STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

SHERRY LOAR, MICHELLE BERRY,
and PAULETTE SILVERSON

Plaintiffs,

Supreme Court No. _____
Court of Appeals No. 294087

v

MICHIGAN DEPARTMENT OF HUMAN SERVICES,

and ISHMAEL AHMED, in his official capacity as
Director of Michigan Department of Human Services

Defendants.

PLAINTIFFS'APPLICATION FOR LEAVE TO APPEAL

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This mandamus case concerns the propriety of the executive branch of state government converting home-based day care providers, who are in reality home-based business owners or individual independent contractors, into government employees who can then be unionized. Pursuant to MCL 600.4401, this case was filed as an original action in the Court of Appeals.

The primary issue in deciding jurisdiction is whether home-based day care providers are public employees. *Lansing v Carl Schlegel, Inc*, 257 Mich App 627 (2003); *Prisoners' Labor Union v Dep't of Corrections*, 61 Mich App 328, 330 (1975) ("It is undisputed that [Michigan Employment Relations Commission] has jurisdiction over the inmates' claims if, and only if, those inmates are 'public employees' within in [sic] the meaning given that term in [Public Employment Relations Act (PERA)]."). Thus, this jurisdictional issue goes to the heart of the question presented here: Are home-based day care providers independent contractors or public employees? If plaintiffs are correct in their legal claim, then MERC does not have jurisdiction over this matter.

Determining whether plaintiffs are independent contractors or public employees involves matters of public record that are undisputed. There are no additional facts that must be ascertained in order to decide the proper construction of constitutional provisions. Because there are no disputed facts, and because "[c]onclusions drawn from undisputed facts are questions of law," *Regents of Univ of Michigan v Employment Relations Comm*, 389 Mich 96, 103 n. 3 (1973), no discovery is necessary. Hence, under MCL 600.4401(1), this suit was filed as a mandamus action directly at the Court of Appeals against the state officers named herein.

The Court of Appeals dismissed this action through a summary order. On February 10, 2010, it also denied a timely motion for reconsideration. This application for leave is filed within 42 days of the denial for reconsideration and is timely pursuant to MCR 7.302(C)(2).

STATEMENT OF QUESTIONS INVOLVED

I. Under PERA, are home-based day care providers public employees of a public employer?

Plaintiffs: No.

Defendants: Have not addressed the merits of this issue.

Court of Appeals: Did not address this issue in its summary dismissal order or in denying the motion to reconsider.

II. Does the state constitution prevent the DHS from giving the MHBCCC the power to engage in collective bargaining with a public employee union purporting to represent home-based day care providers?

Plaintiffs: Yes.

Defendants: Surprisingly, Defendants also say "yes."

Court of Appeals: Did not address this issue in its summary dismissal order or in denying the motion to reconsider.

III. Does the state have a clear legal duty to stop withholding so-called "union dues" for a purported public employees union of home-based day care providers from subsidy payments meant to enable low-income parents to purchase day care?

Plaintiffs: Yes.

Defendants: Have not addressed this issue to date.

Court of Appeals: Did not address this issue in its summary dismissal order or in denying the motion to reconsider.

INTRODUCTION

Plaintiffs Sherry Loar, Michelle Berry, and Paulette Silverson[1] are home-based day care providers who tend children whose parents qualify for state day care subsidies. In September 2009, Plaintiffs filed an action for mandamus at the Court of Appeals, seeking to stop Defendant Department of Human Services (DHS) and its director, Defendant Ishmael Ahmed, from diverting "dues" to a union, Child Care Providers Together Michigan (CCPTM).[2] Plaintiffs claim Defendant DHS does not have the constitutional authority to reclassify home-based day care providers, who are business owners and independent contractors, as government employees.

As will be discussed below, organized labor faces a significant legal impediment to unionizing home-based day care providers in Michigan and in other states because these providers are not public employees. To avoid this problem, labor has attempted to promote a new model that uses providers' direct or indirect receipt of state money as a nexus to create a "public employer" with which to bargain. Theoretically, the creation of this "employer" converts the independent contractors and private businesses into public employees.

In Michigan, the "employer of record" became the Michigan Home Based Child Care Council (MHBCCC), a two-staff-member entity with a tiny — or, as will be discussed below, entirely nonexistent — budget. The MHBCCC was created out of an attempted interlocal

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[1] This suit was originally filed by Loar and Dawn Ives. Ives has since been dismissed without prejudice. Berry and Silverson were added as plaintiffs as part of an amended complaint. For a short period, Loar was the only plaintiff, and there is a document or two in the Court of Appeals record that reflects that. But at most times, there have been multiple plaintiffs, and for ease of reference, "Plaintiffs" will be used in the plural.

[2] This is a joint enterprise of the United Auto Workers (UAW) and the American Federation of State, County and Municipal Employees (AFSCME).

agreement between Defendant DHS and Mott Community College (Mott).[3] The agreement purported to give the MHBCCC the power to engage in collective bargaining with a union of home-based day care providers. This attempt to expand the class of "public employees" subject to this state's public-sector bargaining laws through an interlocal agreement, not legislation, is important to this case.[4]

Not long after the agreement between the DHS and Mott was signed, the CCPTM submitted signature cards from some day care providers and sought to organize. After a vote by mail, the union was certified, and it eventually entered into a "collective bargaining agreement" with the MHBCCC. The DHS subsequently began withholding so-called "union dues" from the biweekly Child Development and Care Program subsidy checks the department paid out to home-based day care providers on behalf of low-income parents qualifying for state day care assistance.[5] The "dues" equaled 1.15% of the value of the checks.

The DHS began withholding "dues" in January 2009. At the time this suit was filed, Plaintiffs estimated that the 40,000 to 70,000 home-based day care providers in Michigan affected by this case would pay $3.7 million in "dues" in 2009.

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[3] As discussed in Part II of the discussion section of this application, there were foundational flaws in the implementation of the interlocal agreement that rendered it void from the start.

[4] As will be discussed below, in their last filing at the Court of Appeals, Defendants made a stunning admission: "[Plaintiffs claim] that DHS gave the [MHBCCC] the 'power to collectively bargain.' . . . DHS did not — indeed *could not* — grant MHBCCC the power to collectively bargain." Defendants' Reply to [Plaintiffs'] Brief in Support of Answer to Defendants' Motion to Dismiss Pursuant to MCR 2.116(C)(8) and (C)(4) at 1 (emphasis in original). It should be added that Defendants mischaracterized Plaintiffs' argument when they stated "[Plaintiffs claim] that DHS gave the [MHBCCC] the 'power to collectively bargain.' " In fact, Plaintiffs observe that the DHS improperly *attempted* to give the MHBCCC collective bargaining power, but Plaintiffs maintain that the DHS *could not* grant such power. Surprisingly, Defendants then agreed the DHS could not.

[5] When this case was first filed, Plaintiffs believed that Defendant DHS paid the "dues" directly to the union. Freedom of Information Act requests subsequently filed with the MHBCCC show that the "dues" are first given to the MHBCCC, which then forwards the money to the union. That the entity to which the "dues" are first diverted is the MHBCCC, rather than the CCPTM, does not affect whether it is proper for Defendant DHS to divert the "dues" at all.

