Constitution, Article II, Section 1(C). *See also Ohio Gen. Assembly* at ¶ 9. Ohio Constitution, Article II, Section 1(D) lists exceptions to the general rule that all laws and sections of laws are subject to referendum, providing in

pertinent part: "Laws providing for tax levies, appropriations for the current expenses of the state government and state institutions, and emergency laws necessary for the immediate preservation of the public peace, health or safety, shall go into immediate effect. * * * The laws mentioned in this section shall not be subject to referendum."

{¶ 27} "The constitutional right of citizens to referendum is of paramount importance." *Ohio Gen. Assembly* at ¶ 8. "The referendum * * * is a means for direct political participation, allowing the people the final decision, amounting to a veto power, over enactments of representative bodies. The practice is designed to 'give citizens a voice on questions of public policy.' " *Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 673 (1976), quoting *James v. Valtierra*, 402 U.S. 137, 141 (1971).

{¶ 28} Plaintiffs contend the trial court erred by dismissing their claim despite finding a violation of the right of referendum. The trial court found R.C. 9.06 and section 753.10 were not exempt from the right of referendum because they failed to meet the listed exceptions in Ohio Constitution, Article II, Section 1(D). However, the trial court concluded that plaintiffs could not avail themselves of the right of referendum because they admitted they made "no effort to seek, obtain, or file referendum petitions from or with the Secretary of State." (Decision, at 25.)

{¶ 29} As previously noted, R.C. 9.06 as amended by H.B. No. 153 and section 753.10 as enacted in 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." *LetOhioVote.Org* at ¶ 29. Further, nothing "would permit the referendum exception to apply to provisions that, once implemented, raise revenue to provide funds for an appropriation in another part of the act, even if * * * they are 'inextricably tied' or related to each other." *LetOhioVote.Org* at ¶ 35. Because the contested provisions do not fall within the exceptions to the right of referendum, pursuant to *LetOhioVote.Org*, R.C. 9.06 and section 753.10 violate the right of referendum.

{¶ 30} Defendants do not contest that R.C. 9.06 and section 753.10 violate the right of referendum, but continue to argue that plaintiffs' failure to file a referendum petition with the secretary of state within 90 days of the effective date of H.B. No. 153 is fatal to their claim. In support of this contention, defendants cite to *State ex rel. Ohioans for Fair Dists. v. Husted*, 130 Ohio St.3d 240, 2011-Ohio-5333, for the proposition that a

referendum petition must be timely filed within 90 days from the date the governor filed the bill in the office of the secretary of state.

{¶ 31} Here, because the record does not reflect that plaintiffs timely filed a petition for referendum or made any attempt to exercise such right, it was within the trial court's discretion to determine that they forfeited the right to referendum pursuant to *Ohioans for Fair Dists. Id.* at ¶ 1. Unlike *LetOhioVote.Org*, wherein the court granted an extension of time for the plaintiffs to file a referendum petition with the office of the secretary of state after the office rejected their first timely attempt to file, plaintiffs, in the present matter, admit they made no effort to file a referendum petition. In reaching this conclusion, we recognize that the filing of a referendum petition constitutes a significant investment of time and money. However, such obstacles, especially in consideration of plaintiffs' absence of action during the pendency of the present action, do not remove the requirement that a petition for referendum be timely filed before seeking relief for a violation of the right of referendum.

{¶ 32} Accordingly, the trial court did not err in dismissing plaintiffs' complaint as it related to the violation of the right of referendum in Ohio Constitution, Article II, Section 1(C).

C. Joint Venture

{¶ 33} Ohio Constitution, Article VIII, Section 4 provides, in pertinent part: "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."

{¶ 34} A joint venture is " 'an association of persons with intent, by way of contract, express or implied, to engage in and carry out a single business adventure for joint profit, for which purpose they combine their efforts, property, money, skill and knowledge, without creating a partnership, and agree that there shall be a community of interest among them as to the purpose of the undertaking, and that each coadventurer shall stand in the relation of principal, as well as agent, as to each of the other coadventurers.' " *Al Johnson Constr. Co. v. Kosydar*, 42 Ohio St.2d 29 (1975), paragraph one of the syllabus, quoting *Ford v. McCue*, 163 Ohio St. 498 (1955), paragraph one of the syllabus. The state, in compliance with Article VIII, cannot act as "the owner of part of a property which is

owned and controlled in part by a corporation or individual." *Alter v. Cincinnati*, 56 Ohio St. 47 (1897).

{¶ 35} However, Article VIII does not forbid all collaboration between the state and private enterprises. See *Grendell v. Ohio Environmental Protection Agency*, 146 Ohio App.3d 1, 10-11 (9th Dist.2001). "[T]he appropriation of public money to a private corporation to be expended for a public purpose is a valid act of the legislative body." *State ex rel. Dickman v. Defenbacher*, 164 Ohio St. 142, 151 (1955). See also *State ex rel. Ohio Congress of Parents & Teachers v. State Bd. of Edn.*, 111 Ohio St.3d 568, 2006-Ohio-5512, ¶ 67; *Cincinnati v. Dexter*, 55 Ohio St. 93 (1896) ("A sale made in good faith, and for a fair value, under such circumstances, cannot properly be characterized as a loan of the credit of the municipality, directly or indirectly, to or in aid of the purchaser."); *State ex rel. Campbell v. Cincinnati St. Ry. Co.*, 97 Ohio St. 283, 309 (1918) (holding that a city "has the right to contract with the railway company for the operation thereof" and "has also the right to provide in the contract for the payment of all expenses of operation, depreciation, maintenance, etc., out of the gross proceeds received from all sources of operation of the road, under such terms and conditions as the city and its duly authorized officers and boards may deem to be for its best interests").

{¶ 36} Plaintiffs assert both a facial challenge and a challenge to the application of R.C. 9.06 and section 753.10. "To prevail on a facial constitutional challenge, the challenger must prove the constitutional defect, using the highest standard of proof, which is also used in criminal cases, proof beyond a reasonable doubt." *Ohio Congress of Parents & Teachers* at ¶ 21, citing *Dickman*, paragraph one of the syllabus. "To prevail on a constitutional challenge to the statute as applied, the challenger must present clear and convincing evidence of the statute's constitutional defect." *Ohio Congress of Parents & Teachers* at ¶ 21, citing *Belden v. Union Cent. Life Ins. Co.*, 143 Ohio St. 329 (1944), paragraph six of the syllabus.

{¶ 37} Plaintiffs contend the payment of an annual ownership fee, the reservation of a right to repurchase the prisons, and the various regulatory provisions governing operation of the privatized prisons cause R.C. 9.06 and section 753.10 to violate the prohibition on joint ventures and also unconstitutionally extend the state's credit to a private enterprise. Defendants respond that the sale of a public facility, authorized by the

legislature and made in good faith and for fair-market value, is constitutional and cannot be characterized as a loan.

{¶ 38} Here, nothing in plaintiffs' complaint demonstrates that the challenged provisions result in the sort of partnerships or unions that the Ohio Constitution forbids. The state retains no ownership interest in the facilities to be privatized because the challenged provisions authorize the sale of the property as an entire tract by quit-claim deed. *Compare State ex rel. Eichenberger v. Neff*, 42 Ohio App.2d 69, 75 (10th Dist.1974) (finding an arrangement wherein "the land of the state is joined by the improvements of the lessee under the lease" violated Ohio Constitution, Article VIII, Section 4). Under the challenged sections, the state and private entities do not possess " 'equal authority or right to direct and govern the movements and conduct of each other.' " *Grendell* at 11, quoting *Ford* at 502-03. Plaintiffs point to no authority for the proposition that a contractual right to repurchase the property violates Ohio Constitution, Article VIII, Section 4. 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.' " *Grendell* at 12, quoting *Taylor v. Ross Cty. Commrs.*, 23 Ohio St. 22, 78 (1872).

{¶ 39} Even accepting all of the allegations in the complaint as true and making all reasonable inferences in favor of plaintiffs, no set of facts in plaintiffs' complaint, if proven, would entitle them to relief. *See Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 193 (1988) (finding a court need not presume the truth of conclusions unsupported by factual allegations); *Pepper v. Bd. of Edn. of Toledo Pub. Schools*, 6th Dist. No. L-06-1199, 2007-Ohio-203, ¶ 13, 18. Accordingly, the trial court did not err in dismissing plaintiffs' complaint with regard to the allegations of a violation of Ohio Constitution, Article VIII, Section 4 both on its face and as applied.

{¶ 40} In conclusion, plaintiffs' first assignment of error as it relates to a violation of the one-subject rule is sustained, but as it relates to all other alleged errors is overruled.

IV. Alternative Claim

{¶ 41} Finally, plaintiffs assert that the trial erred in dismissing their complaint because they stated a claim that the employees working at the Marion prison complex are public employees as defined in R.C. 4117.01(C). Defendants respond that the State

Employment Relations Board ("SERB") has exclusive jurisdiction to determine whether an individual is a public employee as defined in R.C. 4117.01(C) and, as a result, plaintiffs lacked standing to pursue their constitutional and alternative claims.

{¶ 42} Standing is " 'a party's right to make a legal claim or seek judicial enforcement of a duty or right.' " *Ohio Pyro, Inc. v. Ohio Dept. of Commerce*, 115 Ohio St.3d 375, 2007-Ohio-5024, ¶ 27, quoting Black's Law Dictionary (8th Ed.2004) 1442. Unless the party seeking relief establishes standing, a court cannot consider the merits of the party's legal claim. *Ohio Pyro* at ¶ 27; *U.S. Bank Natl. Assn. v. Gray*, 10th Dist. No. 12AP-953, 2013-Ohio-3340, ¶ 17, citing *Fed. Home Loan Mtge. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017, ¶ 22.

{¶ 43} To establish standing, a plaintiff must have a personal stake in the matter he or she seeks to litigate. *League of United Latin Am. Citizens v. Kasich*, 10th Dist. No. 10AP-639, 2012-Ohio-947, ¶ 21, citing *Tiemann v. Univ. of Cincinnati*, 127 Ohio App.3d 312, 325 (10th Dist.1998). A plaintiff demonstrates his or her personal stake by alleging an actual, palpable injury caused by the defendant that has a remedy in law or equity. *Id.*, citing *Tiemann* at 325. An injury borne by the population in general is not sufficient to confer standing, but must be borne by the plaintiff in particular. *Id.*, citing *Tiemann* at 325, citing *Allen v. Wright*, 468 U.S. 737 (1984). *See also State ex rel. Walgate v. Kasich*, 10th Dist. No. 12AP-548, 2013-Ohio-946, ¶ 16.

