

**STATE OF OHIO
BEFORE THE STATE EMPLOYMENT RELATIONS BOARD**

In the Matter of

Professionals Guild of Ohio,

Petitioner,

and

State of Ohio, Department of Rehabilitation and Correction,

Respondent,

and

Management Training Corporation, Lake Erie Correctional Institution and
North Coast Correctional Treatment Facility,

Respondent.

Case Nos. 2004-REP-11-0212, 2005-REP-04-0053, & 2005-REP-04-0054

ORDER DISMISSING REQUESTS FOR RECOGNITION
(OPINION ATTACHED)

Before Chairman Mayton, Vice Chairman Gillmor, and Board Member Verich:
September 28, 2006.

On November 22, 2004, and April 7, 2005, the Professionals Guild of Ohio ("PGO") filed a total of three Requests for Recognition, seeking to represent certain employees of the Management Training Corporation ("MTC") at its Lake Erie Correctional Institution ("MTC-LECI" or "LECI") and its North Coast Correctional Treatment Facility ("MTC-NCCTF" or "NCCTF") (collectively "MTC"). PGO named the State of Ohio, Department of Rehabilitation and Correction ("ODRC") along with MTC-LECI and MTC-NCCTF as the Employer. ODRC moved to consolidate and dismiss asserting, in part, that MTC was not a "public employer" under Ohio Revised Code ("O.R.C.") Chapter 4117. MTC-LECI and MTC-NCCTF objected to the Requests for Recognition, maintaining that the employees in question were not "public employees" within the meaning of O.R.C. § 4117.01(C). PGO filed a brief in opposition to the motion to dismiss and a motion to strike the brief filed by MTC in support of ODRC's motion to dismiss.

STATE EMPLOYMENT
RELATIONS BOARD
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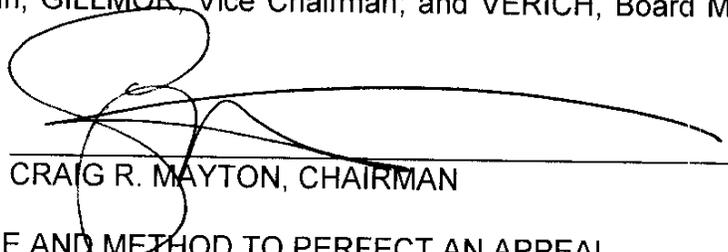
After a preliminary investigation, the Board granted the motion to consolidate, denied the motion to dismiss, and directed this matter to hearing to determine whether the employees in question were public employees and for all other relevant issues. A hearing was held on May 23, 2006, May 24, 2006, September 19, 2006, and November 14, 2006. The Recommended Determination was issued on April 10, 2007.

On April 30, 2007, PGO filed exceptions to the Recommended Determination. On May 21, 2007, MTC filed cross-exceptions and a response to the PGO's exceptions. Also on May 21, 2007, ODRC filed cross-exceptions and a response to the PGO's exceptions. On June 1, 2007, PGO filed a response to MTC's and ODRC's cross-exceptions.

After reviewing the record, the Recommended Determination, PGO's exceptions, MTC's and ODRC's responses to the exceptions, MTC's and ODRC's cross-exceptions, PGO's response to the cross-exceptions, and all other filings in this case, the Board adopts the Findings of Fact and Conclusions of Law in the Administrative Law Judge's Recommended Determination, incorporated by reference, and finds that Ohio Revised Code § 4117.01(C) does not require the National Labor Relations Board to decline jurisdiction before the State Employment Relations Board exercises its jurisdiction, and that the employees of MTC at its Lake Erie Correctional Institution and North Coast Correctional Treatment Facility are not "public employees" pursuant to Ohio Revised Code § 4117.01(C). As a result, the Requests for Recognition in Case Nos. 2004-REP-11-0212, 2005-REP-04-0053, and 2005-REP-04-0054 are hereby dismissed for lack of jurisdiction.

It is so ordered.

MAYTON, Chairman; GILLMOR, Vice Chairman; and VERICH, Board Member,
concur.



