

In the Supreme Court of Ohio

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

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1. Rebuttal To Defendants Statement Of Facts

It is undisputed that no statute required the State to pay an AOF to CCA. Plaintiffs' Second Brief proved that the AOF is not a payment to purchase an asset because the prison was sold for the fixed amount of \$72,770,260. Plaintiffs also established that the AOF is not a lease payment and CCA has not argued otherwise. The State's Brief claims that the AOF payments are "analogous to a rental payment." (32). But, this is not what the RFP says. The State is attempting to re-write the contract. Plaintiffs' Brief also explained how the Operations and Management Contract ("O & M Contract") contains a fixed Per Diem payment for O & M services. (Second Brief 1-2, 32-33).

CCA counters that the AOF is "an optional payment for services, specifically, the exclusive use of LECF now owned by CCA" and "[t]his exclusivity alone is something that the State is receiving in return for the AOF payment." (Brief 2, 4). The State says if it did not pay this AOF, CCA would "be permitting the State to use CCA's property for free." (p. 32). Both assertions ignore the written RFP which is part of the contract. Moreover, Defendants fail to identify any language in any contract document, and there is none, which says that the AOF payments are for the exclusive use of the prison or are rental payments.

Exclusivity is required by R.C. 9.06(A)(4), not the AOF component of CCA's contract with the State. R.C. 9.06(A)(4) prohibits CCA from housing any out-of-state prisoners at Lake Erie. (State Appx. 68). Second, §4.9 of the RFP required CCA to couple a Lake Erie prison purchase bid with a bid for an O & M Contract. The purpose of an O & M Contract is to house Ohio inmates. (R. 82, Appx. 3).¹ CCA could not purchase the prison without the accompanying O & M bid. (Supp. 25). Third, §9.4 of the RFP expressly stated that the State would house at

¹ CCA references docket entry 82, which is the 16 page Appendix it filed in the Court of Appeals, discussed *infra*. The same page is in (Supp. 25).

Lake Erie at least 1,618 Ohio inmates and the State guaranteed payment for each of those inmate beds regardless of whether they were occupied or not. Section 9.4 provides: “The contractor is guaranteed to be paid a Per Diem for at least 90% of the Designated Bed Capacity regardless of the actual number of inmates at the institution at that time.” Per Diem payments are O & M Contract payments. (Supp. 2). AOF payments are different. (Id.). Thus, the Per Diem payment pays for exclusivity, not the AOF. (R. 82, Appx. 7, ¶1; Supp. 2).

The guaranteed Per Diem payment also refutes the State’s “free use” argument. The Per Diem in the O & M portion of the Contract pays to “house” the inmates. “Housing” the inmates includes providing: cells, beds, security, staff, food, medical, rehabilitation etc. “Using” the prison and “housing” the prisoners are both covered by the Per Diem payment. CCA cannot house inmates without the inmates using the prison. Conversely, the State cannot use the prison without CCA housing inmates. Thus, both the use of the prison and housing the inmates is paid by the O & M Per Diem payments and these payments are guaranteed regardless of occupancy.

The State again arguing its “free” theme and CCA try to obscure the point that the Per Diem in the O & M Contract pays for both “ownership” and “use” costs. Section 4.10 of the RFP provides that the “Offeror may submit an AOF for the first eighteen months based on the ownership of the correctional complex and use of that complex by the ODRC to house inmates.” (Supp. 25). This section also says that “the State may pay the Contractor an Annual Ownership Fee (AOF) for costs (e.g. purchase price recovery, renovation and fixed equipment associated with the ownership(s) of the Lake Erie Correctional Complex and the use of any one or more complexes to house ODRC inmates.” (Id.). CCA admits this statement in its Court of Appeals Brief. (Supp. 30). Section 9.4 of the RFP says “there may be multiple cost components of the contract 1) O & M of the facility and 2) ownership of the facility. As such, the Contractor 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.” (Id. 27). CCA admits this RFP statement in its Third Brief at p. 2. Indeed, the name of the payment itself says it is a payment based upon ownership-Annual Ownership Fee. The contract language refutes Defendants assertions that the AOF payments are for the exclusive use of the Lake Erie prison or that without it the State is using CCA’s property for free.