{¶ 44} "R.C. Chapter 4117 established a comprehensive framework for the resolution of public-sector labor disputes by creating a series of new rights and setting forth specific procedures and remedies for the vindication of those rights." *Franklin Cty. Law Enforcement Assn. v. Fraternal Order of Police, Capital City Lodge No. 9*, 59 Ohio St.3d 167, 169 (1991). R.C. 4117.12(A) provides that unfair labor practices are "remediable by the state employment relations board as specified in this section," but does not provide for the filing of an original complaint in common pleas court. "Ultimately, the question of who is the 'public employer' must be determined under R.C. Chapter 4117." *Franklin Cty. Law Enforcement Assn.* at 170.

{¶ 45} The trial court found that SERB was the proper jurisdictional vehicle to pursue questions involving public employees, but determined that SERB did not possess the authority to resolve whether the statutes in question were constitutional. The trial court also found that R.C. 9.06(K) conferred jurisdiction as to constitutional questions

regarding the challenged amendments to H.B. No. 153. As a result, the trial court concluded plaintiffs had standing to bring their claims since the trial court had jurisdiction, plaintiffs alleged a tangible injury in fact, and plaintiffs could not pursue remedies to their constitutional claims in another forum.

{¶ 46} Defendants do not contest that SERB would be unable to address the constitutional claims asserted by the plaintiffs. Instead, defendants assert without reference to authority that R.C. 9.06(K) does not supply the trial court with jurisdiction, but rather is a venue provision. R.C. 9.06(K) as amended in H.B. No. 153 provides: "Any action asserting that section 9.06 of the Revised Code or section 753.10 of the act in which this amendment was adopted violates any provision of the Ohio constitution . . . shall be brought in the court of common pleas of Franklin county." We conclude the trial court possessed jurisdiction to decide the constitutional claims raised by plaintiffs. *See Nibert v. Dept. of Rehab. & Corr.*, 119 Ohio App.3d 431, 433 (10th Dist.1997); *Wandling v. Ohio Dept. of Transp.*, 78 Ohio App.3d 368, 371 (4th Dist.1992).

{¶ 47} Defendants' contention that plaintiffs lacked standing to pursue their constitutional claims is also without merit. Defendants admit that SERB lacks the authority to resolve the constitutional claims asserted in this case, and simultaneously assert that plaintiffs cannot demonstrate an injury sufficient to confer standing because SERB is the only proper forum to address questions involving public employees.

{¶ 48} Here, unlike in *Walgate*, plaintiffs allege a direct, concrete injury different from that suffered by the public in general. *Id.* at ¶ 16. Since it would have been futile for plaintiffs to assert their constitutional claims before SERB, it would be a manifest absurdity to also prevent them from asserting their constitutional claims before the trial court. "Because administrative bodies have no authority to interpret the Constitution, requiring litigants to assert constitutional arguments administratively would be a waste of time and effort for all involved." *Jones v. Chagrin Falls*, 77 Ohio St.3d 456, 460-61 (1997). We therefore conclude plaintiffs had standing to pursue their constitutional claims at the trial court.

{¶ 49} Finally, because 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. *Franklin Cty. Law*

Enforcement Assn. at 169; *Ohio Historical Soc. v. State Emp. Relations Bd.*, 66 Ohio St.3d 466, 469 (1993). Accordingly, plaintiffs' second assignment of error is overruled.

V. Motion to Strike

{¶ 50} Plaintiffs filed a motion to strike materials in defendants' merit brief and appendix they allege were not part of the record. As it is unnecessary to rely on the materials plaintiffs seek to strike in order to reach the foregoing conclusions, we overrule as moot plaintiffs' motion to strike. *MP Star Financial, Inc. v. Cleveland State Univ.*, 10th Dist. No. 03AP-1156, 2004-Ohio-3840, ¶ 12, *aff'd*, 107 Ohio St.3d 176, 2005-Ohio-6183.

VI. Disposition

{¶ 51} Because plaintiffs' complaint sufficiently states a claim that the challenged legislation violates the one-subject rule of the Ohio Constitution, we conclude the trial court erred in granting defendants' motion to dismiss. Plaintiffs' first assignment of error is sustained in part and overruled in part and plaintiffs' second assignment of error is overruled. Plaintiffs' motion to strike is rendered as moot. Accordingly, we affirm in part and reverse in part the judgment of the Franklin County Court of Common Pleas and remand with instructions to continue proceedings.

*Judgment affirmed in part;
reversed in part and cause remanded.*

SADLER and CONNOR, JJ., concur.

McCORMAC, J., retired, formerly of the Tenth Appellate District, assigned to active duty under authority of the Ohio Constitution, Article IV, Section 6(C).

IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO
GENERAL DIVISION

State, ex rel. Ohio Civil Service :
Employees Association, et al., :

Plaintiffs, : Case No. 12-CV-8716

Vs. : Judge Pat Sheeran

State of Ohio, et al., :

Defendants. :

DECISION AND ENTRY SUSTAINING MOTION TO DISMISS

Sheeran, J.

This case is before the Court on defendants' Motion to Dismiss the Complaint.

On July 9, 2012, plaintiffs filed a Complaint for Declaratory Judgment, for a Writ of Mandamus, and for injunctive relief. The gist of the Complaint is that the defendants privatized a state owned prison (Lake Erie Correctional Facility), by selling it to Corrections Corporation of America, a named defendant, and that the defendants privatized another state prison, the North Central Correctional Institution, by entering into a contract with defendant Management & Training Corporation, which would run that institution. One consequence of these acts is that the plaintiffs lost their jobs, incurring financial losses as a result of those actions. Plaintiffs contend that the State defendants are also unconstitutionally authorized to sell four other prisons.¹

This case was originally assigned to Judge Horton. A motion to transfer the case was filed by the Defendants. Judge Horton GRANTED the transfer, and in doing so held that this case was a re-filed case. Having reviewed that Decision, this Court has no disagreement with it.

¹ Complaint, at ¶55.



Plaintiffs contend that the statutory authority relied on by the State defendants in these privatization actions are unconstitutional on their face, and as applied to the employee plaintiffs. As a result of the alleged constitutional deficiencies, the actions taken by the State defendants were and are void and illegal, and that the sale of the prison facility must be “vacated and cancelled.”² The employee plaintiffs seek reinstatement and reimbursement for their losses. Plaintiff OCSEA also alleges the loss of over 270 bargaining unit members from the two prisons that have been privatized to date.

The bases for the claim of unconstitutionality are alleged violations of Article II, Section 15(D) of the Ohio Constitution (the “Single Subject” rule), Article VIII, Section 4 of the Ohio Constitution (“Prohibition Against Joining Property Rights”), and Article II, Section 1 and 1c of the Ohio Constitution (the “Right to Referendum”), as they relate to Ohio Revised Code sections 9.06, 753.10 and 812.20. The plaintiffs also ask that Am.Sub.H.B. No. 153 be declared unconstitutional in that it allegedly violates the Single Subject Rule.

In the alternative, plaintiffs ask for a declaration that the individuals now working in the affected prisons are public employees, as that term is defined in R.C. 4117.01(C).

On September 6, 2012, plaintiffs filed an Amended Complaint. The amended complaint added Josh Mandel, as the State Treasurer, the Office of Management and Budget, and its director, Timothy Keen, as parties defendant. The amended complaint also added a section on Sub.S.B. No. 321, arguing that it is unconstitutional in violation of the Single Subject Rule.³

The State Defendants filed a Motion to Dismiss on September 7, 2012. On September 13, 2012, the plaintiffs filed a Motion to file an Amended Complaint. This motion was filed in order to comply with the requirement that leave of court is required to amend a complaint once a

² Complaint, at ¶3.

³ Amended Complaint, at ¶¶137-141.

defendant has filed an answer or other responsive pleading. Plaintiffs noted that they erred in not realizing that three of the twelve defendants had filed an answer prior to the filing of the amended complaint. On November 2, 2012, this Court sustained the motion to amend the complaint. For purposes of this Motion, the plaintiffs and the defendants have agreed that the defendants' do not first have to file an Amended Answer, and that the original motion to dismiss applies to all parties, including the new ones who were added in the Amended Complaint.

Prefatorily, this Court will note that when considering a Motion to Dismiss, a court must presume all factual allegations contained in the complaint to be true and make all reasonable inferences in favor of the non-moving party. Dismissal of a claim pursuant to Civ. R. 12(B)(6) is only appropriate where it appears beyond a doubt that a plaintiff can prove no set of facts in support of his claim that would entitle him to relief.⁴

1. The Jurisdictional Argument: R.C. Chapter 4117

The first argument defendants raise is that this Court should dismiss the complaint based on a lack of jurisdiction; specifically, that R.C. Chapter 4117 grants the State Employee Relations Board (SERB) exclusive jurisdiction to determine who is a public employee.

Certainly, where a court lacks subject matter jurisdiction, it has no choice but to dismiss the complaint. However, the lack of jurisdiction must be "patent and unambiguous."⁵

Part of the relief requested in the amended complaint is for this Court to order that the individual plaintiffs herein are public employees for purposes of their wages and benefits, as

⁴ See, e.g. *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St. 3d 190, 192, cited in, e.g. *Moore v. City of Middletown*, 133 Ohio St. 3d 55, 2012 Ohio 3897.

⁵ *State, ex rel. Smith, v. Frost* (1995), 74 Ohio St. 3d 107, 109; see also *State ex rel. FOP v. Court of Common Pleas* (1996), 76 Ohio St. 3d 287, 289 (writ of prohibition will be granted where court patently and unambiguously lacks jurisdiction).

defined in R.C. 4117.03. Defendants argue that the SERB has exclusive jurisdiction to determine who is a public employee.⁶

In *Franklin County Law Enforcement Ass'n. v. Fraternal Order of Police* (1991), 59 Ohio St. 3d 167, the Ohio Supreme Court affirmed the trial court's dismissal of a case where the plaintiffs sought injunctive relief that would restrain the FOP from conducting a vote, and would prevent any collective bargaining agreement until SERB designated the proper union representative. Other cases cited by the state defendants have similar holdings.

