

**IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO
CIVIL DIVISION**

UNITED AUTO WORKERS LOCAL UNION 1112, <i>et al.</i>	:	
	:	
PLAINTIFFS,	:	Case No. 05CVH-03-2553
	:	
v.	:	Judge Bender
	:	
JENNIFER L. BRUNNER, OHIO SECRETARY OF STATE, <i>et al.</i>,	:	
	:	
DEFENDANTS.	:	

UNITED AUTOWORKERS REGION 2B, <i>et al.</i>,	:	
	:	
PLAINTIFFS,	:	Case No. 07CVH-03-3412
	:	
v.	:	Judge Bender
	:	
JENNIFER L. BRUNNER, OHIO SECRETARY OF STATE, <i>et al.</i>,	:	
	:	
DEFENDANTS.	:	

FRANKLIN COUNTY BOARD OF COMMISSIONERS,	:	
	:	
PLAINTIFF,	:	Case No. 07CVH-05-7008
	:	
v.	:	Judge Bender
	:	
STATE OF OHIO, <i>et al.</i>	:	
	:	
DEFENDANTS.	:	

**MOTION OF PLAINTIFF FRANKLIN COUNTY COMMISSIONERS
FOR PARTIAL SUMMARY JUDGMENT**

Now comes Plaintiff Franklin County Commissioners, by and through the undersigned counsel, and pursuant to Civ. R. 56, and moves this Court for summary judgment in its favor on

Count I of its Complaint. This motion is made upon the grounds that there are no genuine issues of material fact and that Plaintiff Franklin County Commissioners is entitled to judgment as a matter of law. The grounds for this Motion are set forth in the following Memorandum in Support.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. LEGAL STANDARD

Civ. R. 56(C) provides for the granting of summary judgment when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Any party moving for summary judgment must satisfy a three-part inquiry showing (1) that there is no genuine issue as to any material fact; (2) that the party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion, which conclusion is adverse to the party against whom the motion for summary judgment is made.

The present case involves a newly enacted statute and its constitutionality. Specifically, the issue presented is whether certain provisions of Amended Substitute House Bill No. 694 (“H.B. 694”) are retroactive in violation of Section 28, Article II of the Ohio Constitution. There are no questions of fact at issue. As set forth below, if applied retroactively to political contributions made prior to its effective date, H.B. 694 is unconstitutional. Thus, Plaintiff Franklin County Commissioners (“Franklin County”) is entitled to judgment as a matter of law on Count I of its Complaint.

II. FACTS

Amended Substitute House Bill 694 was passed by the 126th Ohio General Assembly on December 20, 2006.¹ The Act provides for substantive changes to certain provisions of Ohio’s Campaign Finance Law.

Of particular concern and relevance to the instant action, H.B. 694 amended the provisions of R.C. § 3517.13, which provide for limitations on the making and accepting of

¹ Plaintiff recognizes that there exist procedural irregularities in the passage, signing, and filing of H.B. 694. For purposes of this Motion only, Plaintiff will assume all proper actions were taken by the General Assembly, Governor’s office, and Secretary of State’s office.

political contributions from owners of business seeking to contract with governmental agencies. Limitations on political contributions by owners of business seeking to contract with governmental agencies are not new. Indeed, R.C. § 3517.13 has long contained restrictions, essentially similar to the ones at issue herein, on the ability of owners of businesses to make political contributions to certain officeholders and to receive public contracts for goods or services in excess of \$500 as a result of those political contributions. Specifically, former R.C. §§ 3517.13(I) and (J) provided that no agency or department of the state or any political subdivision was to award any contract for goods or services costing more than \$500 to any individual, partnership, association, estate, trust, corporation or business trust if the individual, partner, shareholder, administrator, executor, trustee, or owner of more than twenty percent of the corporation or business trust, or any of their spouses, made contributions totaling in excess of one thousand dollars to the holder of the public office, or their campaign committee, having ultimate responsibility for the award of the contract.