Next, the State simplistically argues that the State is free to both sell its property and purchase a service without violating the Ohio Constitution. That isn’t an issue. The RFP required that CCA submit a Per Diem bid below the \$45.86/inmate/day ceiling in order to achieve the 5% savings required by R.C. 9.06(A)(4) and §4.10 of the RFP. By making a below-the-ceiling Per Diem bid of \$44.25/inmate/day (enabling CCA to take the work from the state employees), CCA could offset lost income from an artificially low O & M bid by receiving the AOF ownership subsidy payments. And, the record shows precisely that. CCA paid \$72,770,260 to purchase the prison. CCA will get back in AOF payments \$79,800,000 an amount greater than it paid plus an additional \$7,000,000 to use at it pleases. CCA ends up owning the Lake Erie prison for free. By paying CCA’s ownership costs, the State engaged in a form of financing which enabled CCA to take the work from the state employees. This type of financing may be new and different from the cases previously considered by this Court. But, it is nonetheless a financing arrangement within the scope of Article VIII, Section 4.

Thus, Plaintiffs have demonstrated that the State (i) does not make the AOF payments in return for exclusive use of the Lake Erie prison (ii) the parties do not have a lease (iii) the AOF pays for CCA’s ownership costs (iv) CCA delivers nothing to the State in return for the AOF payment and (v) payment of an AOF for ownership costs is a new form of financing the sale of

State assets. Plaintiffs have also shown that the AOF payments satisfy the definition of a subsidy because the State is aiding CCA with money to bid under the ceiling and is, in effect, gifting the Lake Erie prison to CCA. This is precisely what Section 4 was designed to prevent. Therefore, the complaint stated a claim that the AOF payments violate Ohio Constitution, Article VIII, Section 4.

2. The Subsidy Argument Was Raised Below

Plaintiffs' Amended Complaint in ¶156 stated that "the Annual Ownership Fee ('AOF') language in the contract which amounts to a subsidy...." (R. 111). In Plaintiffs Court of Appeals briefs, the words "subsidy" or its equivalent is used no less than 20 times with related facts and arguments. (See, R. 75, pp. 11-13, 46-49; R. 90, pp. 16-19; R. 108, pp. 3-8). Cases cited here were also cited below. Notably, CCA's Appellate Brief argued that the AOF payments were not a "subsidization of CCA's cost of owning LECF [Lake Erie]...." (R. 82, p. 15). The State's Appellate Brief (R. 84, p. 22) acknowledged that Plaintiffs raised the subsidy argument ("such AOF amounts to a subsidy") and responded saying "assuming that the purpose of the AOF is to pay to CCA in order to offset some business costs, the State is allowed to pay such fees."

3. CCA's Court Of Appeals Appendix And Plaintiffs Motion To Strike

It is open to question whether the Appendix attached to CCA's brief filed in the Court of Appeals (R. 82, Appx. 1-16), and referenced here by both Plaintiffs and CCA, is properly a part of the record because those pages from the RFP were not filed in the Common Pleas Court and were not identified in an affidavit. They first appeared in the record as CCA's Appendix on appeal. Plaintiffs moved to strike that Appendix because new matter cannot be added to the record on appeal. (R.88).² The Court of Appeals ruled that the motion would be decided when it

² *State v. Ishmail*, 54 Ohio St.2d 402, 377 N.E.2d 500 (1978), ¶1 syllabus; *State ex rel. Fogle v. Steiner*, 74 Ohio St.3d 158, 162, 656 N.E.2d 1288 (1995).

decided the appeal. (R. 97). But, it never ruled on the motion to strike.

Plaintiffs referenced CCA's Appendix only to show that their AOF Article VIII, Section 4 claim was based in fact. But, CCA's Court of Appeals Appendix should not be considered as a complete RFP and Contract because it isn't. The RFP alone is well over 100 pages only 16 of which were in CCA's Appendix. Moreover, Plaintiffs sought discovery, including official copies of the complete RFP and contract while the case was in the trial court. The State moved to stay discovery and for a protective order, producing nothing in the interim. (R. 114, 137). The case was dismissed before any discovery and records were produced.

Because the AOF claim was dismissed on a Civ. R. 12(B)(6) motion, the allegations in the complaint must be taken as true. As CCA's Court of Appeals Brief is properly part of the appellate record any admissions therein are consistent with a motion to dismiss and they are properly before this Court. "Judicial admissions may occur at any point during the litigation process." Parties are bound by admissions made in appellate briefs. *Matter of Estate of Tallman*, 1997 S.D. 49, ¶13, 562 N.W.2d 893 (1997).