From the start, this case has generated tremendous media coverage — a point relevant under MCR 7.302(B)(2), which states that application to this Court should include issues generating "significant public interest." The case has been discussed in The Wall Street Journal, The Weekly Standard, The Washington Times, The Detroit News, Detroit Free Press, Lansing State Journal, Flint Journal, Livingston Daily, Petoskey News-Review, and other papers around the state. It was the subject of a four-minute segment on Fox News' national news show on February 11, 2010, which led to it being discussed on the nationally syndicated Rush Limbaugh radio show the next day, and it has been covered on other syndicated radio shows as well. The undersigned has been interviewed by TV Channels 2, 7 and 56 in Detroit; Channels 6 and 10 in Lansing; Channels 12 and 25 in Flint; Channel 5 in Saginaw; and on a variety of radio stations, including NPR's Michigan Radio and Detroit's News/Talk 760 WJR Radio (several times).

Indeed, this case satisfies MCR 7.302(B), which sets forth grounds for leave to appeal. Subparts (2) and (3) of that rule state:

> (2) the issue has significant public interest and the case is one by or against the state or one of its agencies or subdivisions or by or against an officer of the state or one of its agencies or subdivisions in the officer's official capacity;
> (3) the issue involves legal principles of major significance to the state's jurisprudence;

Id.

Aside from receiving wide media coverage, the instant suit is against a state agency (DHS) and an officer of the state (DHS Director Ishmael Ahmed). The case directly involves the propriety of a state executive agency diverting millions of dollars from a program meant to help low-income parents obtain child care while they work or study. In addition, this case raises the fundamental constitutional question of whether an executive agency — and by extension, the governor — has usurped legislative power. Clearly, this case meets the criteria of MCR 7.302(B)(2) and (3).

That said, this case is in a somewhat odd procedural posture. The case originated at the Court of Appeals. Defendants chose to focus on jurisdictional and technical defenses and did not file a brief on the merits. The Court of Appeals then dismissed the action in a summary order that failed to discuss its rationale. Plaintiffs filed a motion for reconsideration that sought to have that court explain its holding. That motion was denied. Thus, Defendants have yet to discuss the merits of this action, and there is no indication of the reasoning by which the lower court made its decision. Plaintiffs request that this Court issue the writ of mandamus or grant leave to appeal, but also recognize that some alternative form of relief, such as a remand to the Court of Appeals for a merits briefing and the entry of an opinion, may be appropriate.

STATEMENT OF FACTS

A. General definitions and facts

In Michigan, parents have a right to hire a home-based child care provider; similarly, they may remove their children from the provider's care at any time. Parents and providers agree on the providers' compensation. They also determine which days and which hours the children will spend in the providers' care.

Some Michigan parents receive a subsidy from the state for child care. Defendant DHS notes: "For most families, DHS pays less than the full cost of child care. Families are expected to pay the difference between the DHS payment and the provider's actual charge." http://www.michigan.gov/dhs/0,1607,7-124-5453_5529_7143-20878--,00.html (last accessed March 21, 2010). Defendant DHS licenses, certifies or enrolls all home-based child care providers.

According to an Auditor General's 2008 performance audit, Defendant DHS classifies "childcare providers into five different service types: day-care centers, group day-care homes,

family day-care homes, day-care aides, and relative care providers." Auditor General Performance Audit, Child Development and Care Program Payments at 41 (July 29, 2008).[6] Day care centers are defined as "a facility, other than a private residence, receiving 1 or more preschool or school-age children for care for periods of less than 24 hours a day, where the parents or guardians are not immediately available to the child." MCL 722.111(1)(g). A "group" home is "a private home in which more than 6 but not more than 12 minor children are given care and supervision for periods of less than 24 hours a day unattended by a parent or legal guardian, except children related to an adult member of the family by blood, marriage, or adoption." MCL 722.111(1)(i)(iv). A "family" home is the same except that it has "1 but fewer than 7 minor children." MCL 722.111(1)(i)(iii). The terms "day-care aide" and "relative care provider" are not explicitly defined in Michigan statutes or regulations. The Auditor General defined "day care aide" as: "An individual (including a relative) who provides [Child Development and Care (CDC)] Program childcare in the home of the CDC Program child. A day-care aide may live with the parent or substitute parent and the CDC Program child." Program Payments Audit at 80. The Auditor General defined "relative care provider" as:

> A child provider that is related to the CDC Program child needing care by blood, marriage, or adoption as a grandparent/step grandparent, great-grandparent/step great-grandparent, aunt/step aunt, uncle/step uncle or sibling/step sibling. The individual must be 18 or older, must not live in the same house as the child, and must provide the childcare services in the relative's home.

Id. at 83-84 (July 29, 2008). Each Plaintiff operates her own group day care home. Complaint Exhibit 1; Amended Complaint Exhibits 22-23.

Michigan receives a federal Temporary Assistance for Needy Families block grant. See generally 42 USC §§ 601-19. In the fiscal 2009 appropriation, 2008 PA 248, the DHS was

[6] This document is available at http://audgen.michigan.gov/comprpt/docs/r431030005.pdf (last accessed on March 24, 2010). It will be referred to as "Program Payments Audit."

allocated $382,629,800 for "Day care services." *Id*. at 6. For fiscal 2010, 2009 PA 129, the appropriation was $238,755,100.[7] *Id.* at 8.

The Auditor General audited 30 months of the "Child Development and Care (CDC) Program Payments" from October 5, 2003, through March 4, 2006. Program Payments Audit at 59. In that time period, the DHS paid out $1,115,110,789 in child care subsidy payments. *Id*. The percentages paid out to the various provider types were: (1) enrolled relative care providers — 39.6%; (2) enrolled day care aides — 25.2%; (3) licensed day care centers — 16.5%; (4) licensed group day care homes — 10.4%; (5) registered family day care homes — 8.2%; and (6) unlicensed day care centers and homes[8] — 0.1%. *Id*.

CCPTM contends it represents a "bargaining unit" composed of group day care providers, family day care providers, relative care providers, and day care aides. This unit would encompass 83.4% of the payments from the audit period.[9]

B. Organized labor's attempts to unionize home-based day care providers in other states

The instant case occurs as part of a major national initiative by organized labor to increase its membership by redefining traditional notions of employer-employee relations when state or local governments help compensate a service rendered. As of 2004, according to the National Women's Law Center, only 3% of day care center workers — as opposed to home-based day care providers — were either in a union or covered by a union contract, despite organizing efforts dating back to the 1960s. Deborah Chalfie, et al, Getting Organized:

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[7] The 2009 "Daycare services" line item was split into two categories: "Regulated day care services" and "Unregulated day care services." The figure provided is the sum of the two.

[8] Basically, these are facilities on federal land. See Auditor General Performance Audit, Child Development and Care Program Payments at 84 (July 29, 2008).

[9] The 16.5% of the payments that went to licensed day care centers would be excluded, as would the 0.1% that went to unlicensed day care centers and homes.

Unionizing Home-based Child Care Providers 6 (2007).[10] Starting in 2005, organized labor actively began seeking to unionize home-based day care providers.

The National Women's Law Center identifies some obstacles that labor has faced in doing so:

> Child care centers may be difficult to organize, but at least there is a traditional employer-employee relationship between the owners and staff. In contrast, home-based providers do not easily fit into a legal status that permits them to unionize. The federal labor laws that cover the private sector expressly exclude both independent contractors and persons providing domestic services in another person's home from the legal definition of "employee." . . . . [P]roviders are either independent contractors — self-employed business owners — or, in the case of a small number of . . . providers who are providing care in a child's home, [are] otherwise not in an employer-employee relationship under the federal labor relations laws.
>
> . . .
>
> Even if providers were considered employees under federal labor laws, however, the entities with which they would negotiate over key elements of their work — state and local governments — are not considered employers. They are expressly excluded from the definition of "employer" under the federal labor laws, and thus state and local public-sector employees . . . require specific legal authority in order to obtain collective bargaining rights with their government employer. . . .
>
> In other words, <u>without additional, specific legal authority, home-based child care providers have no right to organize for the purpose of collective bargaining, and the state has no right to recognize or negotiate with the providers' representative</u>.

