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INTRODUCTION

Appellees/Cross-Appellants Ohio Civil Service Employees Association, et al. (hereafter referred to as “Cross-Appellants”) ask this Court to declare: (1) that a payment by the state of Ohio to a private corporation pursuant to a contract violates the Ohio Constitution and (2) that long-standing statutory authority which grants exclusive jurisdiction to an administrative agency should be disregarded. Cross-Appellants’ propositions of law are unsupported by the facts or the law. This Court should not adopt Cross-Appellants’ position.

STATEMENT OF THE FACTS

Cross-Appellees Corrections Corporation of America and CCA Western Properties, Inc. (collectively, “CCA”) adopt the Statements of the Facts and Statements of the Case presented in the Merit Brief of State Defendants-Appellants and in the Merit Brief of Appellant/Cross-Appellee Management & Training Corporation (“MTC”), which were filed on September 8, 2014. CCA supplements those Statements of the Facts as follows.

Ohio’s Governor, John R. Kasich, signed Am.Sub.H.B. No. 153 (hereafter referred to as “Budget Bill”) into effect on July 20, 2012. The bill amended R.C. 9.06. Originally, R.C. 9.06 was introduced in Am.Sub.H.B. No. 117 in 1995. The statute authorized the state of Ohio to enter into operating and management contracts for Ohio’s prisons with private companies. R.C. 9.06; 1995 H.B. No. 117. The most recent amendments of R.C. 9.06, among other things, included provisions that set forth the conditions of ownership of a state prison facility that could be sold under uncodified section 753.10. R.C. 9.06(J).

Uncodified section 753.10 authorizes the Ohio Department of Rehabilitation and Correction (“ODRC”) to enter into purchase contracts with private companies for the sale of the state’s prison facilities. 2011 H 153, Sec. 753.10. The section also places various restrictions on

the sale terms and on the purchaser that must be included in the purchase contract. *Id.* For example, a contractor/purchaser is required to pay taxes and utilities and maintain mandatory minimum staffing requirements and insurance using their own financial resources. (R. at 82, Appx. pp 5, 8, 9, 11-15.)

After the amendment of R.C. 9.06 and the enactment of uncodified 753.10, CCA entered into an operation, management, and purchase contract with the state of Ohio (“Contract”) for the Lake Erie Correctional Facility (“LECF”). The Contract was executed on December 19, 2011 and CCA paid \$72,770,260 to the State for the purchase of LECF and adjacent property. Pursuant to the terms in the Contract and because CCA elected to purchase LECF, the state of Ohio agreed to pay CCA an Annual Ownership Fee (“AOF”) for the exclusive use of LECF to house the State’s inmates. (R. at 82, Appx. 7.)

The Request for Proposal (“RFP”), which was incorporated into the Contract between the State and CCA, specifically states that “there *may* be multiple cost components of the contract (1) O&M [Operation & Management] of the facility and (2) ownership of the facility. As such, the Contractor [CCA] shall be paid an O&M Per Diem and *may* be paid an Annual Ownership Fee for the ownership, if applicable, and use of the Institution to house ODRC inmates.” (Emphasis added.) (R. at 82, Appx. 6.) The AOF is an optional payment for services, specifically, the exclusive use of LECF now owned by CCA. As permitted by the RFP, CCA elected to propose separately for the operation and management of the facility and the use of the facility, i.e., the O&M per diem and AOF payment.

Whether or not there is a separate AOF, the O&M per diem fee must be set at a 5% discount and the state of Ohio would still be responsible for reimbursable costs above and beyond the per diem fee. (R. at 82, Appx. 3-4.) Indeed, CCA could have only entered into an

O&M agreement and elected not to purchase the facility. Alternatively, CCA could have purchased the facility, entered into an O&M agreement, and elected not to bid for an AOF, allowing CCA to forgo certain restrictions tied to the AOF. However, in order to exclusively utilize the facility for ODRC inmates, the state of Ohio must make an AOF payment to CCA. (R. at 82, Appx. 4.)

The AOF is not a continuing, permanent payment, notwithstanding Cross-Appellants' assertion to the contrary. The arrangement and payment for operation and management by the state of Ohio is renegotiated on a biennial basis and includes consideration of the ODRC Bureau of Budget and Planning Analysis. (R. at 82, Appx. 3, 8.) If the AOF is terminated by the General Assembly, CCA may use LECF to house out-of-state inmates and other restrictions on the facility are also lifted. (R. at 82, Appx. 4.)