CCA's Court of Appeals Brief admits that the RFP says "the State may pay the Contractor an Annual Ownership Fee (AOF) for costs (e.g. purchase price recovery, renovation and fixed equipment) associated with the ownership(s) of the Lake Erie Correctional Complex...." (Supp. 30). In its brief here, CCA states that the RFP "specifically states that 'there *may* be multiple cost components of the contract 1) O & M [Operations & 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.'" (Italics in Original).

Therefore, if this Court determines that CCA's Appendix is not properly a part of the

record and it does not take the Appendix into account these two judicial admissions may nonetheless be properly considered by the Court. Where a statement in an appellate brief is deliberate, clear and unambiguous, the Court has discretion to consider the statement to be a judicial admission of a binding fact. *Robilio v. Stevenson*, 378 B.R. 416 (6th Cir. 2007), *3. Consideration of a judicial admission does not convert the motion to dismiss into one for summary judgment. *Commercial Money Ctr., Inc. v. Illinois Union Ins. Co.*, 508 F.3d 327, 336 (6th Cir. 2007).

The First District Court of Appeals agrees that judicial admissions can be made in an appellate brief but has expressed a somewhat different view in *Beneficial Ohio, Inc. v. Primero, L.L.C.*, 166 Ohio App. 3d 462, 467, 851 N.E.2d 510 (2006). Exercising its discretion, it ruled that an admission in an appellate brief which is not supported by the record would not be considered by that Court. A foreclosure proceeding was conducted in the trial Court and a record was made. Here, a motion to dismiss was granted, no trial record was made. But, the admissions in CCA's two briefs are consistent with its motion to dismiss which admits the allegations in the complaint. Thus, Plaintiffs may rely upon these judicial admissions in CCA's briefs showing that the AOF payments are for ownership costs despite the possible exclusion of the Appendix.

4. Other Rebuttal

CCA's Brief at 3 misstates §4.10 of the RFP claiming that if the AOF is terminated by the State it may house out-of-state inmates at Lake Erie. In fact, housing out-of-state inmates is permitted only when the O & M Contract and the AOF are terminated and the State no longer uses Lake Erie to house its inmates. ("If such use and such AOF are terminated...."). (Supp. 26).

CROSS-APPELLANTS PROPOSITION OF LAW NO. 1

Where A State-Owned Prison Is Sold And In Addition To Paying The Purchaser To Operate The Prison The State Agrees To Pay The Purchaser \$3,800,000 Per Year To

Subsidize The Purchaser's Cost Of Owning The Prison A Claim For Violation Of Ohio Constitution, Article VIII, Section 4 Is Stated Upon Which Relief May Be Granted

1. Nothing Is Received By The State In Return For The AOF Payment

CCA and the State assert that it is not unconstitutional for the State to pay money to utilize a building and pay for a service. In the usual sense, payments to utilize a building are called lease or rental payments. Here, the State does not have a formal lease with CCA for Lake Erie and CCA does not argue otherwise. The State asserts that the AOF payments are “analogous to a rental payment.” The assertion contravenes the RFP, written by the State, which says that the AOF is a payment for ownership costs. The argument is barred by the parol evidence rule. See generally, *Galmish v. Cicchini*, 90 Ohio St.3d 22, 27, 734 N.E.2d 782 (2000). As shown above, the Per Diem in the O & M portion of the Contract pays to “house” the inmates. “Housing” the inmates includes providing: cells, beds, security, staff, food, medical, rehabilitation etc. Thus, both the use of the building and providing the services are paid by the O & M Per Diem payments. The AOF pays CCA’s ownership costs.