Id. at 6-7 (emphasis added).

Organized labor first developed the model of converting private workers into public employees when it sought to unionize "home care workers" — i.e., those who provide domestic services in the homes of the elderly or the disabled. As noted in the passage above, organizing under the National Labor Relations Act was not an option; the NLRA defines "employee" to exclude both domestic services and independent contractors, 29 USC § 152(3), and "employer" to exclude "any State or political subdivision thereof." 29 USC. § 152(2).

[10] This document is available at http://www.nwlc.org/pdf/gettingorganized2007.pdf (last accessed March 23, 2010).

With federal options foreclosed, the Service Employees International Union (SEIU) sought to organize all the home care workers in Los Angeles County against that county. The workers were paid the entirety of their salary by the state, but were hired and fired by the care recipients. When the county refused to meet and confer with the SEIU as the bargaining agent, the SEIU brought suit. In 1991, the courts held that the home care workers were not employees of the county. *Service Employees International Union, Local 434 v Los Angeles Co*, 275 Cal Rptr 508 (Cal Ct App 1991). Subsequently, the California Legislature enacted a law allowing counties to establish "by ordinance, a public authority to provide for the delivery of in-home supportive services." Cal Welf & Inst Code § 12301.6(a)(2).[11] This public authority would be deemed "the employer of in-home supportive services personnel [who were] referred to recipients," although the "recipients" would "retain the right to hire, fire, and supervise the work of any in-home supportive services personnel providing services to them." Cal Welf & Inst Code § 12301.6(c)(1).

Los Angeles County eventually created one of these entities, and in 1999, the SEIU successfully organized against it. This drive netted organized labor 74,000 additional members and was described as "one of the most significant gains in union membership in fifty years." David L Gregory, Labor Organizing by Executive Order: Governor Spitzer and the Unionization of Home-Based Child Day-Care Providers, 35 Fordham Urb LJ 277, 280 (2008).

Oregon was the next state to allow the organization of home care workers, doing so in 2000 through a ballot initiative to amend the state constitution. See Ore Const, art XV, § 11(f). In 2002, Washington passed a similar law through the initiative process, which is codified in pertinent part at Wash Rev Code § 74.39A.270. In 2006, the state of Massachusetts also created

[11] Creation of an entity to be an employer eventually became mandatory. Cal Welf & Inst Code § 12302.25.

an entity to act as the employer of publicly financed home care workers. Mass Gen Laws ch 118G § 31.

The governors of Illinois and Iowa used executive orders to create an employer that the home care workers unions could organize against. Illinois Exec Order 2003-8 (March 4, 2003); Iowa Exec Order 43 (July 4, 2005).[12] In 2007, Ohio's governor issued an executive order that did not create a new employer, but rather allowed the governor to enter directly into mandatory collective bargaining with home care providers. Ohio Exec Order 2007-23S (July 17, 2007).

Michigan and Wisconsin both used "interlocal agreements" between state and local government entities to create an employer for home care employees to bargain against. In Michigan in 2004, the Department of Community Health entered into an interlocal agreement with the Tri-County Consortium on Aging to create the Michigan Quality Community Care Council.

This model of union organization was subsequently applied to home-based day care providers. In 2005, Illinois' governor allowed unionization of these workers via an executive order. Ill Exec Order 2005-1 (February 18, 2005). In 2005, Washington's governor issued an executive directive. Chalfie, et al, Getting Organized at 26 n 28 (2007). Unionization in Oregon was effected by two gubernatorial executive orders. Ore Exec Order 05-10 (September 23, 2005); Ore Exec Order 06-04 (February 13, 2006). In each of these three states, the executive orders were later replaced by state legislation. 5 Ill Comp Stat 315/3(f), (n), (o); 5 Ill Comp Stat 315/7(4); Wash Rev Code § 41.56.028; Ore Rev Stat § 657A.430(3). Between 2005 and 2007, governors in Iowa, New Jersey, Wisconsin, New York, Pennsylvania, Kansas and Maryland

[12] In 2005, the Illinois Legislature codified the arrangement. 5 Ill Comp Stat 315/3(f), (n), (o); 5 Ill Comp Stat 315/7(4).

issued executive orders.[13] In 2009, the state of New Mexico enacted legislation. NM Stat § 50-14-17.[14]

Some attempts to implement this model of union organization failed. Governors in New York, Massachusetts, and California vetoed legislation to permit unionization of home-based day care providers. NY Veto No 215 (June 7, 2006); Mass Veto HB 5257 (August 10, 2006); Cal Veto of Assembly Bill 1164 (October 14, 2007).[15] The voters of Massachusetts rejected a ballot initiative to allow unionization of home-based day care providers. http://www.sec.state.ma.us/ele/elepdf/rov06.pdf at 57-58 (last visited Sept. 11, 2009).

C. Michigan-specific facts

In 1973, Michigan enacted the Child Care Licensing Act, codified at MCL 722.111-128. All group child care homes must be "licensed," while all family child care homes must be "registered." MCL 722.115(1). New and renewing licensees[16] undergo a criminal history check. MCL 722.115f. Annual inspections are required. MCL 722.118a. The legislation states that the "department of human services . . . is responsible for the development of rules for the care and protection of children in organizations covered by this act." MCL 722.112(1). The scope of the rules is set out in MCL 722.112(4) and covers a range of activities and subjects.

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[13] Iowa Exec Orders 45, 46 (January 16, 2006); NJ Exec Order 23 (August 2, 2006); Wis Exec Order 172 (October 6, 2006); NY Exec Order No 12 (May 8, 2007); Pa Exec Order No 2007-06 (June 14, 2007); Kan Exec Order No 07-21 (July 18, 2007); MD Exec Order No 01.01.2007.14 (August 6, 2007).

[14] A union PowerPoint® presentation indicates that in 2006, after initially clashing in organization drives, AFSCME and the SEIU split up 19 states between them. Michigan was assigned to AFSCME (and UAW). http://www.nwlc.org/pdf/Oct4WebinarPresentation.pdf at 17, 19 (last visited March 22, 2010).

[15] A subsequent New York governor eventually issued the executive order mentioned above to allow unionization of home-based day care providers.

[16] Licenses need to be renewed every two years, MCL 722.118, while certificates of registration need to be renewed every three years. MCL 722.119a.

The DHS' licensing rules for family and group day care homes are set forth in R 400.1901-52. Topics include, but are not limited to, the number of vacations days a caregiver[17] can take (no more than 20), R 400.1903(1)(a); training requirements for caregivers, R 400.1905; daily activities, R 400.1914; permissible bedding for the children, R. 400.1916; food preparation requirements, R 400.1931; and various safety issues, R 400.1941-44. Caregivers can hire "assistant caregivers," who must be at least 14, "of responsible character," and trained (within 90 days of being hired) in CPR, first aid, and blood-borne pathogens. R 400.1904.