In their supplemental brief, defendants cite *Carter v. Trotwood-Madison City Bd. of Education* (2d App. Dist.), 2009 Ohio 1769, 181 Ohio App. 3d 764. Here, two retired teachers filed suit for an alleged breach of contract. The issue was whether the retired teachers were public employees. In affirming (but on other grounds) the decision of the trial court to dismiss the action, the court of appeals held that SERB has exclusive jurisdiction under R.C. Chapter 4117.

In numerous cases, courts have held that SERB has exclusive original jurisdiction over the issue of whether a particular entity is a "public employer" or whether particular parties or groups are public employees." (citations omitted).

The Ohio Supreme Court also stressed in *Franklin Cty. Law Enforcement* that "[u]ltimately, the question of who is the 'public employer' must be determined under R.C. Chapter 4117." 59 Ohio St. 3d 167, 170, 572 N.E. 2d 87. The Ohio Supreme Court, therefore, concluded that SERB had exclusive jurisdiction over the case, and that the trial court did not have jurisdiction. *Id.*

Id., at ¶¶58-59.

Plaintiffs' response to the jurisdictional issue is two-fold: First, R.C. 9.06 "squarely vested jurisdiction over the entire case in the Franklin County Common Pleas Court. 9.06(K)."⁷

This section reads in pertinent part as follows:

⁶ Defendants' motion to dismiss, at p. 6.

⁷ Plaintiffs' Supplemental Brief, at 1.

Any action asserting that section 9.06...or 753.10 of the act in which this amendment was adopted violates any provision of the Ohio constitution...shall be brought in the court of common pleas of Franklin county.

Defendants assert that this section is a venue statute, not a jurisdictional one. However, it has long been held in similarly worded sections involving appeals from state administrative agencies, are jurisdictional statutes. See, e.g. the appeals procedure from decisions of the state personnel board of review, as set forth in section 119.12 of the Revised Code. In *Hoffman v. Montgomery County Commissioners* (2d App. Dist. No. 7555), 1982 Ohio App. Lexis 12905, the Court of Appeals for Montgomery County noted that an administrative appeal brought under R.C. 119.12, which requires the case to be filed in the Franklin County Court of Common Pleas, but which in that particular case was filed in the Montgomery County Court of Common Pleas, was properly dismissed for lack of jurisdiction. The trial court there refused a request to transfer venue to Franklin County and the appeals court agreed, noting that since there was no jurisdiction, the action was not properly commenced, and therefore the Montgomery County court had no authority to change venue.

This Court does not see any significant difference between the two statutes. Had, for example, plaintiffs commenced this action in another common pleas court, *Hoffman* would require dismissal, not a change of venue.

Another case noting the jurisdictional requirement of statutorily mandated courts in which certain administrative appeals may be brought is *Nibert v. Department of Rehabilitation and Correction/London Correctional Institution* (10th App. Dist.), 119 Ohio App. 3d 431, 1997 Ohio App. Lexis 1761. Here, the Franklin County Court of Appeals affirmed the dismissal of a case because the action, governed by R.C. 124.34, should have been filed in the county in which the employee resided, and not in Franklin County. As in *Hoffman*, the appeals court noted that

this was a jurisdictional issue, not one involving venue. And the Tenth District made its ruling despite the fact that, as that Court noted, “the present case presents unusual and compelling circumstances for allowing a deviation from the established statutory and case law, [but] we may not ignore the mandate expressed in the first syllable of *Davis*.”⁸

Based on the foregoing, this Court finds that R.C. 9.06(K) is a jurisdictional statute, not one involving venue.

Having so concluded, does this finding conflict with the requirement that matters involving a determination of whether any individual plaintiffs are public employees be determined by SERB administratively? The language of the subsection states that “Any action asserting that [either section] violates...the Ohio constitution and any claim asserting that any action taken by the governor or the department of administrative services or the department of rehabilitation and correction pursuant to section 9.06...or section 753.10...violates any provision of the Ohio constitution or any provision of the Revised Code shall be brought in the [Franklin County common pleas court]. (Emphasis added).

This Court finds that there is no conflict. There is no contention that the actions of any of the defendants “violated” R.C. Chapter 4117. There may be circumstances from the sale of prisons that affect employees, but that does not mean that Chapter 4117 is violated, it merely means that Chapter 4117 is brought into play in order to determine the rights of those persons affected by the sale. However, it bears repeating that there is no allegation that Chapter 4117 itself has in any way actually been violated.

Based on the foregoing, this Court holds that it has jurisdiction on issues concerning the constitutionality of sections 9.06 and 753.10. However, that holding, as noted, does not preclude

⁸ *Nibert*, citing *Davis v. Board of Review* (1980), 64 Ohio St. 2d 102, syllabus paragraph 1. A reading of the case indeed shows the strong possibility of confusion in where to file the appropriate appeal.

SERB's jurisdiction concerning the rights of employees that relate to their employment status. In fact, section 9.06(K) does not affect SERB's jurisdiction at all. They are separate matters.

To summarize the opinion to this point: SERB has exclusive jurisdiction over employee rights, including whether or not the named individual plaintiffs are public employees. This Court has exclusive jurisdiction over the constitutional challenges to the privatization of Ohio prisons.

2. Standing

The next issue involves standing, specifically the question of whether any of the plaintiffs have standing to contest the legislative action. Since SERB has exclusive jurisdiction to determine the employee rights questions in this case, the issue becomes whether any plaintiff alleges anything in the Amended Complaint that would give that person (or organization) standing to contest the constitutionality of the statutes in question. Since the allegations of economic damages are to be determined administratively by SERB, there must be some other basis for standing in order for this case to proceed.

The Amended Complaint seeks declaratory and injunctive relief, as well as a request for a writ of mandamus. The writ of mandamus, requested in Count Three, asks for the reinstatement of the individual plaintiffs to the positions they held prior to the sale of, or private contracts entered into with, the private entities mentioned in the Amended Complaint. As concluded earlier, the reinstatement of the individual plaintiffs is a matter for SERB to determine. Therefore, there is no extraordinary writ before this Court in terms of the constitutionality of the prison sale.

In *ProgressOhio.org, Inc. v. JobsOhio* (10th App. Dist), 2012 Ohio 2655, 973 N.E. 2d 307, the Franklin County Court of Appeals upheld the dismissal of that case based on a lack of standing. In so holding, that Court spoke extensively on the issue of standing.

Under the doctrine of standing, a litigant must have a personal stake in the matter he or she wishes to litigate. [citation omitted]. Standing requires a litigant to have “such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for the illumination of difficult***questions.” [Citations omitted]. In order to have standing, a plaintiff must demonstrate some injury caused by the defendant that has a remedy in law or equity. *Id.* The injury is not required to be large or economic, but it must be palpable. *Id.* Furthermore, the injury cannot be merely speculative, and it must also be an injury to the plaintiff himself or to a class. *Id.* An injury that is borne by the population in general, and which does not affect the plaintiff in particular, is not sufficient to confer standing. [citation omitted].

Id., at ¶8.

In this case, *if* SERB did not have exclusive jurisdiction of the employees’ status, with all the issues that relate to it, including the issue of economic loss, there is no doubt that the individual plaintiffs would have standing to pursue this claim. Clearly, they have a stake that is far more palpable than that of any injury allegedly borne by the population in general.

However, it is clear to this Court that SERB does have, to the exclusion of this Court, jurisdiction over those issues. Therefore, those alleged injuries, which are clearly significant claims, do not give the plaintiffs standing here.

Public right standing is one basis in which the constitutionality of a statute may be brought. It is an exception to the personal injury requirement one must otherwise allege in order to have standing. Public right “is conceived as an action to vindicate the general public interest.” *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St. 3d 451, 1999 Ohio 123.

A close reading of *ProgressOhio.org* indicates that it is not an absolute *requirement* that a plaintiff must seek an extraordinary writ. Or, to put it another way, “overwhelmingly” does not equate to “exclusively.”⁹ Having said that, however, the Tenth District made it clear that,

⁹ See *ProgressOhio.org* at ¶17. In fact, two paragraphs later, the Court of Appeals noted that the vehicle—injunctive relief or extraordinary writ—was “ultimately irrelevant.”

regardless of whether an extraordinary writ is sought or not, there must be “rare and extraordinary circumstances necessary to invoke public interest standing.”¹⁰

The examples cited in the above footnote, that is, where the challenge is to a statute that constitutes an “attack on the judiciary” or affects the right of “every worker” to participate in the Workers’ Compensation system, clearly indicate the nature and scope of the case of rare and extraordinary situations where public interest standing may be invoked. This case, no matter how one reads the Amended Complaint, fails to rise to that level.¹¹

Because the individual plaintiffs lack standing, ProgressOhio.org also lacks standing. *ProgressOhio.org, supra.*

OCSEA’s standing is based on the economic injury that resulted from each of the individually named plaintiffs. Again, noting that the economic injury alleged would be sufficient to constitute a personal stake in the case, and thus make it a true adversarial proceeding, that injury is one that must be determined by SERB.

The analysis thus far has been quite straightforward, and would appear to require this Court to dismiss this case. Having said that, however, Plaintiffs raise an issue that is exceedingly troubling to this Court. Specifically, Plaintiffs note that the Collective Bargaining Agreement (CBA) between the parties cannot be utilized to provide an arbitrator authority to determine the rights of the parties. The Defendants argue that the CBA does provide the wherewithal to give Plaintiffs their just due.

¹⁰ Id., at ¶19. As examples, the Court cited *Sheward* (“an attack on the judiciary...[which] affected every tort claim in Ohio”) and *State ex rel. Ohio AFL-CIO v. Bur. Of Workers’ Comp.*, 97 Ohio St. 3d 504, 2002 Ohio 6717 (“statute at issue...affected every injured worker in Ohio seeking to participate in the worker’s compensation system.”). Statutes that affect a limited number of employees are not in that category.