Ohio Constitution, Article VIII, Section 4 says that “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....” The prohibition is broad, not technical, as is shown by the phrase “in any manner.” “Credit” includes “aiding” a private corporation. A \$72,770,260 prison sale transaction in which the State as seller (i) contractually promises to pay the purchaser \$3,800,000 each year for 21 years for items such as “purchase price recovery, renovation and fixed equipment associated with the ownership” of the prison which the State no longer owns (ii) where the State receives nothing in return for a total payment of \$79,800,000, (iii) where the purchaser ends up owning a prison for free and (iv) the RFP language shows the payment is not a fee for a separate service, the transaction has all the characteristics of a financing arrangement which lends the State’s credit,

or is a subsidy or gift of taxpayer funds to a private corporation.³

Taylor v. Ross Cty. Commrs, 23 Ohio St. 22, 78 (1872) says that contracting with a corporation to perform a service “is a different thing from investing public money in the enterprises of others, or from aiding them with money or credit.” The AOF certainly aids CCA with money and/or credit in purchasing the prison and the taking of the work from State employees. Article VIII, Section 4 prohibits “governmental involvement only in ventures that subsidize commerce or industry.” *State ex rel. Tomino v. Brown*, 47 Ohio St.3d 119, 122, 549 N.E.2d 545 (1989). The AOF subsidizes CCA by enabling it to own the prison at no cost and to undercut the Per Diem ceiling on its O & M bid. “Running throughout Article VIII of the Ohio Constitution is a concern about placing public tax dollars at risk to aid private enterprise.” *State, ex rel. Petroleum Underground Storage Tank Release Comp. Bd., v. Withrow*, 62 Ohio St. 3d 111, 114, 579 N.E.2d 705 (1991). It is undisputed that the AOF places tax dollars at risk for 21 years.

In *C.I.V.I.C. Group v. Warren*, 88 Ohio St. 3d 37, 723 N.E.2d 106 (2000), this Court rejected a scheme in which the City engaged in a financing arrangement pledging taxpayer monies for improvements on land owned by a developer despite the developer’s promise to repay it 80% of its costs and where the City would at the end of the 15 year period own the property and improvements. Because ownership costs are the responsibility of the landowner, this Court found the City was taking action “to raise money for,” and “loan its credit to, or in aid of,” a private corporation in violation of Ohio Constitution, Article VIII, Section 6. Syllabus. Cases interpreting Section 6 are proper precedent for Section 4 because they are “nearly identical.” *State ex rel. Eichenberger v. Neff*, 42 Ohio App.2d 69, 74, 330 N.E.2d 454 (1974).

³ Article VIII, Section 4 uses the word “given.”

The State argues that *C.I.V.I.C.* “is far afield” from this case because there money was raised by bonds. That fact does not make *C.I.V.I.C.* inapplicable here because the AOF is a new type of financing arrangement using taxpayer money in the State’s overall prison privatizing effort. Recognizing that the State received \$72,000,000 for the prison and will give back to CCA \$79,000,000 in AOF payments, the net outcome of this prison privatizing scheme is a gift of a \$72,000,000 prison to CCA. This new method of financing is an unlawful subsidy which violated Ohio Constitution, Article VIII, Section 4.

2. The Mixed Property Rights Shown Here Establish That The State Is A Joint Owner

The legal issue is whether the term “joint owner” in Article VIII, Section 4 is to be interpreted as an expression of a type of business or is it to be used in the more general sense of mixing property rights. The State argues that Section 4 requires some type of State ownership and it has none because it sold the prison and the ownership must be by a “juridical entity.” (22,28).

In *Neff, supra*, the university owned the land upon which Kroger proposed to place improvements with the goal of operating a shopping center. Despite the absence of a formally established combined business, the Court found that this arrangement created a joinder of property in violation of Section 4. In the syllabus, that Court wrote: “An arrangement between an agency of the state and a private corporation under which property belonging to each is joined for the purposes of a commercial venture results in a lending of the credit of the state and violates Section 4 of Article VIII of the Ohio Constitution.”

CCA argues that the Court below correctly held that no “joint venture” existed. However, Section 4 uses the words “joint owner” not joint venture. The Court of Appeals ruled that nothing in Plaintiffs complaint showed “the sort of partnerships or unions that the Ohio Constitution forbids.” (St. Appx. 24). This observation seems to recognize that an improper

“union” of interests will violate Section 4 and a formal business organization is not required.

Grendell v. Ohio Envtl. Prot. Agency, 146 Ohio App. 3d 1, 10, 764 N.E.2d 1067 (2001) summarizing case law says “Where, however, ownership of public property is kept ‘separate and distinct’ from privately owned property, the court has found no prohibited business partnership.” This means that the converse is also true. Where such property interests are merged or mixed, the relationship violates Section 4.