There do not appear to be any statutes or regulations that specifically govern the conduct of relative care providers or day care aides.[18] The DHS has a Web page titled "Relative Care Provider Requirements" that contains a list of prerequisites for participating in the program. http://www.michigan.gov/dhs/0,1607,7-124-5453_5529_7148-15293--,00.html (last accessed March 24, 2010). The DHS Web site also contains a "Relative Care Application," a form that was modified in March 2010. http://www.michigan.gov/documents/dhs/DHS-0220-R_194100_7.pdf (last accessed March 20, 2010). Applicants must agree to a list of conditions, including one that states "I understand that I am considered to be self employed and not an employee of DHS." *Id.* There is also a "Day Care Aide Requirements" Web page, which lists conditions for participation in that program. http://www.michigan.gov/dhs/0,1607,7-124-5453_5529_7148-15175--,00.html (last accessed March 20, 2010). The DHS' online application for day care aides indicates that it was last modified in March 2010. http://www.michigan.gov/documents/dhs/DHS-0220-A_194099_7.pdf (last accessed March 20, 2010). Applicants must agree to a list of conditions, including one that states:

[17] The "caregiver" is the licensee/registrant in whose home the children are being tended.

[18] Administrative rules R 400.5001-15 concern relative care providers and day care aides, but primarily discuss eligibility and reimbursement.

> I understand the parent/substitute parent is my employer (not DHS) and is responsible for the employer's share of any employer's taxes that must be paid, such as Federal Insurance Contributions Act (FICA) and Federal Unemployment Tax (FUTA) taxes. My employer (parent/substitute parent) is also required to provide me with a W-2 at the end of the year for tax purposes.

Id.

The DHS' online Child Development and Care (CDC) Handbook, last revised in December 2009, states:

> When a parent chooses a provider, both the parent and provider are forming a business relationship with each other. This is an agreement between the parent and provider that may be in writing. Any agreement should at least cover:
>
> - How payment will be made.
> - Hours of care.
> - Charge for care.
> - When payment is expected.
> - And any notice of when care is no longer needed.
>
> The parent is responsible for any child care charges not paid by DHS. He/she also has to pay for the cost of any care provided while the parent is not involved in DHS Approved Activities, and for child care services provided before being authorized for child care by DHS.
>
> All child care providers, except for Aides, are self-employed. This means that the provider runs their own business. If the provider is an Aide, he/she works for the parent of the child and is a household employee of the parent under federal law. Under the Fair Labor Standards Act the parent has to pay the employer's share of any employer's taxes that need to be paid, such as Social Security, Federal Insurance Contribution Act (FICA) and Federal Unemployment Tax Act (FUTA) taxes. Parents also have to give a W-2 form at the end of the year to the aide so they can do their taxes.
>
> Please note: Provider is not employed by the State of Michigan or the Child Development and Care Program. Providers are not eligible for unemployment insurance.

http://www.michigan.gov/documents/dhs/DHS-PUB-0230_222206_7.pdf (last accessed on March 23, 2010; emphasis in original).

In April 2006, the CCPTM attempted to organize against the DHS. Complaint, Exhibit 7. The proposed bargaining unit was "all providers receiving reimbursements from the CDC

Program under the following job classifications: (1) group day care providers; (2) family day care providers; (3) relative care providers; and (4) day care aides." *Id*.

On July 27, 2006, pursuant to Const 1963, art 7, § 28 and the Urban Cooperation Act, MCL 124.501-512, the DHS and Mott Community College entered into an interlocal agreement, creating the MHBCCC. Complaint, Exhibit 8. The DHS claimed that "entering into this Agreement is necessary or appropriate to assist the Department in carrying out its duties and functions, including licensing, regulating, assisting, providing training for, and administering the subsidy payments to eligible home based child care providers." *Id*. at § 1.06. That agreement defined a "provider" as one who supplies home-based child care services and is "licensed or registered" by the DHS or "who receives payments for providing home-based child care services through the Department." *Id*. at § 1.15. The parties clarified that "[i]t is not the purpose of this Agreement to limit the selection process of child care providers by families; families will continue to select and retain the provider who best suits their needs." *Id*. at § 2.01.

The agreement also professed to give the MHBCCC the "right to bargain collectively and enter into agreements with labor organizations. [The MHBCCC] shall fulfill its responsibilities as a public employer subject to 1947 PA 336, MCL 423.201 to 423.217 [PERA]." *Id*. at § 6.10.

Sometime after its creation, the MHBCCC entered an undated document titled "Resolution 2006-1." Complaint, Exhibit 9. This document attempted to transfer the signatures from the CCPTM's organization drive against the DHS to an organization drive against the MHBCCC and summarily declare the CCPTM the bargaining agent for home-based day care providers. *Id*.

Despite this resolution, the CCPTM soon filed a petition for representation elections with the Michigan Employment Relations Commission (MERC).[19] Complaint, Exhibit 10. In its September 2006 petition for representation proceedings, the CCPTM formally sought to unionize against the MHBCCC and claimed that the bargaining unit included:

> All home-based child care providers including: group day care providers, family day care providers, relative care providers, and day care aides, who provide child care services under the Michigan Child Development and Care Program and other programs and child care services undertaken by MHBCCC.

Complaint, Exhibit 11.[20] The claimed unit size was 40,532 individuals. Complaint, Exhibit 10.[21]

MERC ran a certification election by mail in October and November of 2006. Of the 6,396 individuals who voted, 5,921 voted in favor of unionization, and 475 opposed unionization.[22] Complaint, Exhibit 13. On November 27, 2006, MERC certified the results. *Id*.

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[19] MERC Case R 06I-106.

[20] This petition was actually amended from its original form. The original petition to MERC based membership in the proposed union on the receipt of state CDC subsidies. The amended petition removed the reference to the subsidies. Complaint, Exhibit 11.

[21] According to the Notice of Election from MERC case R06I-106, this group was constituted of those "who were employed during the payroll period ending June 30, 2006." Complaint, Exhibit 12. "Employed" presumably means "received a subsidy check from the state." This inference is based on some basic arithmetic. A 2008 Auditor General's performance audit of the CDC program defines "active" as a "child day-care provider that is either currently authorized by DHS to care for CDC children or eligible to be authorized by DHS to care for CDC children." Auditor General Performance Audit, Suitability of Child Development and Care Program Providers (July 22, 2008) at 58; document available at http://audgen.michigan.gov/comprpt/docs/r431029905.pdf (last accessed March 24, 2010). The audit breaks down the "approximate number of active providers" as of September 30, 2006, by provider type: (1) relative care — 32,950; (2) day-care aide — 26,900; (3) family day-care home — 8,350; and (4) group day-care home — 3,600. *Id*. at 49. These figures sum to 71,800. The approximately 30,000 person difference between the purported bargaining unit and the active employees found just three months later is likely due to the first group's being limited to only those who received a benefit check.

While the difference is legally irrelevant to Plaintiffs' argument, it does suggest that the signature requirement for the certification election should have been a percentage of some 70,000 providers, not of 40,532.

[22] Implicitly, representation elections only require a majority of those voting, not a majority of those eligible to vote. R. 423.149b(5).

The MHBCCC and the CCPTM entered into what they contend was a collective bargaining agreement, and this document became effective on January 1, 2008. Complaint, Exhibit 14. The preamble to the agreement recognizes its distinctive nature:

> This agreement formalizes the unique relationship between the MHBCCC and the CCPTM. . . .
>
> CCPTM and MHBCCC recognize that the implementation of various provisions in this Agreement will necessarily require the assistance and cooperation of entities that are not a party to this Agreement, primarily the Department of Human Services. CCPTM and MHBCCC agree to work together in good faith in order to secure the assistance and cooperation of the appropriate entities when required by the provisions of this Agreement.

Id. at 3. Further, they acknowledge "the right of Department of Human Services to create and implement policies that may affect the professional standing and services provided by child care Providers." *Id*. at 23.