¹¹ Id., at ¶31: “There is no question that appellants’ challenge raises significant concerns about at least some of the provision of the JobsOhio Act. However, in terms of great public interest, the most one can say about the challenged legislation is that it ‘makes significant changes to the organizational structure of state government.’ (citation omitted). *This is not enough of a public concern to confer standing on appellants.*” (Emphasis added).

Article 25 of the CBA governs the grievance procedure. The word “grievance” itself is given an expansive definition, “any difference, complaint or dispute between the Employer and the Union or any employee regarding the application, meaning or interpretation of this Agreement.”¹² The procedure that follows “shall be the exclusive method of resolving grievances.”¹³

Plaintiffs note that the current CBA was in effect *before* the adoption of Am. Sub. H.B. No. 153 was adopted and argues that the CBA “could not...contain [the type of] specific language which identifies and preempts R.C. 9.06 or R.C. 753.10...”¹⁴

In *State ex rel. Ohio Association of Public School Employees v. Batavia Local School District Board of Education*, 2000 Ohio 130, 89 Ohio St. 3d 191, the collective bargaining agreement (cba) ran from March 1, 1996 through February 28, 1999. At the end of the 1998 academic year, i.e. June, 1998, the board of education (“board”) considered, then did, enter into a contract with a private company to provide bus transportation. The result of this act included the laying off of the fourteen persons who had held those positions. This led to a grievance being filed by some of the affected employees. The superintendent refused to reinstate those employees, and said employees filed for extraordinary relief in the Court of Appeals. That court granted summary judgment to the board. The Supreme Court, in a 4-3 decision, reversed.

The Supreme Court noted the interplay between public employees’ statutory rights and provisions of a collective bargaining agreement,¹⁵ noting that “when the [collective bargaining] agreement makes no specification about a matter pertaining to wages, hours and terms and conditions of employment, the parties are governed by all state or local laws addressing such

¹² Article 25, Section 25.01(A).

¹³ *Id.*

¹⁴ Plaintiffs’ Supplemental Brief after Oral Argument, at 3.

¹⁵ *Id.*, at 89 Ohio St. 3d 196.

terms and conditions of employment.”¹⁶ In other words, the CBA will prevail over the state statute, provided the CBA “*specifically exclude[s]*” statutory rights to negate the application of those rights.”¹⁷ The Court’s decision makes it clear that a CBA’s “general layoff and recall provision” by itself was not sufficient to address the specific issue raised by the board’s action.

Another point of significance in this case is the Supreme Court’s noting that “[W]e must construe the language of the parties’ agreement to avoid a ‘manifest absurdity.’”¹⁸

This is, in essence, the point Plaintiffs are making here: the CBA could not reasonably have anticipated that one or more prisons would have been sold, and the rights of the employees would have been thus affected.¹⁹ Since the CBA could not “specifically exclude” statutory rights that did not exist at the time the CBA was entered into, it becomes a manifest absurdity to try to apply the CBA to a situation that could not reasonably have been foreseen. And if one only wishes to apply existing law (which, under *Batavia*, would seem to be required), that law (in effect now) expressly gives the State of Ohio the right to privatize one or more prisons. Where, then, is the proper forum for aggrieved employees to proceed?

The State Defendants note that the Plaintiffs have two options: the first is the grievance procedure, which has been discussed above, and the second is to pursue an unfair labor practice grievance under SERB, pursuant to R.C. 4711.11. The Defendants note that the CBA, under Article 39, addresses subcontracting. However, the provision quoted by the Defendants permits the employer “to contract out any work it deems necessary or desirable because of greater efficiency, economy, programmatic benefits or other related factors.”²⁰ While this provision is

¹⁶ Id.

¹⁷ Id. (Emphasis in original).

¹⁸ Id., at 198.

¹⁹ Plaintiffs’ Supplemental Brief after Oral Argument, *supra*, at 3.

²⁰ State Defendants’ Post Hearing Brief, at 5, quoting the CBA at Article 39.01.

not necessarily exactly on point, other sections relating to the sale, lease, assignment or transfer of any facility are covered under the CBA.²¹

This Court agrees, to an extent, with the State Defendants here. Clearly, there are articles in the CBA that relate to specific issues raised by the Plaintiffs. However, the underlying problem is that the grievance procedure does not and cannot decide the constitutionality of the statutes at issue here. And pursuing a SERB remedy is equally futile, since an administrator does not possess the authority to determine the constitutionality of a statute. As such, either route is, to all intents and purposes, manifestly useless.

This, therefore, brings us full circle in the discussion. SERB is the proper jurisdictional vehicle to pursue questions involving public employees. But pursuing a SERB resolution (or a grievance procedure) is, in this case at least, by definition useless. This brings this Court back to the *Batavia* decision's language that the law cannot require a "manifest absurdity."²²

The solution to this seeming dilemma goes back to the jurisdictional question. It must be remembered that the lack of jurisdiction must be "patent and unambiguous." To this Court, the lack of jurisdiction is probable, but under these circumstances it does not rise to the level of patent and unambiguous.

If this Court has jurisdiction, and given the above, it now must proceed as if it does, the issue of Standing must be reconsidered. Clearly, the lack of standing previously noted is based on the jurisdiction of SERB to determine the "public employee" questions. Absent the ability of this Court to consider the status of the employee plaintiffs, those persons, as well as the OCSEA,

²¹ Id., quoting Article 44.06 ("Successor"). Other provisions noted affect closure of a facility (Id., and see also Article 36); seniority (Article 16 of the CBA), Layoffs and bumping (Article 18), and the work week, schedules and overtime (Article 13).

²² Granted, the language in *Batavia* covered a different situation, the language of the parties' agreement. But the general principle of avoiding absurdity can hardly be considered novel.

and therefore ProgressOhio.org, did not have standing to bring this case. But since this Court now at least arguably has jurisdiction, the individual plaintiffs have standing.

ProgressOhio.org argues here that “standing for one is standing for all.”²³ See, e.g. *ACLU v. Grayson County* (6th Cir. 2010), 591 F.3d 837, 843, citing *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 52, n.2 (2006). The 6th Circuit in *Grayson County*, after citing that rule, then noted, a few paragraphs later, that since “Meredith has standing, there is no need to address the standing of the other plaintiffs.”²⁴ The state defendants cite an earlier 6th Circuit decision indicating that the aforementioned principle is a “misstatement of the law,” but because the above decisions post-date *National Rifle Association of America v. Magaw*, 132 F.3d 272 (6th Cir. 1997), and because the United States Supreme Court has opined on the issue, this Court cannot ignore the more recent precedent.

Based on the foregoing, the plaintiffs have standing to pursue these claims. This Court will now proceed to the merits of the Motion to Dismiss.

3. The Single Subject Rule

This Court, in Case No. 2011 CV 10647, exhaustively considered whether or not the legislation contained in the bill involving the privatization of prisons violated the One Subject Rule. Because the Court therein conducted an exhaustive research of the precedents, and there has been nothing determined since that time that contradicts that finding, this Court will repeat that portion of the previous decision below. In so doing, the Court reiterates that it has Shepardized *State v. Bloomer* and has found no decisions from the appellate courts that have further discussed the One Subject Rule.

²³ Plaintiffs’ Memorandum Contra, at p. 16.

²⁴ *Id.*, at 843.

Article II, Section 15(D) of the Ohio Constitution reads as follows: "No bill shall contain more than one subject, which shall be clearly expressed in its title."

"The one-subject rule was added to our Constitution in 1851. It was one of the proposals resulting from the efforts of the Second Constitutional Convention, of 1850-1851. See Kulewicz, *The History of the One-Subject Rule of the Ohio Constitution* (1997), 45 *Cleve.St.L.Rev.* 591, 591-593. The genesis of support for this rule had its roots in the same concerns over the General Assembly's dominance of state government that formed the most significant theme of the Constitution of 1851. These concerns, illustrated earlier in this opinion, resulted in the placement of concrete limits on the power of the General Assembly to proceed however it saw fit in the enactment of legislation. The one-subject rule is one product of the drafters' desire to place checks on the legislative branch's ability to exploit its position as the overwhelmingly pre-eminent branch of state government prior to 1851."

The rule derives in part from the prevailing antipathy toward the manner and means by which the General Assembly exercised its pre-1851 power to enact special laws. By virtue of this power, the General Assembly "became heavily involved in the subsidization of private companies and the granting of special privileges in corporate charters. The General Assembly passed a number of Acts * * * designed to loan credit or give financial aid to private canal, bridge, turnpike, and railroad companies. * * * The public began to bemoan the taxes imposed on them for the benefit of private companies and the losses incurred by the state when subsidized corporations failed." *Id.* at 464, 715 N.E.2d 1062. Concurrently, special charters or bills of incorporation were often assured passage through a system of logrolling, i.e., the practice of combining and thereby obtaining passage for several distinct legislative proposals that would probably have failed to gain majority support if presented and voted on separately. *Id.* at 495-496, 715 N.E.2d 1062. In limiting each bill to a single subject, the one-subject rule strikes at the heart of logrolling by essentially vitiating its product.

In re Nowak (2004), 104 Ohio St. 3d 466, at ¶¶30-31. *Nowak* settled a long-standing issue by holding that the Single Subject rule was mandatory, not directory, in nature.

In recent years, the Ohio Supreme Court has considered this issue on numerous occasions. The most recent decision sets forth a number of general principles very clearly.

Our role in the enforcement of the one subject provision is limited. To avoid interfering with the legislative process, we must afford the General Assembly 'great latitude in enacting comprehensive legislation by not construing the one-subject provision so as to unnecessarily restrict the scope and operation of laws, or to multiply their number excessively, or to prevent legislation from embracing in one act all matters properly connected with one general subject.' *State, ex rel.*

Ohio Civ. Serv. Emps. Assn., AFSCME Local 11, AFL-CIO v. State Emp. Relations Bd., 104 Ohio St. 3d 122, 2004 Ohio 6363, 818 N.E. 2d 688, quoting *Dix*, 11 Ohio St. 3d at 145... We have further emphasized that “every presumption in favor of the enactment’s validity should be indulged.” *Hoover v. Franklin County Bd. of Commrs.* (1985), 19 Ohio St. 3d 1, 6...

State v. Bloomer (2009), 122 Ohio St. 3d 200, at ¶¶47 and 48.