Here, the Lake Erie prison is not separate and distinct because the State pays for CCA’s ownership costs through the AOF. Additionally, these legal authorities also require mixing the State/CCA relationship:

- Lake Erie prison is considered under the control and jurisdiction of ODRC. R.C. 9.06(J)(1).
- The Lake Erie prison is a state institution. Attorney General Opinion (Supp. 55-56).
- Section 753.10(B)(2)(d) imposes an obligation on CCA, and all successors in title, to grant to the State an irrevocable right to repurchase the prison and transferred land.
- Section 753.10(B)(2)(d) provides that upon the occurrence of a breach of the contract or other default as stated in §753.10(B)(2)(d)(i) and (ii), the State has the right to repurchase Lake Erie and surrounding land
- If CCA sells the prison and the O & M Contract is terminated, ODRC can resume operation and management of the entire prison despite the fact that ODRC does not own the prison. R.C. 753.10(B)(2)(e).
- Housing inmates is inherently a governmental responsibility of the State which cannot be delegated to a private entity. *State of Tennessee v. Gilliam*, 2010 WL 2670822
- R.C. 9.06(B)(3) imposes an obligation on CCA to comply with all rules promulgated by ODRC which apply to state-run prisons⁴

Collectively, the unlawful AOF payments, statutory law and the Attorney General’s description of the relationship between the parties and continued exercise of jurisdiction and control over the Lake Erie prison and CCA by the State create an unlawful joinder of interests in violation of Article VIII, Section 4.

The State avers that Plaintiffs make no argument that the State’s O & M Contract with

⁴ See also, Second Brief 7-9, 16, 32-33, 36-38.

MTC violates Section 4. Because on this record MTC has not (and to counsel's knowledge has not) purchased the Marion Complex, no AOF payments are being made at this time. Thus, Plaintiffs have not argued here that the current MTC situation violates Section 4. But, Plaintiffs have argued that the entire circumstances involved in the sale and operation of the Lake Erie prison to CCA with the AOF payments must be considered in resolving this constitutional issue. (Second Brief 7-9, 16, 32-38).

As a concluding point here, the State says that Plaintiffs have not explained why a permissible sales contract and a permissible "services" contract become impermissible when undertaken together. (34). The question erroneously assumes that the AOF is a "services" contract and assumes it to be valid. As Plaintiffs have shown, the AOF is not a "services" contract and it is not permissible separately or when combined with the purchase contract and the O & M Contract. And, *Grendell, supra*, is inapposite because the AOF is a financing arrangement in which the State is obligated for 21 years to pay \$3,800,000 to CCA from taxpayer money to defray its ownership costs and receives nothing in return. This violates Article VIII, Section 4.

CROSS-APPELLANTS PROPOSITION OF LAW NO. 2

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

CCA and MTC argue that: R.C. 9.06(K) does not amend O.R.C. Chapter 4117 and Plaintiffs have not alleged a constitutional violation connected to R.C. 4117.01(C); declaratory judgment cannot be used to bypass SERB; CCA did not employ any Plaintiffs and thus did not deny their rights under R.C. 4117.01(C), nor did MTC deny such rights; that R.C. 4117.02(O) supports the rulings; and, that in effect Plaintiffs are alleging the State committed an unfair labor practice ("ULP") by unilaterally amending the CBA which is a ULP within SERB's jurisdiction.

The State raises two additional arguments: that R.C. 4117.10(A) supersedes R.C. 9.06(K) because the General Assembly has not specified that it trumps SERB's jurisdiction and that Plaintiffs' complaint relies upon R.C. 4117.01(C) thereby invoking SERB's jurisdiction. None have merit.

Plaintiffs Tinker and Zimmerman were employed by the State and worked at the Lake Erie prison before they were laid off by the State. They were not continued in employment by CCA after the prison sale and their rights under R.C. 4117.01(C) were not recognized by either the State or CCA. (R. 111, ¶18, 115-119, 120-123). Douce was employed by MTC for a short time but she was neither paid public employee wages nor received public employee benefits. (Id. ¶10, 14, 83-87). Tackett, who was not covered by O.R.C. Chapter 4117, was displaced from Marion Correctional Institution ("MCI") and forced to take a demotion to Ohio Reformatory for Women ("ORW"). (Id. ¶16-16, 114). Douce and Tackett were denied their rights under R.C. 4117.01(C). Plaintiffs Combs, Crawford, Hall, Herron, Schuster and Sayers were all employed at North Central Correctional Institution in Marion but could not continue employment there because the State and MTC would not recognize their rights under R.C. 4117.01(C). (Id. ¶8-15, 17, 69-70, 77-80, 88-90, 95-97, 105-107, 110). Thus, all Defendants refused to comply with R.C. 4117.01(C).