Prior to the enactment of H.B. 694, boards of county commissioners were specifically exempted from these limitations. Former R.C. § 3517.13(M)(1) provided that “[d]ivisions (I) and (J) of this section do not apply to contracts awarded by . . . boards of county commissioners . . .” The changes effected by H.B. 694 included the elimination of the exemption set forth in subsection M(1), ostensibly bringing boards of county commissioners within the purview of the statutory limitations.

The new statutory limitations which are the subject of the instant matter are contained in R.C. §§ 3517.13(I)(1)(a), (I)(1)(b), (I)(4)(a), (J)(1)(a), (J)(1)(b), and (J)(4)(a). (In the interests of clarity and economy, complete excerpts of those provisions are attached hereto as Exhibit A). Those sections generally provide that no agency or department of the state or any political

subdivision shall award any contract for goods or services in excess of \$500 to any individual, partnership or other unincorporated business, association, including, without limitation, a professional association organized under Chapter 1785 of the Revised Code, estate, trust, corporation or business trust if certain listed persons have made contributions to the holder of the public office having ultimate responsibility for the award of the contract in excess of \$1,000 individually, or \$2,000 collectively, including within that limitation political action committees that are affiliated with such organizations, within the two previous calendar years. Furthermore, subsections (I)(3) and (J)(3) provide that no agency or department of the state or any political subdivision shall award any contract for goods or services in excess of \$500 unless the contract contains a certification that the covered persons listed in those sections have not contributed in excess of the proscribed amounts within the two previous calendar years.

As a result of H.B. 694, counties such as Plaintiff are prohibited from awarding contracts for goods or services in excess of \$500 to a vendor where the covered persons have contributed in excess of the proscribed amounts in the two previous calendar years.

On April 10, 2007, the Franklin County Board of Commissioners adopted Resolution No. 275.07 which authorized the Franklin County Prosecuting Attorney to make application to the Franklin County Common Pleas Court for the employment of the law firm of Bricker & Eckler, LLP, as bond counsel for Franklin County, for the issuance of bonds to finance the construction of a new Franklin County Common Pleas courthouse. In conducting its due diligence in order to comply with the new provisions, it was discovered that contributions in excess of the proscribed amounts had been made by partners, spouses, and/or a political action committee affiliated with the law firm to members of the Franklin County Board of Commissioners. As a result of this revelation, and pursuant to the limitations now contained in R.C. 3517.13, Plaintiff is unable to

engage the same bond counsel it has retained for the past 25 years for the anticipated bond issuance. Plaintiff is at a significant disadvantage as a result of the potential retrospective application of the provisions of H.B. 694 in that it will not be able to engage its desired bond counsel due to campaign contributions that were made well before the effective date of the new law at a time when such contributions were legal, and contained no penalties or prohibitions on Plaintiff's ability to contract.

III. ARGUMENT

“Retroactive laws . . . have received the near universal distrust of civilization.” *Van Fossen, et al., v. Babcock & Wilcox Co.* (1988), 36 Ohio St.3d 100, 104, 522 N.E.2d 489. Thus, in Ohio, statutes are presumed to be prospective unless specifically made retroactive. R.C. § 1.48; *State v. Consilio*, 9th Dist. No. 22761, 2006-Ohio-649, at ¶8. The Ohio Supreme Court has held that “[w]here there is no clear indication of retroactive application, then the statute may only apply to cases which arise subsequent to its enactment.” *Kiser v. Coleman* (1986), 28 Ohio St.3d 259, 262, 503 N.E.2d 753. If, however, a statute is retroactive, it is unconstitutional if it affects a substantive right. Ohio Constitution, Article II, Section 28.