Bloomer goes on to note that not every violation of the one-subject rule requires a finding of unconstitutionality. A violation must be “manifestly gross and fraudulent” before an enactment may be invalidated. *Id.*, at ¶49. So long as there is a common purpose or relationship between topics, “the mere fact that a bill embraces more than one topic will not be fatal.” *Id.*

Subsequent paragraphs in *Bloomer* give examples of statutes that were found not to violate the one-subject rule. Of particular interest to this decision is the example given in *State, ex rel. Willke, v. Taft* (2005), 107 Ohio St. 3d 1. There, the Supreme Court upheld a resolution proposing an amendment to the Ohio Constitution authorizing the issuance of general obligation bonds for (1) funding public infrastructure capital improvements, (2) research and development, and (3) the development of certain business sites and facilities. This combination of the three programs into one amendment was “seemingly the product of a tactical decision”,²⁵ this decision was “not so incongruous that it could not, by any reasonable interpretation, be considered germane to the purposes of statewide job creation and development.”²⁶

The Ohio Supreme Court contrasted the above decisions from those that invalidated certain statutes. Thus, in *State, ex rel. Ohio Academy of Trial Lawyers, v. Sheward* (1999), 86 Ohio St. 3d 451, the Supreme Court struck down a tort reform bill that tried to “combine the wearing of seat belts with employment discrimination claims, class actions arising from the sale of securities with limitations on agency liability in actions against a hospital, [and] actions by a

²⁵ *Bloomer*, at ¶51, citing *Willke*, *supra* at ¶38.

²⁶ *Id.*

roller skater with supporting affidavits on a medical claim.” *Id.*, at 497-498, quoted in *Bloomer, supra*, at ¶52. Of particular interest to this decision is the decision in *State, ex rel. Ohio Civ. Serv. Emps. Assn., AFSCME Local 11, AFL-CIO, v. State Emp. Relations Bd.*, 104 Ohio St. 3d 122. There, the Supreme Court invalidated a statutory provision that excluded certain employees from a collective bargaining process when that provision was enacted as part of an appropriations bill encompassing a wide range of budgetary concerns.²⁷

In *Nowak, supra*, the Supreme Court invalidated a provision that attempted to settle whether recorded mortgages were presumptively valid where those mortgages contained violations of other sections of the Revised Code such as having only one witness (former R.C. 5301.234). The basis for the invalidity was that the statute, which was included in an appropriations bill, simply had no common purpose or relationship with the remainder of the statute.

Another key component of *Nowak* is that where there is a clear disunity, no further evidence of fraud or logrolling is required. As that Court noted,

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.” *Id.* at 145, 11 OBR 436, 464 N.E.2d 153. Otherwise, we are left with the anomalous proposition that a bill containing more than one subject does not violate a constitutional provision that prohibits a bill from containing more than one subject.

Id., at ¶71.

²⁷ Cited in *Bloomer*, at ¶52. The significance here is that this case also involved an appropriations bill. See also: *Akron Metropolitan Housing Authority Board of Trustees v. State of Ohio* (2008), Franklin App. No. 07 AP-738, 2008 Ohio — (rejecting “modifying local authority”/“authority to regulate local housing” as being too vague or not connected with the stated rationale.)

With these principles in mind, we turn to the instant case. R.C. 812.20 references the enactment, amendment or repeal of approximately 388 different sections and/or subsections of the Revised Code. As Plaintiffs point out in paragraph 50 of their Complaint, H.B. 153 contains many subjects that are quite diverse, among them the elimination of a prior felony as a bar to the issuance or renewal of a barber's license; the establishment of a gambling hotline; requiring school districts to implement merit-based pay regulations; the modification of the Rules of Evidence relating to expert testimony by a coroner or deputy coroner; creation of a check-off to permit taxpayers to donate all or part of their refund to the Ohio Historical Society; a prohibition of non-therapeutic abortions in specific places such as public hospitals and clinics; and the elimination of all collective bargaining rights for Ohio Turnpike employees.²⁸

In *Simmons-Harris v. Goff* (1999), 86 Ohio St. 3d 1, the Ohio Supreme Court otherwise upheld the constitutionality of the "school voucher program", except for finding that that section's inclusion into the appropriations bill violated the Single Subject Rule. The Supreme Court found a "blatant disunity" between the school voucher program and the remainder of the statutes in the bill. *Id.*, at 16.

The *Goff* decision is noteworthy because of some parallels with the instant case. As the Supreme Court noted,

Am.Sub.H.B. No. 117 contains many other examples of topics that "lack a common purpose or relationship." Am.Sub.H.B. No. 117 contained three hundred eighty-three amendments in twenty-five different titles of the Revised Code, ten amendments to renumber, and eighty-one new sections in sixteen different titles of the Revised Code. Baldwin's Ohio Legislative Service (1995) L-621-622.

Id., at 15 (footnote omitted).

²⁸ Plaintiffs Complaint lists more examples than are cited here. But the above is a fair sample.

The Supreme Court did not consider the constitutionality of the other sections of Am.Sub.H.B. No. 117, many of the provisions of which “appear [to be] unrelated”, *Id.*, but that was because the relief sought was limited to the school voucher program.

Here, Plaintiffs’ demand for relief asks that this Court declare H.B. 153 to be unconstitutional in its entirety.²⁹ However, the remainder of Count One strictly refers to those sections of the Revised Code that relate to the privatization of a portion of the prison system. In addition, Plaintiffs relate some, but not all, of the alleged violations of H.B. 153. This Court, therefore, will follow the lead of the Ohio Supreme Court in *Goff* and refrain from making a declaration as to the constitutionality of those sections of H.B. 153 that have not actually been argued here, at least insofar as the ruling on Plaintiffs’ Motion for a Temporary Restraining Order is concerned. This Court will note, however, that the same language used in *Goff*, i.e. “appear unrelated” certainly *appears* to apply in reference to the instances Plaintiffs cite in H.B. 153.

This Court, however, does not find *Goff* to be controlling as to the prison privatization aspects of H.B. 153 are concerned. In *State, ex rel. Roundtable, v. Taft* (2003), 2003 Ohio 3340, the Tenth District Court of Appeals faced the issue of whether the bill authorizing the Ohio Lottery Commission to participate in multi-state lotteries (the “MegaMillions” game) violated, inter alia, the Single Subject Rule. The Court of Appeals noted, first, that “[a]ssessment of an enactment’s constitutionality will be primarily a matter of a “case-by-case, semantic and contextual analysis,” citing *State, ex rel. Dix, v. Celeste* (1984), 11 Ohio St. 3d 141, 145.

Next, the Court of Appeals held that the statutory provisions authorizing the new lottery game would generate millions of dollars in revenue for Ohio schools, which was “a sufficient

²⁹ Amended Complaint, Count One, ¶168 (A).

common thread with...H.B. 405, which, by the time it was finally enacted, truly had become a budget correction bill primarily concerned with funding.” *Id.*, at ¶49.

In reaching this conclusion, the Court of Appeals cited *Comtech Systems, Inc. v. Limbach* (1991), 59 Ohio St. 3d 96, which held that the “introduction of a stream of revenue was sufficiently related to the core subject of revenues and expenditures to justify inclusion in an appropriations bill.” *Id.*, at ¶50.

Here, while it is clear that a number of provisions of H.B. 153, as cited by Plaintiffs, “appear” to clearly be at odds with the Single Subject Rule, *Goff, supra*, those provisions are considerably different than the sections before this Court that deal with prison privatization. As in *Roundtable*, the purpose of the privatization bill is to generate a stream of revenue to, in this instance, help balance the budget. This is certainly a connected subject to an appropriations bill.³⁰ At the very least, it is not a “manifestly gross or fraudulent” violation of the Single Subject requirement.

Whether the other sections of H.B. 153 that are cited by Plaintiffs are actually in violation of the Single Subject Rule does not affect the outcome regarding the prison privatization portions of this bill (which is what Plaintiffs’ action is really about). As Plaintiffs acknowledge, the remedy of severability exists in the event that any portion of a bill are found to be in violation of the Single Subject Rule.

Based on all the foregoing, this Court finds that the prison privatization portions of H.B. 153 are not in violation of the Single Subject Rule.

³⁰ Plaintiffs note in their Complaint that the prison privatization portions of H.B. 153 were attached by way of a “rider.” While there have been comments in a number of cases as to the suspect nature of a rider, whether this portion of H.B. 153 came to be a part of the bill as being part of the original legislation or by some other method, the fact is that the manner in which a court is to determine whether a violation of the Single Subject Rule exists is to examine whether a “disunity” exists between the contested section (s) and the bill in its entirety.

4. Prohibition Against Joining Property Rights

The next basis upon which Plaintiffs assert a Constitutional violation is in reference to Article Eight, Section 4 of the Ohio Constitution. That section reads in pertinent part as follows:

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 whatsoever.

In essence, the statutory provisions require the private contractor to operate and maintain the prison in a lawful manner.

R.C. 753.10 permits the director of the ODRC to award contracts for the operation and management of up to five (5) prison facilities. The provisions of this section authorize, inter alia, the Governor to execute the necessary deed(s) to the respective property.

In reviewing these statutes and comparing them to the Constitutional prohibition, this Court cannot conclude that the legislation at issue is in violation of this prohibition. The State of Ohio simply does not become a joint owner. Regulatory oversight—which occurs in many facets of state government—is not the same as joint ownership. Furthermore, because of the many constitutional requirements, under both the United States and Ohio Constitutions, relating to the operation of prisons and the treatment of prisoners, it seems clearly necessary for the State, in attempting to privatize a portion of the prison system, to create and enforce rules relating to the operation of such prisons. Finally, those cases cited by Defendants in their Memorandum In Opposition, at 11, are persuasive on this issue.

Based on the foregoing, the challenged legislation does not violate Article Eight, Section 4 of the Ohio Constitution.

5. Right of Referendum

Plaintiffs next allege that the R.C. 9.06, 753.10 and 812.20, as amended by H.B. 153, violate the Right of Referendum as that right is set forth in Article II, Section 1, 1c and 1d of the Ohio Constitution.