R.C. 4117.01(C) is not a venue provision. It is substantive law. Venue is the province of this Court under the Modern Courts Amendment and the Rules of Civil Procedure. "The Modern Courts Amendment conferred authority on the Supreme Court of Ohio to promulgate rules relating to matters of procedure in courts of Ohio, while the right to establish the substantive law in Ohio remained with the legislative branch of government." The rule will control for procedural matters; the statute will control for matters of substantive law. Substantive law means

that body of law which creates, defines and regulates the rights of the parties. The word substantive refers to common law, statutory and constitutionally recognized rights. The observation that a statute looks like procedure does not change the outcome because substantive law may be packaged in procedural wrapping where it creates a right to address potential injustice. *Havel v. Villa St. Joseph*, 2012-Ohio-552, ¶¶ 2, 12, 16, 29, 34, 131 Ohio St. 3d 235.

R.C. 9.06(K) is substantive law because it is a statute enacted by the General Assembly. Further, common pleas court jurisdiction is established by legislative enactment. *Mattone v. Argentina*, 123 Ohio St. 393, 175 N.E. 603 (1931), ¶1 syllabus. Secondly, R.C. 9.06(K) is a legislative remedy to address a potential injustice. It makes no allowance for other proceedings in different tribunals. R.C. 9.06(K) lists no jurisdictional exceptions to its vesting of jurisdiction over this entire case in the Franklin County Common Pleas Court. Where there are no exceptions, the Court should not create one. “To interpret what is already plain is not interpretation, but legislation, which is not the function of the courts, but of the general assembly.” *Sears v. Weimer*, 143 Ohio St. 312, 316, 55 N.E.2d 413 (1944). This Court is without the authority to create jurisdictional exceptions when the statutory language does not. That power resides solely in the General Assembly. *Waltco Truck Equip. Co. v. City of Tallmadge Bd. of Zoning Appeals*, 40 Ohio St. 3d 41, 43, 531 N.E.2d 685 (1988).

If any one of the three conditions stated in R.C. 9.06(K) exists, then the Franklin County Common Pleas Court had jurisdiction over the entire case. Here, Plaintiffs established at least two grounds for court jurisdiction. The complaint alleged that prison privatizing by Defendants violated Ohio Constitution, Article II, Section 15(D) and Article VIII, Section 4. (Any claim asserting that any action taken by the State pursuant to R.C. 9.06 or §753.10 violates any provision of the Ohio constitution). (R. 111, ¶¶3-4, 125-136, 154-158). Second, R.C. 9.06(K) says

that any action taken by the State pursuant to R.C. 9.06 or §753.10 which “violates any provision of the Revised Code” shall be brought in the Franklin County Common Pleas Court. The complaint alleged that Defendants have failed and refused to provide to Plaintiffs, employees of MTC and CCA and any of the displaced public employees the wages, benefits and contract rights applicable to state employees under R.C. 4117.01(C). (R. 111, ¶160-66).

Grasping at straws, MTC’s unfair labor practice (“ULP”) argument is concocted out of thin air. Nowhere does MTC identify any provision of the CBA which was unilaterally and wrongfully changed by the State because it never happened. Further, it is undisputed that no party filed any ULP charge with SERB to invoke its ULP jurisdiction.

Because the North Central Correctional Institution (“NCCI” now “North Central Complex”) was privatized and MTC is a private-sector employer and its employees are currently considered private-sector employees, its labor relations are regulated by the National Labor Relations Act (“NLRA”). 29 U.S.C. § 151-169. As matters currently exist OCSEA is barred as a matter of federal law from representing those employees. (Second Brief 5-6, 38-39, 41-42). This does not result from any change in the CBA whether wrongful or not. As the situation currently exists, SERB cannot entertain a ULP charge from any party involved in this lawsuit because it cannot exercise any jurisdiction over parties whose employment is regulated by the NLRA. State law is preempted. *Wisconsin Dep’t of Indus., Labor & Human Relations v. Gould Inc.*, 475 U.S. 282, 286, 106 S. Ct. 1057 (1986). Nor, because of federal preemption, can SERB order any remedy which is enforceable against MTC and its employees. To sum up, SERB cannot enforce R.C. 4117.01(C). However, once the Court determines that the MTC employees at the Marion Complex are public employees as defined by R.C. 4117.01(C), federal law will no longer apply. 29 U.S.C. § 152(2) expressly excludes public employees from the NLRA’s protection. *Unger v.*

