

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

In the Matter of

Ohio Council 8, American Federation of State, County
and Municipal Employees, AFL-CIO

Petitioner,

and

Lorain/Medina County Community-Based Correctional Facility,

Respondent.

Case No. 2007-REP-02-0021

DIRECTIVE DISMISSING PETITION FOR REPRESENTATION ELECTION
(OPINION ATTACHED)

Before Chairman Mayton and Board Member Verich: February 7, 2008.

On February 2, 2007, Ohio Council 8, American Federation of State, County and Municipal Employees, AFL-CIO ("Petitioner") filed a Petition for Representation Election seeking to represent certain employees of Lorain/Medina County Community-Based Correctional Facility ("Respondent"). On May 22, 2007, the State Employment Relations Board ("SERB" or "the Board") directed this matter to hearing to determine an appropriate bargaining unit and for all other relevant issues.

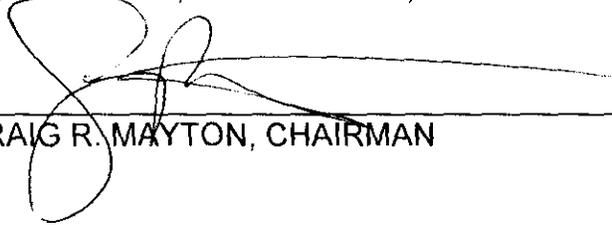
On October 30, 2007, a hearing was held before an Administrative Law Judge. The parties presented testimonial and documentary evidence concerning whether the employees in question are exempt from the definition of "public employee" under Ohio Revised Code Section 4117.01(C)(18). On December 21, 2007, the Administrative Law Judge's Recommended Determination was issued. No exceptions were filed.

After reviewing the record, the Recommended Determination, and all other filings in the case, the Board adopts the Findings of Fact, Analysis and Discussion, and Conclusions of Law in the Administrative Law Judge's Recommended Determination, finding that the employees that are the subject of the Petition for Representation Election are employees of a district community-based correctional facility created under Ohio Revised Code Sections 2301.51 to 2301.58 and were not subject to a collective bargaining agreement on June 1, 2005, and consequently they are exempt from the definition of "public employee" under Ohio Revised Code Section 4117.01(C)(18). As a result, the Petition for Representation Election is hereby dismissed with prejudice.

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STATE EMPLOYMENT
RELATIONS BOARD

It is so directed.

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



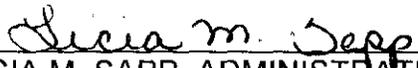
CRAIG R. MAYTON, CHAIRMAN

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.

PROOF OF SERVICE

I certify that a copy of this document was served upon each party and upon each party's representative by certified mail, return receipt requested, this 14th day of March, 2008.



LICIA M. SAPP, ADMINISTRATIVE ASSISTANT

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

OHIO COUNCIL 8, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO,	:	CASE NO. 07-REP-02-0021
Petitioner,	:	
and	:	BETH A. JEWELL
	:	Administrative Law Judge
LORAIN/MEDINA COUNTY COMMUNITY-BASED CORRECTIONAL FACILITY,	:	<u>RECOMMENDED</u>
Respondent.	:	<u>DETERMINATION</u>

I. INTRODUCTION

On February 2, 2007, Ohio Council 8, American Federation of State, County, and Municipal Employees, AFL-CIO ("Ohio Council 8") filed a Petition for Representation Election under §§ 4117.05 and 4117.07, seeking to represent certain employees of the Lorain/Medina County Community-Based Correctional Facility ("CBCF").¹ The CBCF responded by filing objections, asserting that § 4117.01(C)(18) exempts the subject employees from the definition of "public employee" for purposes of public sector collective bargaining. On May 22, 2007, the State Employment Relations Board ("SERB") directed this matter to hearing to determine an appropriate bargaining unit and for all other relevant issues, and directed the parties to mediation.

On October 30, 2007, a hearing was held, wherein testimonial and documentary evidence was presented. Subsequently, both parties filed post-hearing briefs.

¹All references to statutes are to the Ohio Revised Code, Chapter 4117, and all references to administrative code rules are to the Ohio Administrative Code, Chapter 4117.

II. ISSUE

Whether the employees in the proposed bargaining unit are exempted from the definition of "public employee" under § 4117.01(C)(18)?