CRAIG R. MAYTON, CHAIRMAN

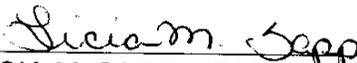
TIME AND METHOD TO PERFECT AN APPEAL

Any party desiring to appeal shall file a Notice of Appeal with the State Employment Relations Board at 65 East State Street, 12th Floor, Columbus, Ohio 43215-4213, setting forth the order appealed from and the grounds of the party's appeal. A copy of such Notice of Appeal shall also be filed with the Court of Common Pleas of Franklin County, Ohio. Such Notices of Appeal shall be filed within fifteen (15) days after the mailing of the State Employment Relations Board's order as provided in Section 119.12 of the Ohio Revised Code.

Order Dismissing Requests for Recognition
Case Nos. 2004-REP-11-0212, 2005-REP-04-0053, & 2005-REP-04-0054
August 23, 2007
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PROOF OF SERVICE

I certify that a copy of this document was served upon each party by certified mail, return receipt requested, and upon each party's representative by ordinary mail, this 21st day of August, 2007.



LICIA M. SAPP, ADMINISTRATIVE ASSISTANT

direct\08-23-07.05

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In the matter of

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Case Nos. 2004-REP-11-0212, 2005-REP-04-0053, & 2005-REP-04-0054

OPINION

GILLMOR, Vice Chairman:

This matter comes before the State Employment Relations Board (“the Board” or “SERB”) upon the issuance of a Recommended Determination on April 10, 2007, and the filing of exceptions to the Recommended Determination by the Professionals Guild of Ohio and cross-exceptions by the Management Training Corporation and the State of Ohio, Department of Rehabilitation and Correction, and responses to the exceptions and cross-exceptions. For the reasons that follow, the Board finds that the employees of the Management Training Corporation at its Lake Erie Correctional Institution and North Coast Correctional Treatment Facility are not “public employees” pursuant to Ohio Revised Code

§ 4117.01(C). As a result, the Requests for Recognition in these cases are dismissed for lack of jurisdiction.

I. BACKGROUND

On November 22, 2004, and April 7, 2005, the Professionals Guild of Ohio ("PGO") filed a total of three Requests for Recognition, seeking to represent certain employees of the Management Training Corporation at its Lake Erie Correctional Institution ("MTC-LECI" or "LECI") and its North Coast Correctional Treatment Facility ("MTC-NCCTF" or "NCCTF") (collectively "MTC"). PGO named the State of Ohio, Department of Rehabilitation and Correction ("ODRC") along with MTC-LECI and MTC-NCCTF as the Employer. ODRC moved to consolidate and dismiss asserting, in part, that MTC was not a "public employer" under Ohio Revised Code ("O.R.C.") Chapter 4117. MTC-LECI and MTC-NCCTF objected to the Requests for Recognition, maintaining that the employees in question were not "public employees" within the meaning of O.R.C. § 4117.01(C). PGO filed a brief in opposition to the motion to dismiss and a motion to strike the brief filed by MTC in support of ODRC's motion to dismiss.

After a preliminary investigation, the Board granted the motion to consolidate, denied the motion to dismiss, and directed this matter to hearing to determine whether the employees in question were public employees and for all other relevant issues. A hearing was held on May 23, 2006, May 24, 2006, September 19, 2006, and November 14, 2006. The Recommended Determination was issued on April 10, 2007.

PGO is an "employee organization" within the meaning of O.R.C. § 4117.01(D). MTC is a private corporation organized and existing under the laws of the State of Delaware. Its headquarters and principal place of business are Centerville, Utah.

O.R.C. § 9.06, as enacted, provides for the private operation and management of initial intensive program prisons in Ohio. O.R.C. § 9.06(A)(3)(a) requires on-site monitoring and compliance with American Correctional Association (“ACA”) standards.

MTC offers, among other services, private management of state prison facilities. MTC contracts with state governments to manage correctional institutions across the United States as well as internationally. MTC operates LECI and NCCTF pursuant to contracts with ODRC. ODRC has no ownership or controlling interest in MTC. The contracts provide that the partners, employees, officers, and agents of MTC will not be deemed to be personnel of ODRC.

Under the LECI and NCCTF contracts with ODRC, MTC operates and manages both facilities in exchange for per-diem, per-prisoner payments from ODRC. MTC receives no other funding from ODRC. MTC pays all operating expenses, including employee wages and benefits, from its own funds and is not reimbursed by ODRC for any of its costs to operate the prisons. ODRC purchases oversight services from MTC. The contracts designate the level of oversight ODRC is purchasing from MTC by specifying a certain number of mandatory posts and the times or days per week during which these posts are required to be staffed. The contracts do not require MTC to employ a particular number of people to provide the requisite staffing.