In their Merit Brief, Cross-Appellants do not rely upon the facts in the record and have misstated parts of the RFP and Contract between the State and CCA. The facts in the record do not support their claims. The State's payment of the AOF to CCA is a payment for public services, which is not prohibited by the Ohio Constitution.

RESPONSE ARGUMENTS TO CROSS-APPELLANTS' PROPOSITIONS OF LAW

Proposition of Law 1: The Ohio Constitution does not prohibit the State of Ohio from paying a private company to perform a public service and does not prescribe the method of compensation.

A. The annual payment of \$3,800,000 from the state of Ohio to CCA is not a subsidy.

Cross-Appellants rely upon unsupported factual allegations to argue that the AOF paid by the state of Ohio to CCA is a subsidy. Cross-Appellants' allegations are not based on facts in the record and there is no Ohio law to support their conclusions. The AOF is not a subsidy or a subsidization of the cost of purchasing/owning LECF. Cross-Appellants incorrectly stated that "[t]hese AOF payments are taxpayer monies given to CCA fto (sic) subsidize its ownership costs

and for which the State receives nothing in return.” (Cross-Appellants’ Merit Brief p. 34.) This assertion ignores the fact that a private corporation is housing the state of Ohio’s prisoners. R.C. 5120.03.

Additionally, Cross-Appellants’ argue that the AOF is a “subsidy” because “[t]here are no restrictions on CCA’s use of the AOF payments.” The facts in the record do not support these assertions as the specific description of the AOF in the RFP states the restrictions upon CCA. For example, in exchange for the AOF, CCA is prohibited from housing inmates from out of the state of Ohio. Cross-Appellants ignore that CCA is exclusively housing the state of Ohio’s inmates at LECF. This exclusivity alone is something that the State is receiving in return for the AOF payment.

In support of their argument, Cross-Appellants define subsidy by citing *State Defender Union Emp. v. Legal Aid and Defender Ass’n of Detroit*, 230 Mich.App. 426, 584 N.W.2d 359 (1998). However, Cross-Appellants’ argument is not persuasive. Even if this Court agrees with the Michigan court’s definition of subsidy, the facts in this case do not demonstrate that the AOF is a subsidy. In fact, after adopting the Merriam-Webster’s Dictionary definition of subsidy, the *State Defender Union Emp.* court said “we agree with the trial court and hold that an otherwise private organization is not ‘funded by or through state or local authority’ merely because public monies paid in exchange for goods provided or services rendered comprise a certain percentage of the organization’s revenue. Earned fees are simply not a grant, subsidy, or funding in any reasonable, common-sense construction of those synonymous words.” (Emphasis added.) *Id.* at 432-33.

Furthermore, Cross-Appellants’ subsidy argument is not properly before this Court because this is the first time they assert that the AOF is a subsidy and, as a result, the AOF

payment is what violates Article VIII, Section 4 of the Ohio Constitution. *See Belvedere Condominium Unit Owners' Assn. v. R.E. Roark Cos., Inc.*, 67 Ohio St.3d 274, 279, 1993-Ohio-119, 617 N.E.2d 1075 (“As a general rule, this court will not consider arguments that were not raised in the courts below.”) Cross-Appellants’ arguments have changed significantly from the Complaint and Amended Complaint which were dismissed by the trial court.

In the lower courts, Cross-Appellants’ arguments focused on the prohibition of joint ventures and the unconstitutionality to extend the credit of the State to a private enterprise. (R. 61.) The Tenth District Court of Appeals affirmed the trial court’s Decision to dismiss plaintiffs’ complaint ultimately concluding that there is “nothing in plaintiffs’ complaint [that] demonstrates that the challenged provisions result in the sort of partnerships or unions that the Ohio Constitution forbids.” Cross-Appellants may not, in effect, amend their complaints by presenting a new case theory before the Supreme Court that was foreign to the Complaint and Amended Complaint that were the subject of the Dismissal Entries on appeal.

Moreover, even if their new arguments had been part of the original pleadings, the Tenth District Court of Appeals still would have been correct in affirming the trial court’s Decision to dismiss the complaint. The new arguments still fail to support that this Court should adopt Cross-Appellants’ proposition of law.