In light of the proscriptions set forth in R.C. § 1.48 and Section 28, Article II of the Ohio Constitution, the Ohio Supreme Court has formulated a two-part test to determine whether a statute is unconstitutionally retroactive. First, the court must determine whether the legislature actually intended the statute to be applied retroactively. Second, if the court determines that the legislature intended the statute to apply retroactively, it must then determine whether the statute is substantive or remedial. *State v. LaSalle*, 92 Ohio St.3d 178, 2002-Ohio-4009, 772 N.E.2d 1172, at ¶14.

As set forth below, there is no indication that R.C. §§3517.13(I) and (J) apply to contributions made prior to the effective date of H.B. 694. If, however, the provisions of §§ 3517.13(I) and (J) are deemed to apply retrospectively, then those provisions of H.B. 694 are unconstitutional.

A. *The General Assembly expressly provided that H.B. 694 is to be retroactively applied to January 1, 2007.*

Section 3 of H.B. 694 provides as follows:

SECTION 3. Notwithstanding any provision of section 3517.13 of the Revised Code to the contrary, no agency or department of this state or any political subdivision shall be prohibited from awarding a state contract, as defined in section 3517.093 of the Revised Code, to an individual, partnership or other unincorporated business, association, estate, trust, corporation, or business trust as a result of any of the following * * * (B) Any combination of contributions made prior to January 1, 2007, by any combination of the following * * *

Thus, the express language of H.B. 694 provides for retroactive application, at least to January 1, 2007.²

B. *The General Assembly did not expressly provide that the provisions of R.C. §§ 3517.13(I) and (J) apply to contributions made prior to January 1, 2007.*

As set forth above, a statute may be applied retroactively only if there is an express indication to that effect. *Van Fossen*, 36 Ohio St.3d at 106. The court in *Van Fossen* construed R.C. § 4121.80(H), which included a specific statement of retroactive application: “[t]his section applies to and governs any action based upon a claim that an employer committed an intentional tort against an employee pending in any court on the effective date of this section and all claims or actions filed on or after the effective date, notwithstanding any provisions or of any prior statute or rule of law of this state.” Conversely, where a statute is silent as to whether it applies

² Section 3 of H.B. 694 is technically inapplicable to political subdivisions such as Franklin County because it refers only to a “state contract,” which is defined in R.C. § 3517.093(C)(4) as “a contract awarded by any agency or department of this state.” However, Franklin County submits that this results from poor drafting and not an intent by the General Assembly to treat county agencies differently than state agencies.

retroactively, it may only be applied prospectively. *LaSalle*, at ¶¶14-15 (“the state has failed to establish that R.C. 2953.36 contains any language necessary to withstand the threshold analysis required by R.C. 1.48”); *Althof v. Ohio State Board of Psychology*, Franklin App. No. 05AP-1169, 2007-Ohio-1010, ¶69 (construing R.C. § 2305.51). See also *AFSCME, Local II, AFL-CIO v. Ohio School Facilities Comm.*, Franklin County App. Nos. 06AP-413 and 06AP-414, 2007-Ohio-297, ¶¶18-29 (finding that R.C. § 3318.31 contained no language indicating the General Assembly intended the statute to apply retroactively and stating, “if a court cannot find a clearly expressed legislative intent for retroactivity, then the statute is solely prospective in application”); *Consilio*, at ¶¶8-11 (R.C. 2901.07 was not intended to be applied retroactively as “the legislature did not include the term ‘retroactive’ or ‘retrospective’ in any of the sections . . . had the legislature intended that R.C. 2901.07 apply retroactively, i.e. to persons convicted and/or on community control, etc. prior to the effective date of the amendment, it certainly could have clarified this intention by including specific language to that end”).