III. FINDINGS OF FACT²

1. Ohio Council 8 is an "employee organization" within the meaning of § 4117.01(D). (February 2, 2007 Petition for Representation Election, Case No. 07-REP-02-0021)
2. A community-based correctional facility is a secure rehabilitative residential facility where convicted felons who do not receive mandatory prison terms may be committed. A community-based correctional facility commitment usually involves rehabilitative treatment for alcohol/drug/other substance abuse addictions. (S. 1, 2; Ohio Revised Code §§ 2301.52, 2929.16, and 2929.17)
3. The CBCF is situated at 9892 Murray Ridge Road in the City of Elyria, County of Lorain and State of Ohio. (S. 3)
4. The CBCF houses 56 men and 16 women who have been convicted of fourth or fifth degree felonies and who have violated some type of sanction in community control. The court has committed such individuals to the CBCF as a last measure before sending them to prison. About 98 percent of the individuals committed to the CBCF have violated a sanction related to alcohol or drug abuse. At the CBCF, the individuals typically participate in a 120-day cognitive behavior program taught by CBCF staff. The CBCF also has G.E.D., chemical dependency, job readiness and community service programs. The goal of the programs is to rehabilitate the individuals so they can return to society as law-abiding citizens. (S. 2; T. 16-18; Jt. Exh. E)
5. Presently, the CBCF employs a staff of approximately 35 people, including 1 part-time and 13 full-time employees in the classification of Resident Advisor I, the classification of employees included in the proposed bargaining unit. (S. 4; Jt. Exhs. I-1, 5, 7)

²All references to the transcript of the hearing are indicated parenthetically by "T.," followed by the page number. All references to the Joint Exhibits are indicated parenthetically by "Jt. Exh.," followed by the exhibit letter. All references to the Stipulations of Fact are indicated parenthetically by "S.," followed by the stipulation number. References to the transcript and exhibits in the Findings of Fact are intended for convenience only and are not intended to suggest that such references are the sole support in the record for that related finding of fact.

6. The petitioned-for employees were not subject to a collective bargaining agreement on June 1, 2005. (T. 26)
7. The job duties of a Resident Advisor I are akin to those correctional/confinement duties usually and customarily performed by correction officers at a county jail or by prison guards at a state prison. (S. 5; Jt. Exhs. I-6,7)
8. In August 1995, a Judgment Entry was filed in the Court of Common Pleas of Lorain County, Ohio. The Entry was titled, "In the Matter of the Formation of a Judicial Corrections Board (JCB) for the Purposes of Establishing a District Community Based Correctional Facility and Program for the Use of the Common Pleas Courts, general Division, in Lorain and Medina Counties, Ohio." The Entry provided as follows:

In compliance with Sections 2301.51 to 2301.56, inclusive, of the Ohio Revised Code, we, the undersigned Judges of the aforementioned counties, hereby form a Judicial Corrections Board comprised of the member Judges of the General Division of each of the following CommonPleas [sic] Courts: Lorain and Medina Counties.

The original of this Judgement [sic] Entry shall be filed with the Clerk of the Common Pleas Court of Lorain County who shall then forward certified copies of the same to the Clerk of Medina County for filing therein.

IT IS SO ORDERED.

The Entry was signed by four Lorain County Common Pleas Court judges and two Medina County Common Pleas Court judges. (T. 22-23; Jt. Exh. B)

9. On August 10, 2005, the judges who formed the JCB adopted a resolution "accepting the By-Laws for the Lorain/Medina Counties Community Based Correctional Facility." Among other provisions, the by-laws provide, in Article I, that the JCB membership "shall consist of the general division Judges of the Common Pleas Court of Lorain and Medina Counties." The by-laws provide, in Article II, for meetings of the JCB. The by-laws provide, in Article III, for the officers of the JCB. Article V, titled "Implementation," directs that "[t]he original of this Journal Entry ... shall be filed in the Clerk of Courts of Lorain County, Ohio and said Clerk shall forward a certified copy of same to the Medina County Clerk of Courts for filing therein." (Jt. Exh. A)

10. Michael Willets has been Executive Director of the CBCF since July 1, 2005. Currently, Mr. Willets reports to the Facility Governance Board ("FGB") and the Judicial Advisory Board (JAB") of the CBCF. The FGB and JAB were established by Journal Entry dated October 31, 2006, after Amended Substitute House Bill 162 ("H.B. 162") became effective. Among other revisions to the law governing community-based correctional facilities, H.B. 162 made changes in the facilities' governance structure. (T. 19; Jt. Exhs. C, D, F)
11. From 1990 to 2005, Mr. Willets was the Chief Probation Officer for Lorain County. In this capacity, in 1995, at the direction of the judges of the Lorain County Common Pleas Court, he worked with Medina and Lorain Counties and Ohio Department of Corrections, Division of Parole and Community Services, to establish the JCB and the CBCF under Ohio Revised Code §§ 2301.51 to 2301.56 as then in effect. Mr. Willets drafted the August 2005 Entry establishing the JCB. Mr. Willets served on the Citizens' Advisory Board of the CBCF from 1995 until October 2006, when citizens' advisory boards were abolished by House Bill 162. (T. 22-24; see former § 2301.53)
12. Mr. Willets assisted in the hiring of the CBCF's first Executive Director, Marilyn Brundige, and he worked with Ms. Brundige on a grant for the operation of the facility. (T. 24)
13. On October 31, 2006, a Journal Entry captioned "in the matter of Lorain Medina Community Based Correctional Facility Judicial Advisory Board" and titled "Establishment; Appointment to Judicial Corrections Board; 2301.51A)(3) Appointment to Facility Governing Board" was filed in the Court of Common Pleas of Lorain County, Ohio. The Journal Entry stated that under H.B. 162, the obligations, powers and responsibilities previously held by the JCB would be assumed by the CBCF's Facility Governing Board. The Journal Entry further provided that the judges wished to continue the operation of the existing CBCF. The Journal Entry created the JAB and made initial appointments to the FGB. (Jt. Exh. C)
14. On February 16, 2007, the FGB adopted by-laws for the governance of the CBCF. (Jt. Exh. D)

IV. ANALYSIS AND DISCUSSION

Section 4117.01(C) provides in relevant part 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, except:

(18) Employees of community-based correctional facilities and district community-based correctional facilities created under sections 2301.51 to 2301.58 of the Revised Code who are not subject to a collective bargaining agreement on June 1, 2005.