The parties recognize that "parents have the sole and undisputed authority to: 1) hire Providers of their choice; and 2) remove Providers from their service at will for any reason." *Id*. at 14. The parties agree that any action taken by a parent "concerning termination of services of a Provider shall not be subject to the grievance procedure." *Id*. at 16.

Another set of provisions recognizes that the parties are dependent upon the Legislature to fund any agreement reached:

> Although the parties understand that economic increases are largely contingent upon necessary legislative funding, MHBCCC agree to work jointly with CCPTM to find creative solutions to fund economic increases when new funds are insufficient.
>
> The MHBCCC, in agreement with the Union, will recommend to the Governor to make the necessary budget recommendations to the Legislature for Home Based Child Care Providers as outlined in Appendix B — Rates. And in addition, will provide the necessary political support to make effective the economic increases in this agreement.

Id. at 26. If the Legislature does not provide the requested funding, the parties are to meet to determine how to proceed. *Id*.

The MHBCCC and the CCPTM agree "union dues" are to come from the child care subsidy payments:

> Deductions of Union dues shall begin no later than thirty (30) days from the first date for which a provider received subsidized payment.
>
> . . .
>
> Union dues and initiation fees shall be deducted from the Provider's payments and remitted to the Union. . . . The warrant stub will state "Union Dues" and the amount of the deduction. . . .

Id. at 9, 15. No collection was to occur until a method of garnishing them was worked out: "No dues will be deducted until the technical capability has been secured to allow for the deduction of dues." *Id*. at 10. The collective bargaining agreement defined "providers" as those licensed, registered, or enrolled and receiving subsidy payments. *Id.* at 5. Thus, according to the document's terms, a home-based day care provider is covered by the collective bargaining agreement only when receiving CDC subsidies.[23]

In January 2009, the DHS sent the plaintiffs notification that "dues" would now be collected:

> Consistent with the 2006 election of the Child Care Providers Together Michigan union, and in compliance with its contract, beginning January 2009, a 1.15% dues/fair share fee deduction will be made from all in-home child day care providers' CDC State payments.

Complaint, Exhibit 15.[24] The "State of Michigan Remittance Advice" sent to the Plaintiffs at the top of their CDC subsidy checks showed that the checks were "DHS-funded payments." Complaint, Exhibits 16. Plaintiffs also received 1099 forms listing DHS as the payer. Complaint,

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[23] Hence, the group of day care providers covered by the collective bargaining agreement could vacillate considerably depending on how many of the 70,000 home-based day care providers receive CDC subsidies in any two-week period.

[24] At the time of filing, it was presumed that the bargaining unit would still garner 83.4% of the appropriation. Thus, it was estimated the annual dues amount would be $382,629,800 x 83.4% x 1.15%, or $3.7 million. The fact that the 2009-2010 appropriation, which in part covers the last three months of 2009, decreased from the previous year means this estimate should be lowered to $3.3 million. $382,629,800 x .75 (9 months of fiscal year) x 83.4% x 1.15% + $238,755,100 x .25 (3 months) x 83.4% x 1.15% = $3.3 million.

Exhibits 18; Amended Complaint, Exhibits 26, 27. With each check, Plaintiffs received a document titled "Department of Human Services Child Development and Care Statement of Payments" indicating that "dues" were being deducted from each payment and specifying the amount of dues being removed from the check. Complaint, Exhibit 16.

At the Court of Appeals on September 16, 2009, Plaintiffs filed a complaint of mandamus seeking to stop the DHS and its director from removing these "dues" from their checks. On October 7, 2009, Defendants filed a motion to dismiss on technical and jurisdictional grounds.

Because that motion eventually led to Defendants' important admission, the motion's main points are worth reviewing. In part, the motion claimed that Plaintiffs did not provide Defendants sufficient notice of the cause of action[25] and that jurisdiction was lacking because nongovernmental "necessary parties" were not named.[26] Defendants also mischaracterized Plaintiffs' claim as "the Union was improperly formed because it did not have the state legislature's approval." Defendants' Motion to Dismiss Pursuant to MCR 2.116(C)(8) and (C)(4) at 1.

In response on October 28, 2009, Plaintiffs explained that they were not challenging the formation of the union — unions can exist without being granted mandatory collective bargaining power. *Smith v Arkansas State Highway Employees, Local 1315*, 441 US 463 (1979). Rather, Plaintiffs reiterated that "Defendants did not have the authority to give the Michigan Home Based Child Care Council the power to collectively bargain as the 'employer' of home-based day care providers under the interlocal agreement." [Plaintiffs'] Brief in Support of

[25] Plaintiffs countered, in part, by noting that the complaint's title contained "mandamus," that there was a reference to a court rule and statute on mandamus, that the sole count was "mandamus," and that the accompanying brief contained the elements of mandamus.

[26] Plaintiffs countered this by showing other mandamus actions where the addition of nongovernmental defendants did not prevent the Court of Appeals from having original jurisdiction of a mandamus action.

Answer to Defendants' Motion to Dismiss at 4-5. Plaintiffs sought to have the dismissal motion denied and a schedule set for briefs and arguments on the merits.

On November 6, 2009, Defendants sought leave to file a reply brief. In the attached brief, Defendants admitted that "DHS did not — indeed *could not* — grant MHBCCC the power to collectively bargain." Defendants' Reply to [Plaintiffs'] Brief in Support of Answer to Defendants' Motion to Dismiss Pursuant to MCR 2.116(C)(8) and (C)(4) at 1 (emphasis in original).[27]

On December 30, 2009, despite considerable public interest in the case and despite the Defendants' concession of a central point in the litigation, the Court of Appeals entered a terse summary order dismissing the action. The pertinent portion of the order stated: "The complaint for mandamus is DENIED. The motion to dismiss is DENIED as moot."[28] On January 20, 2010, Plaintiffs filed a motion for reconsideration that focused on the difficulty that the parties and this Court could have in analyzing such a summary dismissal order and again requested that a merits briefing and argument be scheduled at the Court of Appeals. On February 10, 2010, the Court of Appeals denied the reconsideration motion.[29]

Since this dismissal, two matters indirectly related to this case have sparked further public interest. The first involves the Legislature's apparent attempt to end the MHBCCC's financing in the fiscal 2010 budget. The Democratic Chairman, Representative Dudley Spade, and the Republican Vice Chairman, Representative Dave Agema, of the Michigan House

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[27] This quote is the source of Plaintiffs' assertion in the Statement of Questions Involved that Defendants agree that the state constitution prevents DHS from conferring on the MHBCCC the power to collectively bargain with a union of home-based day care providers. To be clear, Defendants' admission does not explicitly indicate that the DHS is prevented from conferring this power by the state constitution; Defendants may have some other basis for their concession. Their rationale is necessarily unclear, given that this one-sentence admission represents Defendants' only discussion of the merits of the case to date.

[28] Per MCR 7.302(A)(1)(g), a copy of that order is attached.

[29] A copy of that order is also attached to this application for leave.