H.B. 694 contains no express provision for the application of its political contribution limits prior to January 1, 2007. Revised Code §§ 3517.13(I) and (J) prohibit a political subdivision from awarding a contract for the purchase of goods or services costing more than \$500 to certain entities that contributed more than \$1,000 (in individual contributions) or \$2,000 (in combined contributions) to the public office holder with the ultimate responsibility for the award of the contract “within the two previous calendar years.” The language “within the two previous calendar years” generally sets forth the relevant time period for measuring the threshold of political contributions. It does not expressly provide that contributions made in 2005 and 2006 prohibit the execution of a covered contract after April 4, 2007. In fact, the legislature attempted to expressly provide that H.B. 694’s limitations would not apply to contributions made in 2005

and 2006. As set forth in Section 3 of the Act, contributions made prior to January 1, 2007, do not prohibit the state or any political subdivision from awarding a state contract. Unfortunately, by only referencing a state contract, the legislature effectively made this provision inapplicable to political subdivisions. However, by making Section 3 specifically applicable to political subdivisions, the legislature meant for the Act to apply to contracts awarded by Franklin County. Clearly had the legislature intended for the provisions of H.B. 694 to apply retrospectively, it could easily have indicated as much in language similar to that contained in § 3 of the uncodified provisions of the Act.

Finally, the State effectively conceded that there is no express intent as to retroactivity. In its Memorandum in Opposition to Plaintiff's Motion for Preliminary Injunction filed April 11, 2007, page 36, the Attorney General stated, "such a result may easily be avoided by reading the new law so as to apply prospectively to new agreements."

Given these uncodified provisions, as well as the specific absence of any express intent to apply the limitations to contributions made prior to January 1, 2007, this Court should declare that R.C. §§ 3517.13(I) and (J) do not apply to contributions made to Franklin County prior to January 1, 2007.

C. *The application of H.B. 694 to contributions made prior to April 4, 2007, is unconstitutional.*

Where a statute is expressly retroactive and substantive, rather than remedial, it is unconstitutional under Section 28, Article II of the Ohio Constitution. *LaSalle*, at ¶13; *Consilio*, at ¶8; R.C. §1.48. The retroactive application of the limitations set forth in R.C. §§ 3517.13(I) and (J) would do much more than "merely substitute a new or more appropriate remedy for the enforcement of an existing right," which is the definition of a remedial law. *Van Fossen*, 36 Ohio

St.3d at 107. The retroactive application of H.B. 694 would, instead, create a new penalty on acts that were legal prior to April 4, 2007.

A retroactive statute is substantive and therefore unconstitutionally retroactive if it (1) impairs or takes away vested rights, (2) affects an accrued substantive right, or (3) imposes new or additional burdens, duties, obligations, or liabilities as to a past transaction. *Van Fossen*, 36 Ohio St.3d at 106-107. Accordingly, any application of H.B. 694's new prohibitions looking back two years prior to the effective date would achieve a trifecta of unconstitutionality, falling under each of these three considerations. The application of the additional burdens, obligations, and liabilities in H.B. 694 would apply adverse consequences, i.e. the inability to grant and receive a public contract on something past, i.e. prior political contributions. *Discount Cellular, Inc. v. PUCO*, 112 Ohio St.3d 360, 2007-Ohio-53, 859 N.E.2d 957 (when PUCO applied its 1700 Order to dismiss a complaint alleging conduct that constituted a statutory violation prior to the effective date of the Order, it altered the legal significance of past conduct); *AFSCME, Local II, AFL-CIO v. Ohio School Facilities Comm.*, Franklin County App. Nos. 06AP-413 and 06AP-414, 2007-Ohio-297; Ohio Elections Commission Advisory Opinion 96ELC-02 (“the making of political campaign contributions is an exercise of First Amendment and other freedoms granted by the Constitution of the United States” and “any limitations placed thereon by state statute clearly apply to a substantive right rather than effecting some procedural remedy and would require a prospective application”) (attached hereto as Exhibit B).

IV. CONCLUSION

For the reasons set forth above, Franklin County respectfully requests that the Court declare that H.B. 694 does not apply to contributions made prior to its effective date.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This certifies that the foregoing was sent via electronic mail to the individuals set forth below on May 29, 2007:

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