The State of Ohio (“State”) owns the land and the actual physical structure of each prison. The State has provided much of the initial equipment, replacement of which is the responsibility of MTC. The State has provided heavy, installed equipment, which remains the property of the State and the replacement of which is the responsibility of the State.

According to the contracts with MTC-LECI and MTC-NCCTF, ODRC employs an on-site monitor at LECI and NCCTF to monitor compliance with MTC’s contracts with ODRC. The on-site monitor visits both prisons and prepares a monthly report for ODRC. If the on-

site monitor notes non-compliance with the contract, the monitor may give instructions or may make requests of MTC to remedy the contract breach. The on-site monitor's authority does not extend to non-contractual deficiencies.

MTC hires the petitioned-for employees to work at LECI and NCCTF. The employee submits an application to MTC. MTC conducts interviews, employment-reference checks, and drug screenings. Minimum qualifications are specified in the contracts. The MTC facility warden makes the final hiring decision after an MTC hiring committee recommends the top three candidates. The employee signs an employment contract with MTC setting the employee's salary and other benefits. The new employees receive orientation and training from MTC. MTC provides an employee handbook for new employees, rules of conduct, substance-abuse policy, conflict-of-interest policy, and information on employee benefits. The only employees over whom ODRC has right of final approval are the Warden, Deputy Wardens, Chief of Security, Facility Investigator, Food Service Manager, and Medical Administrator.

MTC conducts performance evaluations and determines raises and bonuses for the petitioned-for employees. Bonuses are paid to MTC employees based on the employee's performance and MTC's overall profitability. MTC employees have received wage increases in years when ODRC employees did not and in years in which the per-diem fee paid by ODRC did not increase. MTC is responsible for administering discipline and for laying off staff. MTC determines the fringe benefits that will be offered to the petitioned-for employees. The petitioned-for employees receive health insurance through an MTC-sponsored health plan.

MTC provides uniforms, patches, and badges for the petitioned-for employees. MTC assigns new employees to a post and a shift. MTC pays the petitioned-for employees with checks drawn on MTC accounts. MTC is responsible for all withholdings from the petitioned-for employees' paychecks, including state and federal taxes, FICA payments,

and pension contributions. MTC is responsible for all unemployment and workers' compensation premiums associated with the petitioned-for employees' employment. MTC assigns overtime for the petitioned-for employees and approves all time-off requests.

If ODRC wishes to impose an additional service on MTC, MTC is not required to assume services not covered under the contract. To add an additional service with an associated cost increase, MTC and ODRC must agree to an amendment of the contract. If ODRC does not want to pay the additional costs, it can waive MTC from those services.

MTC hires its own subcontractors without ODRC approval. With regard to MTC's employees, ODRC's only interests are that the employees meet the minimum qualifications for their positions and that a background check and drug screening are completed. ODRC cannot require MTC to terminate an employee who does not meet the minimum qualifications or who does not pass the background check, but ODRC may require that the employee work for an MTC facility other than LECI or NCCTF. MTC has its own on-site HR managers at LECI and NCCTF to handle employee issues.

MTC employees are not subject to ODRC policies for travel, political practices, employee grooming, performance review, selection, retention, promotion, screening and interviewing committees, interim appointments, initial probationary period, overtime for both exempt and FLSA-eligible employees, payroll and timekeeping, workers compensation, Family and Medical Leave Act, monitoring of administrative leave, military service leave and notice requirements, return-to-work partnership policy, service of legal process and representation, insurance coverage, employee grievances, exempt-employee grievance procedure and professional-career services. The contracts between ODRC and MTC do not require MTC to adopt particular work rules or employment policies.

PGO did not file an election petition with the National Labor Relations Board ("NLRB") with regard to any of the employees covered by the Requests for Recognition

filed by PGO in these cases. PGO witness in this matter, Hiram McPherson, a corrections officer at MTC-LECI, applied for employment with MTC, received an offer of employment from MTC, signed an employment agreement with MTC, received orientation training by MTC, and received copies of MTC's employee handbook, rules of conduct, substance-abuse policy, conflict-of-interest policies, and information regarding benefits, including MTC's 401(K) plan. MTC assigned him to a post and a shift. He received paychecks from MTC and was notified by MTC as to any changes in his compensation. He was supervised by an MTC officer and received performance evaluations and disciplinary notices from MTC. At hearing, John Jones, a PGO witness who was also a corrections officer at MTC-LECI, acknowledged that his terms and conditions of employment were controlled by MTC.