In pertinent part, Article II, Section 1 reads as follows:

The legislative power of the state shall be vested in a general assembly consisting of a senate and a house of representatives but the people reserve to themselves the power to...adopt and reject [laws] at the polls on a referendum vote as hereinafter provided.

Article II, Section 1c reads in pertinent part as follows:

No law passed by the general assembly shall go into effect until ninety days after it shall have been filed with the governor in the office of the secretary of state, except as herein provided.

Article II, Section 1d reads in pertinent part as follows:

Laws providing for tax levies, appropriations for the current expenses of state government and state institutions, and emergency laws necessary for the preservation of the public peace, health or safety, shall go into immediate effect. Such emergency laws upon a yea or nay vote must receive the vote of two-thirds of all the members elected to each branch of the general assembly, and the reasons for the necessity shall be set forth in one section of the law, which shall be passed only upon a yea or nay vote, upon a separate roll call thereon.

The Ohio Supreme Court has stated on numerous occasions that the right of referendum is "of paramount importance" to the citizens of Ohio. *State, ex rel. LetOhioVote.org, v. Brunner* (2009), 123 Ohio St. 3d 322, at ¶18, citing *State, ex rel. Ohio General Assembly, v. Brunner* (2007), 115 Ohio St. 3d 103.

Defendants do not deny the importance of the right of referendum, and they clearly cannot assert (nor do they) that H.B. 153 passed as an "emergency measure" as set forth in Article II, Section 1d of the Ohio Constitution. Defendants' arguments are that none of the Plaintiffs, and no one either connected or not connected with this case has even begun the separate referendum process. Because no steps have been attempted to place the referendum on

the ballot, Defendants argue that Plaintiffs lack standing to “complain about the effective date of the budget bill and whether it infringes on the right to referendum.”³¹

Defendants’ arguments, as made in 2011, are of questionable validity. Before speaking to this action, the Court will review the questionable validity of those arguments when made in 2011. First, in order to commence a referendum action, one must follow the law which provides the means by which a referendum may occur.

The Ohio Constitution states that “No law passed by the general assembly shall go into effect until ninety days after it shall have been filed by the governor in the office of the secretary of state...” Article II, Section 1c, Ohio Constitution. This ninety day period is required because it is precisely that time period in which a referendum petition is to be filed with the Secretary of State. *Id.* Since the Ohio Constitution requires that the referendum petition be filed within ninety days “after any law shall have been filed by the governor in the office of the secretary of state”, it appears that once the law goes into effect, the right of referendum has ended.³²

In this instance, H.B. 153, by its own terms, went into effect *immediately*. Whether R.C. 9.06 and R.C. 753.10 can be considered to be exempt from the referendum requirement depends on whether they meet the stated exceptions to that requirement. Those exceptions are contained in Article II, Section 1d of the Ohio Constitution.

It is abundantly clear that the exceptions relating to “tax levies” and “emergency laws for the preservation of the public peace, health or safety” do not apply here. Therefore, the key question is whether the remaining exception, “appropriations for the current expenses of the state

³¹ Memorandum in Opposition, at 9.

³² This is one question that the Court has not had time to address. It appears that the 90 day requirement regarding both the filing of a referendum petition and the effective date of a non-emergency law is not coincidental, and the date the law goes into effect is the day the referendum right ends. If either of the parties disagrees, the Court would appreciate further information.

government and state institutions,” applies. Does the sale of prisons constitute an “appropriation”? Based on binding precedent, this Court holds that it does not.

One of the key questions before the Supreme Court in *State, ex rel. LetOhioVote.org, v. Brunner, supra* was the interpretation of this third exception—appropriations—to the referendum requirement.

First, the Court set the ground rules regarding the interpretation of that provision:

In construing these exceptions, "we must 'read words and phrases in context according to the rules of grammar and common usage.'" *State ex rel. Colvin v. Brunner*, 120 Ohio St. 3d 110, 2008 Ohio 5041, P 43, 896 N.E.2d 979, quoting *State ex rel. Lee v. Karnes*, 103 Ohio St. 3d 559, 2004 Ohio 5718, P 23, 817 N.E.2d 76. We liberally construe the powers of initiative and referendum to effectuate the rights reserved. *State ex rel. Evans v. Blackwell*, 111 Ohio St. 3d 1, 2006 Ohio 4334, P 32, 854 N.E.2d 1025. Further, "[i]n view of the great precaution taken by the constitutional convention of 1912 to set forth and safeguard, with the particularity of detail usually found only in legislative acts, the right of referendum, and the three exceptions thereto, our court should not deny the people that right, *unless the act in question is plainly and persuasively included within one of the three classes excepted from the operation of the referendum.*" (Emphasis added.) *State ex rel. Keller v. Forney* (1923), 108 Ohio St. 463, 467-468, 1 Ohio Law Abs. 698, 141 N.E. 16. These exceptions to the general rule of referendum must be strictly, but reasonably, construed. *Id.* at paragraphs one and two of the syllabus.

Id., at ¶24. The emphasis noted in the paragraph was placed there by the Supreme Court.

The Supreme Court then defined what an “appropriation” is.

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, quoting Webster's New International Dictionary (2d Ed.). See also Black's Law Dictionary (9th Ed.2009) 117-118 (defining "appropriation" to mean "[a] legislative body's act of setting aside a sum of money for a public purpose").

Id., at ¶28.

The Supreme Court expressly **rejected** the argument that because funds are generated—in that case by sales from video lottery terminals (and in this case by the sale of prison(s) and surrounding property)—that this makes them “appropriations.” By the definitions given by the Ohio Supreme Court, it is clear that generated funds from the sale of prison facilities cannot be “appropriations.”

It can also be argued that the sale of prisons and the revenue such a sale would provide are “inextricably linked” to appropriations, and therefore should be permitted as an exception to the referendum requirement. However, this precise argument was raised—and rejected—in *LetOhioVote.org*. The Supreme Court held:

There is no authority in our precedent that would permit the referendum exception to apply to provisions that, once implemented, raise revenue to provide funds for an appropriation in another part of the act, even if -- as the intervening respondents claim -- they are "inextricably tied" or related to each other.

Id., at ¶35.

Finally, it must be noted that the statutes in question are permanent in nature, and the Supreme Court in *LetOhioVote.org* held that any section of the law “which changes the permanent law of the state is subject to referendum under the powers reserved to the people by Section 1 of Article II, even if the law also contains a section providing for an appropriation for the current expenses of state government.” *Id.*, at ¶45.

Based on the foregoing, the contested statutes do not fit within any of the three exceptions to the referendum requirement set forth in the Ohio Constitution.

The conclusions that may be reached from the foregoing are that, first, the portion of H.B. 153 relating to R.C. 9.06 and R.C. 753.10 should have been subject to the referendum requirement, and second, that because they (and the rest of H.B. 153) went into effect

immediately, Plaintiffs had no recourse to the right of referendum.³³ Since Plaintiffs (and any other Ohio citizen) should have had that right, and because they could not have pursued it even if they wished based upon the manner in which this legislation was passed, this Court cannot say that they lack standing to make the arguments concerning the referendum issue. At the time of the filing of the 2011 case, the lack of recourse was most troubling to this Court.

Of course, intervening events have taken place since this Court first reviewed this issue last year. Specifically, Plaintiffs—or at least the ones involved in the earlier case—dismissed that case pursuant to Civ.R. 41(A), and it is admitted on both sides in oral argument on this Motion to Dismiss that there was no effort to seek, obtain, or file referendum petitions from or with the Secretary of State. Defendants' argument that the Plaintiffs have done nothing to exercise their right of referendum at any time does, after the passage of so much time, become telling. At this point, that is to say, by July of 2012, the Court agrees that this inactivity is fatal to the seeking of the referendum remedy.

Based on the foregoing, the Motion to Dismiss is SUSTAINED, and this case is dismissed. This is a final appealable order.

Copies to: all counsel.

³³ As noted supra, this conclusion assumes that a referendum action can only be brought during the time a bill has not become "effective."

Franklin County Court of Common Pleas

Date: 11-20-2012
Case Title: OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION ET AL -
VS- OHIO STATE ET AL
Case Number: 12CV008716
Type: DECISION/ENTRY

It Is So Ordered.

A handwritten signature in black ink, appearing to read "Patrick E. Sheeran", is written over a circular, textured stamp or seal.

/s/ Judge Patrick E. Sheeran

Court Disposition

Case Number: 12CV008716

Case Style: OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION
ET AL -VS- OHIO STATE ET AL

Motion Tie Off Information:

1. Motion CMS Document Id: 12CV0087162012-09-0799970000
Document Title: 09-07-2012-MOTION TO DISMISS
Disposition: MOTION GRANTED

Oh. Const. Art. II, § 15

Current through Legislation passed by the 130th General Assembly and filed with the Secretary of State through File 140 Annotations current through May 19, 2014

Ohio Constitution > CONSTITUTION OF THE STATE OF OHIO > ARTICLE II. LEGISLATIVE

§ 15. How bills shall be passed

- (A) The general assembly shall enact no law except by bill, and no bill shall be passed without the concurrence of a majority of the members elected to each house. Bills may originate in either house, but may be altered, amended, or rejected in the other.
- (B) The style of the laws of this state shall be, "be it enacted by the general assembly of the state of Ohio."
- (C) Every bill shall be considered by each house on three different days, unless two-thirds of the members elected to the house in which it is pending suspend this requirement, and every individual consideration of a bill or action suspending the requirement shall be recorded in the journal of the respective house. No bill may be passed until the bill has been reproduced and distributed to members of the house in which it is pending and every amendment been made available upon a member's request.
- (D) No bill shall contain more than one subject, which shall be clearly expressed in its title. No law shall be revived or amended unless the new act contains the entire act revived, or the section or sections amended, and the section or sections amended shall be repealed.
- (E) Every bill which has passed both houses of the general assembly shall be signed by the presiding officer of each house to certify that the procedural requirements for passage have been met and shall be presented forthwith to the governor for his approval.
- (F) Every joint resolution which has been adopted in both houses of the general assembly shall be signed by the presiding officer of each house to certify that the procedural requirements for adoption have been met and shall forthwith be filed with the secretary of state.

History

(Enacted May 8, 1973. Former § 15 repealed, see HJR No.5, 110th General Assembly.)