Appropriations Subcommittee on Human Services have both stated that the MHBCCC was defunded. The Republican Chair of the Senate Appropriations Subcommittee on Human Services, Senator Bill Hardiman, has concurred. Despite this, the MHBCCC is still operating, prompting legislative inquiries and media interest.[30] The second matter is a federal class action lawsuit challenging the unionization of Michigan's home-based day care providers (the suit was filed on February 17, 2010, in the Western District of Michigan). *Schlaud v Granholm*, Case No. 1:2010cv00147. The plaintiffs in that case contend that mandating that day care providers pay union dues (or any "fair share" fee) violates the First Amendment. The DHS is named as a defendant. No pendent state law claims were made.[31]

DISCUSSION

I. Under PERA, home-based day care providers are not public employees of a public employer.

A. Standard of review

In order to obtain a writ of mandamus, a plaintiff must show: "(1) the plaintiff has a clear legal right to the performance of the duty sought to be compelled, (2) the defendant has a clear legal duty to perform, (3) the act is ministerial in nature, and (4) the plaintiff has no other adequate legal or equitable remedy." *Citizens for Protection of Marriage v State Bd of Canvassers*, 263 Mich App 487, 492 (2004). The Court of Appeals has stated that the first two elements are matters of law and are reviewed de novo. *Id*. at 491-92. The latter two elements

[30] http://www.woodtv.com/dpp/news/politics/Lawmakers-say-No-DHS-spends-anyway (last visited March 23, 2010). Whether the Senate and House properly effectuated the stated legislative intent to defund the agency is still unclear, as is the means by which the MHBCCC is still operating.

[31] Holding the instant action in abeyance for *Schlaud* makes little sense. That case is just beginning. Unlike the instant action, discovery may be required, and the issue of class certification will need to be litigated. It may be many years before that case is resolved. Further, if that case were resolved in the defendants' favor, it still would not mean that the diversion of dues was appropriate under Michigan law.

seem amenable to de novo review, since both are purely legal questions. A number of older cases from the Court of Appeals indicate that a trial court's denial of a writ of mandamus is reviewable for an abuse of discretion. But a de novo review standard makes more sense: all of the elements of mandamus concern straightforward legal questions. There is no room for discretion in the analysis of the mandamus elements: either they are met, or they are not.

The arguments in Part I and Part II of this discussion section focus on the first two mandamus elements. The first argument looks at these two elements in relation to Michigan statutory law to determine whether PERA and the related case law allow home-based day care providers to be classified as government employees. The second argument looks at the same two elements in relation to Michigan's constitution to determine whether day care providers can be reclassified as government employees susceptible to unionization through an interlocal agreement.

Finally, the argument in Part III discusses the remaining elements of mandamus and the propriety of the Court of Appeals' dismissal.

B. Argument: statutory law, clear right, and clear duty

Michigan began allowing public-sector bargaining in 1965 with the enactment of PERA.[32] Soon thereafter, the courts created a four-factored test to distinguish government contractors from government employees. That test has been applied even as the Legislature altered the definition of "employee" in PERA.

Under this test, Plaintiffs are not government employees. In addition, the latest amendment to PERA's definition of "employee" shows that the Legislature meant to prevent novel organizing theories from enlarging the pool of government employees. Further, rulings

[32] Michigan's public-sector bargaining history prior to PERA will be discussed below in the argument in Part II of the discussion.

outside of PERA case law reinforce the fact that home-based day care providers are independent contractors, not government employees.

1. Plaintiffs are not public employees under statutory definitions or case law.

MCL 423.201(1)(e) currently states:

> "Public employee" means a person holding a position by appointment or employment in the government of this state, in the government of 1 or more of the political subdivisions of this state, in the public school service, in a public or special district, in the service of an authority, commission, or board, or in any other branch of the public service, subject to the following exceptions:
>
> (i) Beginning March 31, 1997, a person employed by a private organization or entity that provides services under a time-limited contract with the state or a political subdivision of the state is not an employee of the state or that political subdivision, and is not a public employee.

Id. "Public employer" is not defined in the act, although "public school employer" is defined at MCL 423.201(1)(h).

As originally implemented in 1947 PA 336, state public employment law discussed the meaning of "employee" only in the provision prohibiting strikes:[33]

> No person holding a position by appointment or employment in the government of the state of Michigan, or in the government of any 1 or more of the political subdivisions thereof, or in the public school service, or in any public or special district, or in the service of any authority, commission, or board, or in any other branch of the public service, hereinafter called a "public employee," shall strike.

1947 PA 336, § 2 (originally codified at MCL 423.202); see *Grandville Muni Exec Ass'n v Grandville*, 453 Mich 428, 432-33 (1996).

The enactment of PERA, which significantly altered state public employment law, did not change the definition of "employee" found in MCL 423.202. Nor was the definition altered by the six amendments to PERA between its creation and 1994.[34]

[33] This original state law was known as the Hutchinson Act. It will be discussed below.

As part of 1994 PA 112, the employee definition was relocated to MCL 423.201(1)(e) and slightly reworded to state:

> "Public employee" means a person holding a position by appointment or employment in the government of this state, in the government of 1 or more of the political subdivisions of this state, in the public school service, in a public or special district, in the service of an authority, commission, or board, or in any other branch of the public service.

See *Grandville*, 453 Mich at 433; *id*. n. 9. The current version of MCL 423.201(e)(i) was originally enacted as part of 1996 PA 543.[35]

The meaning of "public employee" under PERA is further illustrated by Michigan case law.[36] In *Wayne County Civil Service Commission v Board of Supervisors*, 22 Mich App 287 (1970), the Court of Appeals dealt with potential conflicts between PERA and a state law that allowed Wayne County to create its own civil service. In that case, three county entities disagreed over which of them acted as the employer of the county's road workers. The Wayne County Civil Service Commission claimed that the Wayne County Board of Supervisors was the employer for all county employees and that the County Civil Service Commission had the sole power to represent the county in determining wages and benefits. The Wayne County Road Commission contended that it was the employer of road employees. Finally, the Wayne County

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[34] 1965 PA 397; 1973 PA 25; 1976 PA 18; 1976 PA 99; 1977 PA 266; 1978 PA 441.

[35] There has been one further amendment to MCL 423.201(e) since that time, 1999 PA 204, but it did not affect the relevant language as it primarily just added MCL 423.201(e)(2), which is not relevant here.

[36] Much of the case law surrounding MCL 423.202 is not relevant to the instant case. For instance, many of the "public employee" cases involved supervisory or executive workers. Typically, the disputes in these cases concerned which bargaining unit the workers belonged to, not whether they were in fact public employees under PERA. *Dearborn School Dist v Labor Mediation Bd*, 22 Mich App 222 (1970); *Hillsdale Community Schools v Labor Mediation Bd*, 24 Mich App 36 (1970); *UAW v Sterling Heights*, 176 Mich App 123 (1989); *Muskegon Co Professional Command Ass'n v Co of Muskegon (Sheriff's Dep't)*, 186 Mich App 365 (1991). Another case dealt with whether teachers without a valid contract were still public employees under PERA. *Holland School Dist v Holland Ed Ass'n*, 380 Mich 314 (1968). Yet another concerned the extent to which constitutionally created state universities were public employers subject to the requirements of PERA. *Board of Control of Eastern Michigan Univ v Labor Mediation Bd*, 384 Mich 561 (1971).

Board of Supervisors contended that there were joint employers in the county, but that the board had the duty and responsibility to engage in collective bargaining under PERA.

The Court of Appeals set forth a four-factored test for identifying the employer: "1) that they select and engage the employee; 2) that they pay the wages; 3) that they have the power of dismissal; 4) that they have the power and control over the employee's conduct." *Id*. at 294. The court took note of a stipulation that the Road Commission could "hire, fire, demote, promote, discipline, and pay its employees performing road work." *Id*. at 298. This led to a holding that the Road Commission — not the Civil Service Commission, and not the Board of Supervisors — was the public employer. The holding was affirmed by this Court. *Wayne Co Civil Service Comm v Bd of Supervisors*, 384 Mich 363, 375-76 (1971).