II. DISCUSSION

A. SERB is not required to wait for the NLRB to decline jurisdiction before exercising jurisdiction

O.R.C. § 4117.01(C) provides in relevant part as follows:

As used in this chapter:

"Public employee" means any person holding a position by appointment or employment in the service of a public employer, including any person working pursuant to a contract between a public employer and a private employer *and over whom the national labor relations board has declined jurisdiction* on the basis that the involved employees are employees of a public employer[.] (emphasis added)

PGO is seeking to represent individuals who are working pursuant to a contract between a public employer (ODRC) and a private employer (MTC). PGO has not filed a petition with the NLRB with regard to any of the employees covered by the Request for Recognition. Thus, the NLRB has neither accepted nor declined jurisdiction.

In *Hamilton v. State Emp. Relations Bd.*, 70 Ohio St.3d 210 (1994), 1994-Ohio-397 (“*Hamilton*”), a transit union filed a Request for Recognition with SERB seeking to represent 23 bus drivers and mechanics. The union named the City of Hamilton as the employer. The city objected, asserting that these individuals were not “public employees” because they were employed by a private company that was responsible for managing the day-to-day personnel matters and assigning bus drivers to routes. The Ohio Supreme Court declined to follow a “strict construction” of the language in O.R.C. § 4117.01(C) because to do so ignored the “liberal construction mandate” in O.R.C. § 4117.22. Instead, the Court, *supra* at 213, held:

[T]he language in R.C. 4117.01(C) referring to the declination of NLRB jurisdiction is merely illustrative of who may be considered public employees for the purposes of collective bargaining. * * * In our view, the statutory provision simply relates one of many situations where SERB may determine certain employees to be public employees. Thus, the fact that the NLRB did not or has not declined jurisdiction over the transit workers in issue is not determinative of SERB’s jurisdiction[.]

The Ohio Supreme Court, having already found that it is not necessary for the NLRB to decline jurisdiction in order for SERB to exercise its jurisdiction, has already decided this issue. SERB is bound by this precedent.

B. PGO Exhibits 105, 108, and 111 were not excluded erroneously

At hearing, the Administrative Law Judge refused to admit into evidence PGO Exhibits 105, 108, and 111 in their entirety. Objections to these exhibits were made for lack of authentication, lack of foundation, and no showing of relevance. A review of the record revealed that PGO Exhibit 105 was not identified by any witness; PGO Exhibits 108 and 111 were identified by a witness. Pages 1, 30, 33, 41, 54, and 76 of PGO Exhibit 111 were admitted into evidence without objection. The record did not contain testimony regarding foundation or relevance for the remainder of PGO Exhibits 105, 108, and 111.

Ohio Administrative Code Rule 4117-1-11(A)(2) provides that individuals conducting hearings like the one herein “shall have the authority” to take certain actions, including to “receive relevant evidence and exclude irrelevant, immaterial, or unduly repetitious evidence[.]” PGO’s exceptions and its brief in support do not explain how these exhibits are relevant or how their exclusion is erroneous. The record supports the conclusion that these exhibits have not been excluded erroneously.

C. The petitioned-for employees at MTC-LECI and MTC-NCCTF are not “public employees” under O.R.C. § 4117.01(C)

PGO filed three separate Requests for Recognition seeking to represent certain employees at MTC-LECI and MTC-NCCTF. The employees in question at MTC-LECI held positions as Corrections Officers. The employees in question at MTC-NCCTF held positions as Accounting Clerks, Case Managers, Maintenance Workers, Food Service Workers, Library Aides, Clerical Workers, Activity Therapists, Instructors, Job Coordinator, Support Staff, Corrections Officers and Line Supervisors. MTC objected to the requests. ODRC moved to dismiss the requests. The objections and motions to dismiss alleged that the employees subject to the requests for recognition were employees of MTC and were not public employees pursuant to O.R.C. § 4117.01(C).

In *Doctors’ Professional Assn. v. State Emp. Relations Bd.*, 2004-Ohio-5839, ¶15 (10th Dist Ct App, Franklin, 11-4-2004) (“*Doctors*”), the appellate court held in part:

For purposes of recognition requests under R.C. 4117.05(A), an initial inquiry must be whether the persons that the organization seeks to represent are public employees, because if persons are not “public employees,” as defined by R.C. 4117.01(C), then the persons are not subject to the provisions of R.C. Chapter 4117. Hence, an organization cannot seek R.C. 4117.05 recognition as the exclusive representative of persons, if the persons it seeks to represent are not public employees.