B. It is not unconstitutional for the state of Ohio to pay CCA for public services.

In exchange for the AOF payment, CCA performs a public service for the State, i.e. exclusively housing the State’s inmates. In their Merit Brief, Cross-Appellants claim that the AOF payment violates Article VIII, Section 4 of the Ohio Constitution. In order to state a claim challenging the constitutionality of enacted legislation, Cross-Appellants were required to allege that the AOF is different than a payment for public services. They could not and did not. The record demonstrates that the AOF is a payment for the use of the facility, among other things. A

payment by the State for public services is not prohibited by the Ohio Constitution and nothing in Cross-Appellants' complaint contains allegations to the contrary.

Article VIII, Section 4 of the Ohio Constitution states: “[t]he 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.” The term “credit” as used in this section has been previously defined as a loan of money to another, the ability to borrow money from another, or one who money is due as a debtor. *State ex rel. Saxbe v. Brand*, 176 Ohio St. 44, 46, 197 N.E.2d 328 (1964). Article VIII, Section 4 of the Ohio Constitution prohibits the state loaning their “credit” and the state becoming a joint venture with a private corporation. Neither one of these issues are present in the facts here. Cross-Appellants allege that the State violated Article VIII, Section 4 of the Ohio Constitution by contracting to pay a yearly payment of \$3,800,000, the AOF, to CCA. The AOF is not a “credit of the state.” Nothing in the record suggests that the AOF is a loan or money due to a debtor. To the contrary, the record shows the AOF is a payment for services. There is no obligation for repayment as would be the case of a loan.

It is not unconstitutional for the state of Ohio to employ a private company, such as CCA, to perform public services, such as housing the State's inmates. *Grendell v. Ohio Environmental Protection Agency*, 146 Ohio App.3d 1, 764 N.E.2d 1067 (9th Dist.2001) at 12, quoting *Taylor v. Ross Cty. Commrs.*, 23 Ohio St. 22 (1872). Since 1995, pursuant to R.C. 9.06, the state of Ohio has had the ability to pay a private company to operate and manage its prison facilities. R.C. 9.06. Moreover, the Ohio Constitution does not “prescribe the mode of * * * compensation” that is paid from the State to private companies for the public services provided.

Id. The AOF is a mode of compensation for a public service. Providing a facility to exclusively house ODRC inmates and then operating the facility is a public service. The financial arrangement by the state of Ohio to pay a private prison owner for a public service may be a new arrangement, but since 2001, R.C. 9.06 has permitted the state of Ohio to pay private companies for the operation and management of prisons. The “new” arrangement here does not violate the Ohio Constitution. Here, the state of Ohio is paying CCA for the use of CCA’s private facility to house ODRC’s inmates.

Cross-Appellants wrongly state that there is an investment from the State to CCA. In order to receive the AOF, CCA must be subject to restrictions set forth by the state of Ohio. This includes an exclusivity provision for use of the facility and a restriction of housing any inmates outside of the State. This AOF is a fixed payment that is renegotiated every biennial by the General Assembly. If the State does not continue to pay the AOF, then CCA will not have to allow exclusive use of the facility. There is no investment risk and taxpayer money is not being put at risk. With or without the AOF, the taxpayers’ money will still need to be used to pay to house the inmates in their State.

The AOF payment from the State to CCA is not prohibited under Article VIII, Section 4. If this Court adopts Cross-Appellants’ proposition of law, then it will be determining that it is unconstitutional for the State to pay money to utilize a building and to pay money to others to perform a public service. There is nothing in the Ohio Constitution that prohibits this. This Court should not adopt this proposition of law. *See Grendell and Taylor, supra.*

C. The AOF does not create a joint venture between the state of Ohio and CCA.

The Tenth District correctly held that the AOF does not create a joint venture between the State and CCA as the State has no direction over the day-to-day operations or any other decision making of CCA. (R. 106); *Grendell, supra* at 12. This Court has previously defined joint

venture as “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, to each of the other coadventurers * * *.” *Al Johnson Constr. Co. v. Kosydar*, 42 Ohio St.2d 29, 325 N.E.2d 549 (1975), paragraph one of the syllabus. There are no “joint profits,” “partnerships,” or “community of interests” between the State and CCA. The State’s payment of an AOF for services does not create a joint venture. The Tenth District’s Decision held that the State does not possess “equal authority or right to direct and govern the movements and conduct” of CCA and there is no joint ownership. (R. at 106, ¶ 38.) This Court should affirm that Decision.

Proposition of Law 2: The trial court lacks jurisdiction to make a factual determination of who is a “public employee” because R.C. 4117.01(C) vests exclusive jurisdiction in the State Employment Relations Board for making such determination.