In *Regents of University of Michigan v Employment Relations Commission*, 389 Mich 96 (1973), this Court faced the question of whether interns, residents and post-doctoral fellows who were "connected" with the University of Michigan Hospital were public employees under PERA. The university claimed that the purported bargaining unit was comprised of students, not employees.

This Court disagreed. Without applying the four-factored test, it held that the personnel were both students and employees, and it noted that PERA did not contain an exclusion for people in this situation.

Specifically, this Court examined whether this group constituted employees. It noted that the university provided them with W-2 forms and withheld a portion of their compensation for "the purposes of federal income tax, state income tax, and social security coverage." *Id*. at 110-11. The university provided them with fringe benefits, including medical coverage. The group performed many tasks for which their employer, the university, was compensated, and the group

members were entrusted with important decisions, such as writing prescriptions, admitting and discharging patients, and performing surgeries. *Id*. at 112.

In *Prisoners' Labor Union at Marquette v Department of Corrections*, 61 Mich App 328 (1975), the Court of Appeals faced the question of whether state prisoners who provided labor under the Correctional Industries Act were public employees for purposes of PERA. That Court noted: "An all-inclusive operational definition of the term 'public employee' is not included in PERA. Instead, we [have the] language in M.C.L.A. § 423.202." *Id*. at 330. It also observed that the definition neither included nor excluded prisoners specifically. *Id*.

The Court of Appeals then examined the details of the Correctional Industries Act. While the court recognized that the act set up the "trappings of conventional employment," it held the act's primary purpose was corrections, not employment. *Id*. at 332-33. Thus, without applying the four-factored test, the Court of Appeals held that the prisoners were not public employees under PERA.

Michigan courts have recognized doctrines involving multiple public-sector employers. *St Clair Prosecutor v AFSCME*, 425 Mich 204 (1986). In *St Clair Prosecutor*, this Court faced the question of who should serve as the public employer during collective bargaining with the county's assistant prosecutors. In rendering its decision, this Court recognized the concept of "coemployers." *Id.* at 227.

This Court held that the coemployer concept can be helpful where day-to-day control and budgetary control of public employees are split. *Id*. at 233. It was noted that, by statute, the St. Clair prosecutor had the ability to "appoint, supervise, and terminate" assistant prosecutors, while St. Clair County, through its board of supervisors, had the power "to control the number and remuneration" of the assistant prosecutors. *Id*. at 226. This Court therefore held that the

county prosecutor and the county board were coemployers that both had a right to sit at the collective bargaining table. *Id.* at 227.[37]

In *Saginaw Stage Employees, Local 35, IASTE v Saginaw*, 150 Mich App 132 (1986), the Court of Appeals sought to determine whether the city of Saginaw was a public employer of stagehands at the Saginaw Civic Center. The stagehands performed work for the city, but a union was responsible for hiring and firing them, distributing their hourly pay, and deciding which of them worked when the city needed extra help.

The Court of Appeals applied the four-factored test from *Wayne County Civil Service Commission. Id*. at 134-35. It held that the stagehands were not city employees because the union, not the city, controlled the workers' activity.

In *Holland-West Ottawa-Saugatuck Consortium v Holland Education Association*, 199 Mich App 245 (1993), three school districts formed a consortium for adult education pursuant to the Urban Cooperation Act. The consortium later sought a ruling that it, not the individual school districts (which each had contracts with their local teachers unions), was the employer of the adult education teachers.

The Court of Appeals set forth the following facts:

> The administrator of the consortium reports to a council composed of the superintendents of the participating school districts. The consortium is responsible for its own budget and financial affairs. The consortium also has contracts with community education employees and leases or rents facilities for its programs.
>
> The collective bargaining agreements between the school districts and [each] union do not include the wages, hours, and working conditions of the

[37] In *Genessee County Social Services Workers Union v Genessee County*, 199 Mich App 717 (1993), the Court of Appeals held that a county prosecutor was not a coemployer, along with the county commissioners, of the "victim-witness assistants" who acted as liaisons between the assistant prosecutors and the crime victim. *Id*. at 719. The court accepted a MERC gloss on *St. Clair Prosecutor* that limited coemployer status to those who could hire and fire a worker and noted that the prosecutor did not have this power over the disputed workers.

> consortium employees. The consortium employees do not have union dues deducted from their wages. The consortium never entered into a collective bargaining agreement with the unions, which stated their preference of negotiating only with the individual school districts on behalf of the consortium adult education teachers.

Id. at 247. The local education unions claimed that under the state school code, a consortium could not be an employer. The Court of Appeals noted that under the code, each school district could hire employees, and that the Urban Cooperation Act "allows school districts to exercise jointly with other school districts any power, privilege, or authority it [sic] shares in common and which each might exercise separately." *Id*. at 250. Having determined that a consortium could have employees, the court affirmed MERC's determination that the consortium, rather than the individual school districts, was the proper employer. The four-factored test was not used to make this determination.

Two court cases led directly to the 1996 amendment of MCL 423.201(1)(e): *AFSCME v Louisiana Homes, Inc*, 203 Mich App 213 (1994), and *AFSCME v Department of Mental Health*, 215 Mich App 1 (1996). Both cases involved "joint employers," a multiple-employer doctrine that "treats two separate employers [of the same employees] as a single unit for collective bargaining purposes." *St Clair Prosecutor*, 425 Mich at 225 n. 2.

The first case, *Louisiana Homes,* went before the Court of Appeals twice. The first time it was titled *Michigan Council 25, AFSCME v Louisiana Homes, Inc*, 192 Mich App 187 (1991).

In the first decision, the Court of Appeals was asked to decide whether the Michigan Department of Mental Health (DMH) was a joint employer of residential care workers at a private facility operating under an agreement with contractors to the state of Michigan. The court began by noting, "The State of Michigan is responsible for providing mental health care services." *Id*. at 188. The DMH contracted with Detroit-Wayne County Community Mental Health (CMH) to provide "residential facilities for mentally ill and mentally retarded persons" in

Wayne County. *Id*. The CMH, in turn, subcontracted these same services to Michigan Residential Care Alternatives (MRCA), which itself subcontracted to Louisiana Homes. The court explained: "MRCA is a private, nonprofit organization whose membership includes residential care providers. MRCA does not operate residential facilities, but instead is primarily a lobbying organization." *Id*.

AFSCME petitioned MERC to be named the collective bargaining agent for employees at three locations operated by Louisiana Homes.[38] MERC found Louisiana Homes and the DMH were joint employers.[39]

The Court of Appeals affirmed. It noted that the DMH set "mandatory guidelines for operating a residential care facility" and that any subcontractor would be bound by those. *Id*. at 190. The CMH operated "in effect, under budget guidelines, personnel decisions and requirements, training requirements, minimum staff qualifications, and contract provisions set by DMH." *Id*. Further, any residential care facility is state-funded. *Id*. The DMH gives an allotment for personnel costs, and the facility cannot provide extra money for that expense. *Id*. at 191. Louisiana Homes hired its own workers, but those decisions were subject to approval by the Michigan Department of Social Services (DSS) as the licensing agency and the CMH as the contract agency. *Id*. at 190-91. Likewise, Louisiana Homes had the power to dismiss its employees, but the Court of Appeals noted that the DMH could place a contract "in jeopardy" if an employee it wanted fired was not. *Id*. at 192. Further, the DMH mandated 120 hours of

[38] As will be discussed below, the union initially sought to organize under the NLRA, but that request was denied because of the close ties between Louisiana Homes and the DMH. See *Michigan Community Services Inc v NLRB*, 309 F3d 348 (2002).