Annotations

Case Notes

AMENDMENT, EFFECT OF UNCHANGED PROVISIONS.
CERTIFICATION BY PRESIDING OFFICERS.
CODIFICATION, CONSTRUCTION OF.
CONSTRUCTION OF STATUTES.
DATE UPON WHICH STATUTE IS ENACTED.
EFFECT UPON NEW ENACTMENT.
EFFECTIVE DATE.
JOINT RESOLUTION.
JURISDICTION OF COURT OF APPEALS.
--INTERNAL RULE OF LEGISLATIVE BODY.
ONE-SUBJECT RULE.
PRESUMPTION LAW PASSED BY REQUISITE NUMBER OF VOTES.
RECORDATION IN LEGISLATIVE JOURNAL.
REPEAL BY IMPLICATION.
REPEAL OF STATUTE.
SCOPE OF "EXISTING SECTIONS" REPEAL.
SIGNATURE OF PRESIDING OFFICER.
VIOLATION OF CLEAR TITLE REQUIREMENT.

Case Notes

ANALYSIS

Kevin Kita



ORC Ann. 9.06

Current through Legislation passed by the 130th General Assembly and filed with the Secretary of State through File 140 Annotations current through May 19, 2014

Page's Ohio Revised Code Annotated > OHIO REVISED CODE GENERAL PROVISIONS > CHAPTER 9, MISCELLANEOUS

§ 9.06. Contracts for private operation and management of correctional facilities

(A)

- (1) The department of rehabilitation and correction may contract for the private operation and management pursuant to this section of the initial intensive program prison established pursuant to section 5120.033 of the Revised Code, if one or more intensive program prisons are established under that section, and may contract for the private operation and management of any other facility under this section. Counties and municipal corporations to the extent authorized in sections 307.93, 341.35, 753.03, and 753.15 of the Revised Code may contract for the private operation and management of a facility under this section. A contract entered into under this section shall be for an initial term specified in the contract with an option to renew for additional periods of two years.
- (2) The department of rehabilitation and correction, by rule, shall adopt minimum criteria and specifications that a person or entity, other than a person or entity that satisfies the criteria set forth in division (A)(3)(a) of this section and subject to division (I) of this section, must satisfy in order to apply to operate and manage as a contractor pursuant to this section the initial intensive program prison established pursuant to section 5120.033 of the Revised Code, if one or more intensive program prisons are established under that section.
- (3) Subject to division (I) of this section, any person or entity that applies to operate and manage a facility as a contractor pursuant to this section shall satisfy one or more of the following criteria:
 - (a) The person or entity, at the time of the application, operates and manages one or more facilities accredited by the American correctional association.
 - (b) The person or entity satisfies all of the minimum criteria and specifications adopted by the department of rehabilitation and correction pursuant to division (A)(2) of this section, provided that this alternative shall be available only in relation to the initial intensive program prison established pursuant to section 5120.033 of the Revised Code, if one or more intensive program prisons are established under that section.
- (4) Subject to division (I) of this section, before a public entity may enter into a contract under this section, 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. No out-of-state prisoners may be housed in any facility that is the subject of a contract entered into under this section.

(B) Subject to division (I) of this section, any contract entered into under this section shall include all of the following:

- (1) A requirement that, if the contractor applied pursuant to division (A)(3)(b) of this section, the contractor continue complying with the applicable criteria and specifications adopted by the department of rehabilitation and correction pursuant to division (A)(2) of this section;
- (2) A requirement that all of the following conditions be met:
 - (a) The contractor begins the process of accrediting the facility with the American correctional association no later than sixty days after the facility receives its first inmate.
 - (b) The contractor receives accreditation of the facility within twelve months after the date the contractor applies to the American correctional association for accreditation.
 - (c) Once the accreditation is received, the contractor maintains it for the duration of the contract term.
 - (d) If the contractor does not comply with divisions (B)(2)(a) to (c) of this section, the contractor is in violation of the contract, and the public entity may revoke the contract at its discretion.

Kevin Kita



- (3) A requirement that the contractor comply with all rules promulgated by the department of rehabilitation and correction that apply to the operation and management of correctional facilities, including the minimum standards for jails in Ohio and policies regarding the use of force and the use of deadly force, although the public entity may require more stringent standards, and comply with any applicable laws, rules, or regulations of the federal, state, and local governments, including, but not limited to, sanitation, food service, safety, and health regulations. The contractor shall be required to send copies of reports of inspections completed by the appropriate authorities regarding compliance with rules and regulations to the director of rehabilitation and correction or the director's designee and, if contracting with a local public entity, to the governing authority of that entity.
- (4) A requirement that the contractor report for investigation all crimes in connection with the facility to the public entity, to all local law enforcement agencies with jurisdiction over the place at which the facility is located, and, for a crime committed at a state correctional institution, to the state highway patrol;
- (5) A requirement that the contractor immediately report all escapes from the facility, and the apprehension of all escapees, by telephone and in writing to all local law enforcement agencies with jurisdiction over the place at which the facility is located, to the prosecuting attorney of the county in which the facility is located, to the state highway patrol, to a daily newspaper having general circulation in the county in which the facility is located, and, if the facility is a state correctional institution, to the department of rehabilitation and correction. The written notice may be by either facsimile transmission or mail. A failure to comply with this requirement regarding an escape is a violation of section 2921.22 of the Revised Code.
- (6) A requirement that, if the facility is a state correctional institution, the contractor provide a written report within specified time limits to the director of rehabilitation and correction or the director's designee of all unusual incidents at the facility as defined in rules promulgated by the department of rehabilitation and correction or, if the facility is a local correctional institution, that the contractor provide a written report of all unusual incidents at the facility to the governing authority of the local public entity;
- (7) A requirement that the contractor maintain proper control of inmates' personal funds pursuant to rules promulgated by the department of rehabilitation and correction for state correctional institutions or pursuant to the minimum standards for jails along with any additional standards established by the local public entity for local correctional institutions and that records pertaining to these funds be made available to representatives of the public entity for review or audit;
- (8) A requirement that the contractor prepare and distribute to the director of rehabilitation and correction or, if contracting with a local public entity, to the governing authority of the local entity annual budget income and expenditure statements and funding source financial reports;
- (9) A requirement that the public entity appoint and supervise a full-time contract monitor, that the contractor provide suitable office space for the contract monitor at the facility, and that the contractor allow the contract monitor unrestricted access to all parts of the facility and all records of the facility except the contractor's financial records;
- (10) A requirement that if the facility is a state correctional institution designated department of rehabilitation and correction staff members be allowed access to the facility in accordance with rules promulgated by the department;
- (11) A requirement that the contractor provide internal and perimeter security as agreed upon in the contract;
- (12) If the facility is a state correctional institution, a requirement that the contractor impose discipline on inmates housed in the facility only in accordance with rules promulgated by the department of rehabilitation and correction;
- (13) A requirement that the facility be staffed at all times with a staffing pattern approved by the public entity and adequate both to ensure supervision of inmates and maintenance of security within the facility and to provide for programs, transportation, security, and other operational needs. In determining security needs, the contractor shall be required to consider, among other things, the proximity of the

ORC Ann. 9.06

facility to neighborhoods and schools.

- (14) If the contract is with a local public entity, a requirement that the contractor provide services and programs, consistent with the minimum standards for jails promulgated by the department of rehabilitation and correction under section 5120.10 of the Revised Code;
 - (15) A clear statement that no immunity from liability granted to the state, and no immunity from liability granted to political subdivisions under Chapter 2744. of the Revised Code, shall extend to the contractor or any of the contractor's employees;
 - (16) A statement that all documents and records relevant to the facility shall be maintained in the same manner required for, and subject to the same laws, rules, and regulations as apply to, the records of the public entity;
 - (17) Authorization for the public entity to impose a fine on the contractor from a schedule of fines included in the contract for the contractor's failure to perform its contractual duties or to cancel the contract, as the public entity considers appropriate. If a fine is imposed, the public entity may reduce the payment owed to the contractor pursuant to any invoice in the amount of the imposed fine.
 - (18) A statement that all services provided or goods produced at the facility shall be subject to the same regulations, and the same distribution limitations, as apply to goods and services produced at other correctional institutions;
 - (19) If the facility is a state correctional institution, authorization for the department to establish one or more prison industries at the facility;
 - (20) A requirement that, if the facility is an intensive program prison established pursuant to section 5120.033 of the Revised Code, the facility shall comply with all criteria for intensive program prisons of that type that are set forth in that section;
 - (21) If the facility is a state correctional institution, a requirement that the contractor provide clothing for all inmates housed in the facility that is conspicuous in its color, style, or color and style, that conspicuously identifies its wearer as an inmate, and that is readily distinguishable from clothing of a nature that normally is worn outside the facility by non-inmates, that the contractor require all inmates housed in the facility to wear the clothing so provided, and that the contractor not permit any inmate, while inside or on the premises of the facility or while being transported to or from the facility, to wear any clothing of a nature that does not conspicuously identify its wearer as an inmate and that normally is worn outside the facility by non-inmates.
- (C) No contract entered into under this section may require, authorize, or imply a delegation of the authority or responsibility of the public entity to a contractor for any of the following:
- (1) Developing or implementing procedures for calculating inmate release and parole eligibility dates and recommending the granting or denying of parole, although the contractor may submit written reports that have been prepared in the ordinary course of business;
 - (2) Developing or implementing procedures for calculating and awarding earned credits, approving the type of work inmates may perform and the wage or earned credits, if any, that may be awarded to inmates engaging in that work, and granting, denying, or revoking earned credits;
 - (3) For inmates serving a term imposed for a felony offense committed prior to July 1, 1996, or for a misdemeanor offense, developing or implementing procedures for calculating and awarding good time, approving the good time, if any, that may be awarded to inmates engaging in work, and granting, denying, or revoking good time;
 - (4) Classifying an inmate or placing an inmate in a more or a less restrictive custody than the custody ordered by the public entity;
 - (5) Approving inmates for work release;
 - (6) Contracting for local or long distance telephone services for inmates or receiving commissions from those services at a facility that is owned by or operated under a contract with the department.
- (D) A contractor that has been approved to operate a facility under this section, and a person or entity that

enters into a contract for specialized services, as described in division (I) of this section, relative to an intensive program prison established pursuant to section 5120.033 of the Revised Code to be operated by a contractor that has been approved to operate the prison under this section, shall provide an adequate policy of insurance specifically including, but not limited to, insurance for civil rights claims as determined by a risk management or actuarial firm with demonstrated experience in public liability for state governments. The insurance policy shall provide that the state, including all state agencies, and all political subdivisions of the state with jurisdiction over the facility or in which a facility is located are named as insured, and that the state and its political subdivisions shall be sent any notice of cancellation. The contractor may not self-insure.