City of Mentor, 387 F. App'x 589, 594 (6th Cir. 2010) (Second Brief 5-6, 38-39, 41-42). After that happens and the *status quo ante* is restored, SERB will thereafter possess jurisdiction. This argument also applies to CCA.

Carter v. Trotwood-Madison City Bd. of Edn., 181 Ohio App.3d 764, 2009-Ohio-1769, 910 N.E.2d 1088 (2nd Dist.) is distinguishable because those retired teachers sued for breach of their CBA and the Court found that their claims “arise from, and depend upon, a collective-bargaining agreement...” (¶2, ¶65). Here, Plaintiffs’ claim to public employee status while working at the Marion Complex for MTC is based upon their R.C. 4117.01(C) rights which are triggered (i) after prison privatization occurs (ii) after they are laid off by the State or involuntarily placed elsewhere in state service (iii) after they are hired by MTC as private-sector employees and (iv) after MTC fails or refuses to comply with R.C. 4117.01(C). The wrong occurs after state employment ceases. Thus, the matter is outside SERB’s jurisdiction and reference to the CBA⁵ is unnecessary to resolve this claim. Too, this explanation rebuts the State’s assertion that Plaintiffs have conceded that they are not public employees and Plaintiffs’ argument “makes no sense.” This refutation also applies to CCA.

For the same reasons, Defendants err in asserting that Plaintiffs have bypassed SERB or

⁵ The *Carter* Court’s discussion of cases in ¶58 overlooks a critical distinction in making an overly broad generalization about SERB’s jurisdiction. In each of the four cases, unlike this case, one of the parties actually invoked SERB’s jurisdiction by filing a document expressly identified as within SERB’s jurisdiction. In *Doctors Professional Assn. v. SERB*, 2004-Ohio-5839, 2004 WL 2474422 and *Ohio Historical Society v. SERB*, 66 Ohio St.3d 466, 613 N.E.2d 591 (1993) the union filed with SERB petitions for representation election. In *OCSEA v. SERB*, 144 Ohio App.3d 96, 759 N.E.2d 794 (2001) the union filed with SERB petitions for representation election and amendment of certification. In *Hamilton v. State Emp. Relations Bd.*, 70 Ohio St.3d 210, 213, 638 N.E.2d 522 (1994) the union filed a request for recognition. See, R.C. 4117.07, O.A.C. 4117-03-01 et seq. and O.A.C. 4117-5-01 et seq. SERB’s jurisdiction was not questioned. The issue was whether the employees were subject to or covered by the Ohio Collective Bargaining Law and SERB made the determination.

artfully pleaded their way around *Franklin County Law Enforcement Assn v. Fraternal Order of Police, Capital City Lodge No. 9*, 59 Ohio St.3d 167, 572 N.E.2d 87 (1991) (“*FCLEA*”). Citation to *State ex rel. Cleveland v. Sutula*, 127 Ohio St. 3d 131, 2010-Ohio-5039, ¶ 24, 27 adds nothing to their argument because the facts of the instant case are so different. Whereas in *Sutula* the union represented the employees and sued to enforce rights which the Court found were equivalent to R.C. 4117.09(A) and R.C. 4117.10(B); the portion of R.C. 4117.01(C) in issue here only applies to private-sector employers and their employees and only after state employment ceases by layoff, demotion etc. *FCLEA* at p. 171 says Chapter 4117 “was not meant to give SERB exclusive jurisdiction over claims that a party might have in a capacity other than as a public employee....”