Section 4117.01(C)(18) specifies that employees of community-based correctional facilities "created under" §§ 2301.51 to 2301.58, who were not subject to a collective bargaining agreement on June 1, 2005, are exempt from the definition of "public employee" for purposes of public-sector collective bargaining. The evidence in the record reveals, and the parties agree, that the petitioned-for employees were not subject to a collective bargaining agreement on June 1, 2005. However, Ohio Council 8 argues that the record does not contain evidence demonstrating that the CBCF is operating in compliance with all provisions within §§ 2301.51 to 2301.58, and that, therefore, the CBCF has not proven by a preponderance of the evidence that it was "created under" these sections. This argument fails.

Together, a preponderance of the testimonial and documentary evidence reveals that in 1995, the CBCF was initially created under the prior version of the law applicable to community-based correctional facilities, §§ 2301.51 to 2301.56, and that it is continuing to exist under these sections as amended by H.B. 162 and now numbering §§ 2301.51 to 2301.58. Mr. Willets testified that he was involved in the formation of the CBCF and that it was created under these sections. Counsel for Ohio Council 8 asked no questions of Mr. Willet and offered no rebuttal evidence. The mere fact that the documentary evidence in the record does not recite every single facet of the law under former §§ 2301.51 to 2301.56 does not controvert Mr. Willets' testimony that the CBCF was created under these sections. The evidence is clear, in Finding of Fact No. 4, that the CBCF is performing the residential, rehabilitative functions that the parties stipulated are the functions of a community-based correctional facility. The documentary evidence that is in the record corroborates Mr. Willets' testimony that the CBCF was formed by a JCB formed under these Revised Code sections. See Joint Exhibits A and B and Findings of Fact Nos. 8 and 9. It is appropriate to draw the inference from the testimony and these two documents that the CBCF was "created under" these sections. No evidence exists that the CBCF was formed in any other manner, or that its formation has been found to be defective. No subsequent journal entry or other form of evidence exists in the record to contradict the inference that the CBCF was "created under" these sections.

Furthermore, the evidence reflecting the current status of the CBCF reveals that it continues to exist under these provisions as amended by H.B. 162. The terms of the October 2006 Journal Entry and the February 2007 bylaws both cite to the provisions of §§ 2301.51 to 2301.58. Ohio Council 8 asserts that the October 2006 Journal Entry does not set forth the correct method for making appointments to the FGB under the current language of § 2301.51(E). However, no provision of these statutes provides that a community-based correctional facility ceases to exist as a creature of such statutes if it is not in compliance with any given provision. Executive Director Willets' testimony is clear that the CBCF was formulated under and exists only because of these statutory provisions. A finding that the CBCF was created under §§ 2301.51 to 2301.58 does not require that SERB determine that the CBCF is in strict compliance with the terms of every component of every statutory section applicable to community-based correctional facilities.

Accordingly, the Resident Advisor I employees who are the subject of the Petition for Representation Election are excluded from the definition of "public employee" under § 4117.01(C)(18) because they are employees of a district community-based correctional facility created under §§ 2301.51 to 2301.58 and were not subject to a collective bargaining agreement on June 1, 2005. Because the proposed bargaining unit consists wholly of employees who are not "public employees" eligible to organize under Chapter 4117, the Petition for Representation Election should be dismissed.

V. CONCLUSIONS OF LAW

Based upon the foregoing, the following Conclusions of Law are recommended:

1. Ohio Council 8, American Federation of State, County, and Municipal Employees, AFL-CIO is an "employee organization" within the meaning of § 4117.01(D).
2. The employees that are the subject of the Petition for Representation Election are exempt from the definition of "public employee" under § 4117.01(C)(18).

VI. RECOMMENDATIONS

The following recommendations are respectfully recommended:

1. The State Employment Relations Board adopt the Findings of Fact and Conclusions of Law set forth above.
2. The State Employment Relations Board dismiss the Petition for Representation Election, with prejudice.

SERB

"Promoting Orderly and Constructive
Labor Relations Since 1984"

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Craig R. Mayton, J.D., Chairman
Michael G. Verich, J.D., Board Member

Ted Strickland, Governor

CERTIFICATION

I, the undersigned General Counsel/Acting Executive Director for the State Employment Relations Board, hereby certify that the attached document is a true and exact reproduction of the original Directive Dismissing Petition for Representation Election of the State Employment Relations Board entered on its journal, on the 14th day of March, 2008.

J. Russell Keith
General Counsel/Acting Executive Director