Cross-Appellants’ second proposition of law requests that this Court disregard R.C. Chapter 4117 which grants the exclusive jurisdiction to the State Employment Relations Board (“SERB”) to determine public-sector labor disputes. As the trial court and Tenth District Court of Appeals both determined, SERB was the proper jurisdictional vehicle to define public employee.¹ The Franklin County Court of Commons Pleas lacks jurisdiction to determine whether or not a person is considered a public employee under R.C. 4117.01(C). Cross-Appellants argue that since R.C. 9.06(K) vested jurisdiction in the Franklin County Court of

¹ It should be noted that prior to the sale, LECF was operated and managed by MTC under an O&M contract pursuant to R.C. 9.06. Therefore, CCA did not employ any of the individuals that are subject to Cross-Appellants’ argument in their second proposition of law. Therefore, CCA could not have denied any of the individual Plaintiffs status as “public employees.”

Common Pleas over the constitutional issues, the Franklin County Court of Common Pleas has jurisdiction over the issue of determining whether or not the employees are considered public employees. This argument is wrong. R.C. 9.06(K) states:

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.

R.C. 9.06(K) simply does not support Cross-Appellants' argument regarding the definition of public employee, because R.C. 9.06(K) does not amend or overrule R.C. Chapter 4117. The Franklin County Court of Common Pleas lacks jurisdiction over this issue because the jurisdiction is exclusively vested in SERB. "Ultimately, the question of who is the 'public employer' must be determined under R.C. Chapter 4117." *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) does not allow for issues within R.C. Chapter 4117 to be remedied in the common pleas court but states that they are "remediable by the state employment relations board." The existence of a constitutional question to invoke jurisdiction in the Franklin County Common Pleas Court in R.C. 9.06(K) does not allow for a person to bypass the exclusive jurisdiction of SERB for other issues related to their claim.

Further, Cross-Appellants attempt to use the declaratory judgment statute, R.C. Chapter 2721, to bypass jurisdiction in SERB and claim that the trial court has the right to declare their

“public employee” status. Generally, under Chapter 2721 a court can determine rights, duties, and obligations. Nonetheless, in *Ohio Historical Soc. v. State Emp. Relations Bd.*, 66 Ohio St.3d 466, 613 N.E.2d 591 (1993), this Court held that the common pleas court lacks jurisdiction over a complaint for declaratory judgment when the exclusive original jurisdiction of the definition of “public employer” lies in SERB. In order for the court to declare rights in a declaratory judgment, the court must have the ability to provide resolution to the litigants or otherwise it would be an advisory opinion. *Arnott v. Arnott*, 132 Ohio St.3d 401, 2012-Ohio-3208, 972 N.E.2d 586. A determination of their rights, duties, and obligations as a “public employee” by the court would not provide any resolution to the Cross-Appellants as the declaratory judgment statute does not permit the trial court to determine discrete issues such as applying definitions to a person. The Cross-Appellants would still need to invoke the jurisdiction in SERB to define the term “public employee” and to determine their rights under the Collective Bargaining Agreement before their claims are resolved.

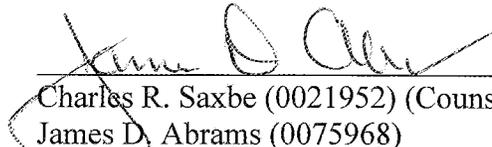
Therefore, this Court should reject Cross-Appellants’ second proposition of law.

CONCLUSION

For the reasons set forth above, CCA respectfully requests (1) that this Court affirm the Tenth District Court of Appeals Decision finding that R.C. 9.06 and 753.10 do not violate Article VIII, Section 4 of the Ohio Constitution, and that the trial court did not have jurisdiction over Cross-Appellants’ claim for declaratory judgment; and (2) that this Court affirm the decision of the trial court dismissing Plaintiffs’ Complaint.

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Respectfully submitted,

A handwritten signature in black ink, appearing to read "James D. Abrams", is written over a horizontal line.

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I hereby certify that a copy of the foregoing *Cross-Appellees Correction Corporation of America and CCA Western Properties, Inc.'s Response to Cross-Appellants' Merit Brief* was served by regular U.S. Mail, postage prepaid, this 22nd day of December 2014, upon the following:

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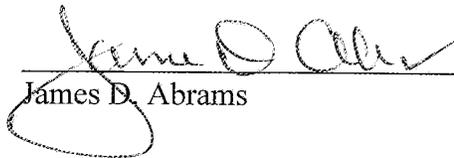
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