O.R.C. § 4117.01(C) defines a “public employee” as follows:

“Public employee” means any person holding a position by appointment or employment in the service of a public employer, including any person working pursuant to a contract between a public employer and a private employer and over whom the national labor relations board has declined jurisdiction on the basis that the involved employees are employees of a public employer[.] (emphasis added)

The issue in the instant case is whether the petitioned-for employees are employees of ODRC or MTC. If they are employed by ODRC, they are employed in the service of a public employer, an agency of the State of Ohio. If the petitioned-for employees are employed by MTC, they are employed by a private corporation and are not employed in the service of a public employer.

The Ohio Supreme Court in *Hamilton* determined that the city, rather than the management company, was the employer of the transit employees, thus making those employees subject to SERB’s jurisdiction. The Court used the “right to control” test previously articulated at Syllabus 2 in *Gillum v. Indus. Comm.*, 141 Ohio St. 373, 48 N.E.2d 234 (1943) (“*Gillum*”):

Whether one is an independent contractor or in service depends upon the facts of each case. The principal test applied to determine the character of the arrangement is that if the employer reserves the right to control the manner or means of doing the work, the relation created is that of master and servant, while if the manner or means of doing the work or job is left to one who is responsible to the employer only for the result, an independent contractor relationship is thereby created.

In *Hamilton*, the Court found that the city owned, controlled, and set policy for the transit system. The city categorized operating expenses as an obligation of the city. The city provided all of the funding for the transit system, owned all of the buses, and set the

routes and fares. The general manager of the transit system was selected with the city's approval.

The Court found that the duties delegated to the transit company were merely ministerial. The crucial point was the fact that the city provided all of the funding for the transit company. Because the city totally controlled the transit company's funding, the Court found that the transit company lacked the type of discretion to bargain meaningfully with the union that an actual employer would possess. The Court was cognizant of the extent of control and the particular items controlled by the city, and of the relationship of those items to effective collective bargaining. The Court cited *Nat'l. Transp. Serv., Inc.*, 240 N.L.R.B. 565 (1979), where the NLRB stated that, under the National Labor Relations Act, the "right to control test" contemplates "whether the Employer has sufficient control over the employment conditions of its employees to enable it to bargain with a labor organization as their representative." The Court also held:

Our decision in this regard is similar to the reasoning of the National Labor Relations Board in *Res-Care, Inc.*, (1986), 280 N.L.R.B. 670,673, 'if an employer does not have the final say on the entire package of employee compensation, i.e., wages and fringe benefits, meaningful bargaining is not possible.' See, also, *PHP Healthcare Corp.* (1987), 285 N.L.R.B. 182, 184.

In the instant case, MTC provides private management of various state prison facilities in addition to other services. ODRC has no ownership or controlling interest in MTC. Under contracts with ODRC, MTC operates and manages LECI and NCCTF in exchange for per-diem, per-prisoner payments from ODRC. MTC interviews the applicants for the positions included in the Requests for Recognition; it also conducts employment-reference checks and drug screenings. MTC provides the uniforms, patches, and badges for the employees. MTC pays the employees by checks drawn on accounts belonging to MTC. MTC is solely responsible for all withholdings from the employees' checks, including state and federal taxes, FICA payments, and pension contributions. MTC determines

salaries and fringe benefits for employees. MTC assigns and approves overtime for all employees and receives and approves time-off requests. MTC gives its employees performance evaluations in accordance with its own policies and procedures. MTC makes all promotion, layoff, and discipline decisions regarding its employees. These factors all describe employment conditions for the MTC employees.

ODRC's only role is to require compliance with the terms of the contract into which MTC voluntarily entered with ODRC. The contracts require compliance with both ACA standards and ODRC standards. ODRC's involvement is limited to monitoring compliance with the terms of the contracts.

In *Doctors*, the court found that, although Social Security Administration regulations governed virtually every detail of the manner in which contracting medical consultants evaluated disability claims for the State of Ohio, Rehabilitation Services Commission ("RSC"), this extensive oversight did not establish RSC's control under *Hamilton*. The court held at ¶30:

The fact that RSC requires the consultants to comply with SSA regulations does not equate to RSC's right to control the activities of the consultants. Stated differently, to the extent that SSA regulations control the activities of the consultants, these regulated aspects are not controlled by either the consultants or RSC, and therefore could be viewed as inconsequential to the determination of whether the consultants are employees of RSC.