R.C. 4117.01(C) applies in other situations. For example, where the State contracts out to an interstate trucking company the work of an entire unit of public employees who were engaged in delivering ODOT construction materials and supplies throughout the state and the contractor hires most of those individuals, R.C. 4117.01(C) would apply to that trucking company. If the State or a county privatized a food service operation at a mental health facility or a jail, R.C. 4117.01(C) would apply to those vendors. If any governmental entity contracted out its computer services work and laid off its public employees, R.C. 4117.01(C) would apply to that private-sector computer company. But, in each case, the rights under R.C. 4117.01(C) would only exist after the triggering events occurred-after government employment ceased and the contractor refused to comply with R.C. 4117.01(C). Thus, the facts make the *Sutula* and *FCLEA* cases distinguishable.

Reference to R.C. 4117.02(O) is misplaced because the statute deals only with appeals from SERB orders. It does not address SERB’s initial jurisdiction. (SERB “shall certify its final

order”). CCA comments that if Plaintiffs are successful in the common pleas court they must nevertheless return to SERB to define the term public employee and determine their rights. MTC adds that Plaintiffs are seeking Court recognition that they are former employees. Neither assertion is correct. R.C. 4117.01(C) provides the definition of a public employee:

‘Public employee’ means ... any person working pursuant to a contract between a public employer and a private employer and over whom the national labor relations board has declined jurisdiction on the basis that the involved employees are employees of a public employer....

Plaintiffs’ rights as public employees are not in dispute. Once Plaintiffs are determined by a Court to be public employees as defined in R.C. 4117.01(C), the CBA between OCSEA and the State contains their rights and the employer’s responsibilities and applies just as it had before the two prisons were privatized. And, Plaintiffs are not asking to be declared former employees. That is their current status at least until a Court declares otherwise.

No Defendant has explained how SERB currently acquires jurisdiction over MTC, CCA, the individual Plaintiffs, OCSEA which does not have a CBA applicable to the Marion Complex or Lake Erie, or the subject matter of this case- the RFP, the contract between the State and MTC and CCA, the O & M Contract, the AOF portion of the contract or that federal law governs the labor relations of MTC and CCA. All Defendants simply refer to generalized language in *FCLEA* that O.R.C. Chapter 4117 is a comprehensive framework for the resolution of public-sector labor disputes. That generalized statement is not an identification of statutory jurisdiction. Nor are *FCLEA*’s facts anywhere close to the facts of this case. *FCLEA* is inapposite.

Last, R.C. 9.06(K) is more than sufficient specificity for common pleas court jurisdiction. It is enacted later in time, is the more specific or special statute and was enacted in the same H.B. 153 and at the same time as R.C. 9.06 was amended and §753.10 was enacted. According to the

Uniform Rules of Statutory Construction, R.C. 9.06(K) prevails.⁶ These statutory rules of construction have existed since 1972 and always implement the General Assembly's intention. Further, neither the State nor the other Defendants have identified any statute in O.R.C. Chapter 4117 with which R.C. 9.06(K) conflicts. Because R.C. 9.06(K) does not conflict with any O.R.C. Chapter 4117 statute, the Court need not determine whether R.C. 9.06(K) is irreconcilable.

ERRATA

In their Second Brief, Plaintiffs stated at p. 31 "The rule of law advocated by the State has been rejected by this Court in *LetOhioVote.Org*, *Simmons-Harris*, *Hoover*, *OCSEA I*, and *Hinkle* and should ~~not~~ be rejected here." The sentence should have omitted the word "not."

CONCLUSION

Defendants' opposition briefs are long on hyperbole and short on reference to the actual facts of the case as shown in the very documents which they wrote and to which they are a party. To paraphrase the United States Supreme Court in *Overmeyer v. Frick*, 405 U.S. 174,178, 92 S. Ct.775 (1972), the defense arguments may be appealing but it is the facts which are important. More often than not, they make sweeping statements which are unsupported by the facts. Privatizing the prisons in the manner discussed at the very least stated a claim that Ohio Constitution Article II, Section 15(D) and Article VIII, Section 4 were violated and that the Franklin County Common Pleas Court had jurisdiction over and could enforce Plaintiffs' claim that the employees were entitled to their rights as public employees while employed by MTC at the Marion Complex and by CCA at the Lake Erie prison.

For the foregoing reasons, Plaintiffs request the Court to reject all Defendants' arguments and find that the complaint stated these cognizable claims and order the relief prayed for in the

⁶ A special provision prevails over a general provision and a statute enacted later in time prevails over the earlier statute. R.C. 1.51, R.C. 1.52(A).

Conclusion of Plaintiffs Second Brief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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