A contractor that has been approved to operate a facility under this section, and a person or entity that enters into a contract for specialized services, as described in division (I) of this section, relative to an intensive program prison established pursuant to section 5120.033 of the Revised Code to be operated by a contractor that has been approved to operate the prison under this section, shall indemnify and hold harmless the state, its officers, agents, and employees, and any local government entity in the state having jurisdiction over the facility or ownership of the facility, shall reimburse the state for its costs in defending the state or any of its officers, agents, or employees, and shall reimburse any local government entity of that nature for its costs in defending the local government entity, from all of the following:

- (1) Any claims or losses for services rendered by the contractor, person, or entity performing or supplying services in connection with the performance of the contract;
 - (2) Any failure of the contractor, person, or entity or its officers or employees to adhere to the laws, rules, regulations, or terms agreed to in the contract;
 - (3) Any constitutional, federal, state, or civil rights claim brought against the state related to the facility operated and managed by the contractor;
 - (4) Any claims, losses, demands, or causes of action arising out of the contractor's, person's, or entity's activities in this state;
 - (5) Any attorney's fees or court costs arising from any habeas corpus actions or other inmate suits that may arise from any event that occurred at the facility or was a result of such an event, or arise over the conditions, management, or operation of the facility, which fees and costs shall include, but not be limited to, attorney's fees for the state's representation and for any court-appointed representation of any inmate, and the costs of any special judge who may be appointed to hear those actions or suits.
- (E) Private correctional officers of a contractor operating and managing a facility pursuant to a contract entered into under this section may carry and use firearms in the course of their employment only after being certified as satisfactorily completing an approved training program as described in division (A) of section 109.78 of the Revised Code.
- (F) Upon notification by the contractor of an escape from, or of a disturbance at, the facility that is the subject of a contract entered into under this section, the department of rehabilitation and correction and state and local law enforcement agencies shall use all reasonable means to recapture escapees or quell any disturbance. Any cost incurred by the state or its political subdivisions relating to the apprehension of an escapee or the quelling of a disturbance at the facility shall be chargeable to and borne by the contractor. The contractor shall also reimburse the state or its political subdivisions for all reasonable costs incurred relating to the temporary detention of the escapee following recapture.
- (G) Any offense that would be a crime if committed at a state correctional institution or jail, workhouse, prison, or other correctional facility shall be a crime if committed by or with regard to inmates at facilities operated pursuant to a contract entered into under this section.
- (H) A contractor operating and managing a facility pursuant to a contract entered into under this section shall pay any inmate workers at the facility at the rate approved by the public entity. Inmates working at the facility shall not be considered employees of the contractor.
- (I) In contracting for the private operation and management pursuant to division (A) of this section of any intensive program prison established pursuant to section 5120.033 of the Revised Code, the department of rehabilitation and correction may enter into a contract with a contractor for the general operation and

management of the prison and may enter into one or more separate contracts with other persons or entities for the provision of specialized services for persons confined in the prison, including, but not limited to, security or training services or medical, counseling, educational, or similar treatment programs. If, pursuant to this division, the department enters into a contract with a contractor for the general operation and management of the prison and also enters into one or more specialized service contracts with other persons or entities, all of the following apply:

- (1) The contract for the general operation and management shall comply with all requirements and criteria set forth in this section, and all provisions of this section apply in relation to the prison operated and managed pursuant to the contract.
 - (2) Divisions (A)(2), (B), and (C) of this section do not apply in relation to any specialized services contract, except to the extent that the provisions of those divisions clearly are relevant to the specialized services to be provided under the specialized services contract. Division (D) of this section applies in relation to each specialized services contract.
- (J) If, on or after the effective date of this amendment, a contractor enters into a contract with the department of rehabilitation and correction under this section for the operation and management of any facility described in Section 753.10 of the act in which this amendment was adopted, if the contract provides for the sale of the facility to the contractor, if the facility is sold to the contractor subsequent to the execution of the contract, and if the contractor is privately operating and managing the facility, notwithstanding the contractor's private operation and management of the facility, all of the following apply:
- (1) Except as expressly provided to the contrary in this section, the facility being privately operated and managed by the contractor shall be considered for purposes of the Revised Code as being under the control of, or under the jurisdiction of, the department of rehabilitation and correction.
 - (2) Any reference in this section to "state correctional institution," any reference in Chapter 2967. of the Revised Code to "state correctional institution," other than the definition of that term set forth in section 2967.01 of the Revised Code, or to "prison," and any reference in Chapter 2929., 5120., 5145., 5147., or 5149. or any other provision of the Revised Code to "state correctional institution" or "prison" shall be considered to include a reference to the facility being privately operated and managed by the contractor, unless the context makes the inclusion of that facility clearly inapplicable.
 - (3) Upon the sale and conveyance of the facility, the facility shall be returned to the tax list and duplicate maintained by the county auditor, and the facility shall be subject to all real property taxes and assessments. No exemption from real property taxation pursuant to Chapter 5709. of the Revised Code shall apply to the facility conveyed. The gross receipts and income of the contractor to whom the facility is conveyed that are derived from operating and managing the facility under this section shall be subject to gross receipts and income taxes levied by the state and its subdivisions, including the taxes levied pursuant to Chapters 718., 5747., 5748., and 5751. of the Revised Code. Unless exempted under another section of the Revised Code, transactions involving a contractor as a consumer or purchaser are subject to any tax levied under Chapters 5739. and 5741. of the Revised Code.
 - (4) After the sale and conveyance of the facility, all of the following apply:
 - (a) Before the contractor may resell or otherwise transfer the facility and the real property on which it is situated, any surrounding land that also was transferred under the contract, or both the facility and real property on which it is situated plus the surrounding land that was transferred under the contract, the contractor first must offer the state the opportunity to repurchase the facility, real property, and surrounding land that is to be resold or transferred and must sell the facility, real property, and surrounding land to the state if the state so desires, pursuant to and in accordance with the repurchase clause included in the contract.
 - (b) Upon the default by the contractor of any financial agreement for the purchase of the facility and the real property on which it is situated, any surrounding land that also was transferred under the contract, or both the facility and real property on which it is situated plus the surrounding land that was transferred under the contract, upon the default by the contractor of any other term in the contract, or upon the financial insolvency of the contractor or inability of the contractor to meet its contractual obligations, the state may repurchase the facility, real property, and surrounding land,

ORC Ann. 9.06

if the state so desires, pursuant to and in accordance with the repurchase clause included in the contract.

- (c) If the contract entered into under this section for the operation and management of a state correctional institution is terminated, both of the following apply:
- (i) The operation and management responsibilities of the state correctional institution shall be transferred to another contractor under the same terms and conditions as applied to the original contractor or to the department of rehabilitation and correction.
 - (ii) The department of rehabilitation and correction or the new contractor, whichever is applicable, may enter into an agreement with the terminated contractor to purchase the terminated contractor's equipment, supplies, furnishings, and consumables.
- (K) Any action asserting that section 9.06 of the Revised Code or section 753.10 of the act in which this amendment was adopted violates any provision of the Ohio constitution and any claim asserting that any action taken by the governor or the department of administrative services or the department of rehabilitation and correction pursuant to section 9.06 of the Revised Code or section 753.10 of the act in which this amendment was adopted violates any provision of the Ohio constitution or any provision of the Revised Code shall be brought in the court of common pleas of Franklin county. The court shall give any action filed pursuant to this division priority over all other civil cases pending on its docket and expeditiously make a determination on the claim. If an appeal is taken from any final order issued in a case brought pursuant to this division, the court of appeals shall give the case priority over all other civil cases pending on its docket and expeditiously make a determination on the appeal.
- (L) As used in this section:
- (1) "Public entity" means the department of rehabilitation and correction, or a county or municipal corporation or a combination of counties and municipal corporations, that has jurisdiction over a facility that is the subject of a contract entered into under this section.
 - (2) "Local public entity" means a county or municipal corporation, or a combination of counties and municipal corporations, that has jurisdiction over a jail, workhouse, or other correctional facility used only for misdemeanants that is the subject of a contract entered into under this section.
 - (3) "Governing authority of a local public entity" means, for a county, the board of county commissioners; for a municipal corporation, the legislative authority; for a combination of counties and municipal corporations, all the boards of county commissioners and municipal legislative authorities that joined to create the facility.
 - (4) "Contractor" means a person or entity that enters into a contract under this section to operate and manage a jail, workhouse, or other correctional facility.
 - (5) "Facility" means any of the following:
 - (a) The specific county, multicounty, municipal, municipal-county, or multicounty-municipal jail, workhouse, prison, or other type of correctional institution or facility used only for misdemeanants that is the subject of a contract entered into under this section;
 - (b) Any state correctional institution that is the subject of a contract entered into under this section, including any facility described in Section 753.10 of the act in which this amendment was adopted at any time prior to or after any sale to a contractor of the state's right, title, and interest in the facility, the land situated thereon, and specified surrounding land.
 - (6) "Person or entity" in the case of a contract for the private operation and management of a state correctional institution, includes an employee organization, as defined in section 4117.01 of the Revised Code, that represents employees at state correctional institutions.

History

146 v H 117 (Eff 9-29-95); 147 v H 215 (Eff 9-29-97); 147 v H 293 (Eff 3-17-98); 148 v H 283 (Eff 6-30-99); 149 v H 94, Eff 9-5-2001; 152 v H 130, § 1, eff. 4-7-09; 153 v H 1, § 101.01, eff. 10-16-09; 153 v H 1, § 101.01, eff.

10-16-09; 2011 HB 153, § 101.01, eff. June 30, 2011.

Page's Ohio Revised Code Annotated:

Copyright © 2014 by Matthew Bender & Company, Inc., a member of the LexisNexis Group. All rights reserved.