Furthermore, ODRC's interest and involvement are limited to matters that would not be bargainable with the petitioned-for employees. These matters include minimum qualifications, selection of high-level managers (not petitioned-for employees), physical facilities and fixtures, number of posts, and times and days of week the posts must be manned. The details that ODRC is concerned with are those details that relate to services to inmates or to the security of the institution. The matters purely under the control of MTC

are those that directly relate to the terms and conditions of employment of the petitioned-for employees.

In *Gillum*, supra at 382, the Ohio Supreme Court describes the relationship that now exists between ODRC and MTC:

As stated in 27 American Jurisprudence, 488, Section 7: "As a practical proposition, every contract for work to be done reserves to the employer a certain degree of control, at least to enable him to see that the contract is performed according to specifications. The employer may exercise a limited control over the work without rendering the employee a mere servant, for a relation of master and servant is not inferable from a reservation of powers which do not deprive the contractor of his right to do the work according to his own initiative, so long as he does it in accordance with the contract. * * *"

ODRC merely requires MTC to comply with the terms of the contract into which it entered. ODRC's control of MTC is limited to the terms of the contract. In order to operate a private prison, a private corporation must comply with ODRC standards and ACA standards, both of which are incorporated into the contract. These standards bear no relationship to factors related to effective collective bargaining. In *Hamilton*, supra at 214, the Ohio Supreme Court recognized this nexus when it held that, by the city controlling the transit company's funding, the transit company "lacks the discretion to meaningfully bargain with the union in the collective bargaining context that a true employer would possess."

In various cases involving actions under 42 U.S.C. § 1983, courts found that "day-to-day management of private contractors performing government functions do not generally constitute state action." For example, in *George v. Pacific – CSC Work Furlough*, 91 F.3d 1227 (9th Cir. 1996), a private company operating a prison under government contract discharged appellant, who then sued the company alleging he was discharged in retaliation for making statements about unsafe working conditions. The trial court granted summary

judgment for the company. The U.S. Ninth Circuit Court of Appeals affirmed the trial court. The appellate court found that the company was not a state actor for purposes of a § 1983 action and the fact that the company performed the traditional government function of incarcerating prisoners under contract with the government did not cause its action in discharging appellant to be state action.

In the present case, the overwhelming weight of the evidence shows that the petitioned-for employees are employed by MTC. MTC controls all relevant aspects of their employment and retains the discretion to bargain meaningfully with the union in the collective bargaining context as required by *Hamilton*. Thus, the employees of MTC-LECI and MTC- NCCTF are not "public employees" pursuant to O.R.C. § 4117.01(C).

III. CONCLUSION

For the reasons set forth above, the State Employment Relations Board finds that Ohio Revised Code § 4117.01(C) does not require the National Labor Relations Board to decline jurisdiction before SERB exercises its jurisdiction, and that the employees of the Management Training Corporation at its Lake Erie Correctional Institution and North Coast Correctional Treatment Facility are not "public employees" pursuant to Ohio Revised Code § 4117.01(C). As a result, the Requests for Recognition in Case Nos. 2004-REP-11-0212, 2005-REP-04-0053, and 2005-REP-04-0054 are hereby dismissed for lack of jurisdiction.

Mayton, Chairman, and Verich, Board Member, concur.

SERB

"Promoting Orderly and Constructive
Labor Relations Since 1984"

State
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Board



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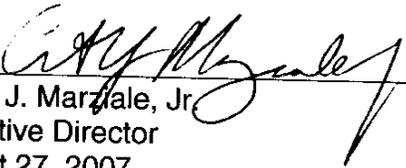
Craig R. Mayton, J.D., Chairman
Karen L. Gillmor, Ph.D., Vice Chairman
Michael G. Verich, J.D., Board Member

Ted Strickland, Governor

Arthur J. Marziale, Jr., J.D., Executive Director

CERTIFICATION

I, the undersigned Executive Director for the State Employment Relations Board, hereby certify that the attached document is a true and exact reproduction of the original Order Dismissing Requests for Recognition of the State Employment Relations Board entered on its journal, on the 27th day of August, 2007.



Arthur J. Marziale, Jr.
Executive Director
August 27, 2007