[39] The Michigan Attorney General did not participate in the MERC proceedings, asserting that MERC lacked jurisdiction.

training for the workers annually, and it even had control over some day-to-day activities of Louisiana Homes' employees through mandates concerning their daily schedule. *Id*.

The Court of Appeals applied the four-factored employer test and held that DMH was a joint employer because more than mere licensing and the provision of grant money were present:

> Department [DMH] has extensive control over the hiring requirements of Louisiana [Homes] although it does not physically hire its employees. It also exerts extensive control, through its rules and regulations, over the day-to-day operations of the home, including the type of work that is done, how it is done, and the conditions under which it is done. . . . [T]he Department's control over Louisiana [Homes'] operations **extends far beyond mere licensing requirements or the provision of funds through a grant arrangement**. Since the Department and Louisiana [Homes] share authority over Louisiana [Homes]' employees and their terms and conditions of employment, we conclude that Louisiana [Homes] and the Department are joint employers of these employees.

Id. at 192-93 (emphasis added).

The second *Louisiana Homes* case concerned the interplay between the NLRA and PERA. AFSCME had sought collective bargaining under PERA because the National Labor Relations Board had prevented the union from organizing under the NLRA, specifically because "an employer health-care institution like Louisiana Homes" was too closely affiliated with an arm of the state — i.e., Michigan's DMH. *Louisiana Homes*, 203 Mich App at 216. After the Court of Appeals' first decision, this Court remanded the case for a determination of whether federal pre-emption prevented entities like Louisiana Homes from being unionized under PERA. *Louisiana Homes*, 203 Mich App at 216. The Court of Appeals held that pre-emption was not a concern given that the NLRB had consistently refused to allow organization in arm-of-state cases. *Id.* at 221.

After the second *Louisiana Homes* decision, the NLRB reversed itself on the arm-of-the-state doctrine and held that entities like Louisiana Homes could be organized under the NLRA. The implications of this decision were discussed in *AFSCME v Department of Mental Health*,

215 Mich App 1 (1996), the second case that led to the amendment of MCL 423.201(1)(e). The Court of Appeals noted that the NLRB's action meant that there was an "insufficient showing" that "the NLRB would decline to assert its jurisdiction" and thus held that the disputed employees could not be organized under PERA. *Id*. at 15.

According to the Senate Fiscal Agency's Bill Analysis for 1996 PA 543, *Louisiana Homes* and *AFSCME v Department of Mental Health* triggered an amendment to PERA. This amendment added MCL 423.201(1)(e)(i), which states:

> Beginning March 31, 1997, a person employed by a private organization or entity that provides services under a time-limited contract with the state or a political subdivision of the state is not an employee of the state or that political subdivision, and is not a public employee.

The analysis indicates that the Legislature sought to prevent those who contract with the state from being employees of the state:

> This bill is needed so that the State will not be drawn into a collective bargaining relationship with thousands of private sector employees who work for contractors doing business with the State. The bill makes it clear that when the State or a political subdivision contracts with a private sector organization to provide services, the employees of that organization are not public employees simply by virtue of that contract nor is the State or political subdivision an employer of those employees by virtue of that contract.

Senate Fiscal Agency Bill Analysis, SB 1015, January 30, 1997.

Since the 1996 amendment, the Court of Appeals has issued one decision that dealt with a public-employee question. *St Clair Co Intermediate School Dist v St Clair Co Ed Ass'n*, 245 Mich App 498 (2001). That case concerned an attempt to unionize a charter school authorized by an intermediate school district.

The Court of Appeals applied the four-factored test and held that the ISD was not an employer:

> Under the relevant part of the Revised School Code and the contract between the ISD and the academy, the academy had the ultimate authority to hire, fire, and

> discipline its employees. The academy also determined the wages, benefits, and work schedule of its employees. The ISD, on the other hand, certainly had extensive oversight responsibilities required by law. However, the ISD did not exercise independent control over the academy's employees on a daily basis and to such a pervasive extent that it could reasonably be considered their employer, whether independent of or jointly with the academy.

Id. at 516.

Hence, both the statutory language and the case law concerning public employees under PERA show that Plaintiffs are not employees of the MHBCCC or any other public employer; rather, they are independent contractors. To begin with, the statutory language, MCL 423.201(1)(e)(i), envisions that only those with long-term continual employment with a public employer will be considered public employees. Home-based day care providers do not meet that criterion. Even assuming arguendo that there is a contractual relationship between a public employer and a home-based day care provider, it is at best indirect, through the parent, and it is time-limited — the length of time a subsidized child is cared for, which may be only a matter of hours. A periodic, partial state payment for services to benefit a third party does not represent a long-term relationship under PERA.

It is also telling that the Legislature's most recent revision of the MCL 423.201(1)(e) was an attempt to reduce the opportunities for workers to be organized into public employee unions. In effect, the Legislature was attempting to foreclose avenues to new labor concepts, not to open up novel ones.

A review of the four-factored test likewise shows that no public employment relationship is involved in the instant case. As mentioned above, there are four factors for determining whether a government entity is a public employer: "(1) that they select and engage the employee; (2) that they pay the employee; (3) that they have the power of dismissal; and (4) that the have

the power and control over the employee's conduct." *Wayne Co Civil Service Comm*, 22 Mich App 294.

The parents are the ones who select and engage a particular provider, a point that is explicitly acknowledged by the "collective bargaining agreement" between the MHBCCC and the CCPTM. The parents pay for any fee not covered by the subsidy. The parents have the power of dismissal over the provider. The parents and the provider, not the MHBCCC, control the hours of care. The MHBCCC does not exercise any control over the providers' work conduct through inspections or oversight; rather, any inspections and oversight are performed by Defendant DHS (and informally, by the parents). Further, as stated in *Louisiana Homes*, licensing requirements and grant money alone are not sufficient to create an employment relationship, and in the instant case, the MHBCCC does not reach even *that* threshold. Hence, the MHBCCC in no way qualifies as a public employer of home-based day care providers under the four-factored test, and nothing substantiates the claim that home-based day care providers are public employees.

Indeed, it is telling that Defendant DHS repeatedly agrees with Plaintiffs' view that they are self-employed. For example, the DHS states in the Child Development and Care (CDC) Handbook cited earlier: "All child care providers, except for Aides, are self-employed. This means that the provider runs their own business. If the provider is an Aide, he/she works for the parent of the child and is a household employee of the parent under federal law." There is no mention of the MHBCCC, even though the handbook was last modified in December 2009. In addition, in the online CDC application forms cited earlier, the DHS requires a relative care provider to affirm that he or she is "considered to be self employed" and a day care aide to affirm that "the parent/substitute parent is my employer." In both cases, no mention is made of the MHBCCC, even though both applications indicate they were last modified in March 2010, long

after the creation of the MHBCCC. Despite insisting on the Plaintiffs' self-employment status, the DHS continues to divert so-called "dues" for a government employees union.

Unlike the situation regarding *Regents of University of Michigan,* day care providers do not have a portion of their compensation withheld for "the purposes of federal income tax, state income tax, and social security coverage." Indeed, Plaintiffs receive a 1099 federal tax form from Defendant DHS — a form appropriate to an independent contractor. This 1099 form lists the compensation provided to Plaintiffs under the heading "nonemployee compensation." Also unlike *Regents of University of Michigan,* no governmental unit charges or collects fees for the providers' services.

Once again, PERA and the related case law do not support the claim that home-based day care providers are public employees of the MHBCCC.

2. Non-PERA Michigan cases

Michigan cases outside of the field of PERA further indicate that Plaintiffs are not employees of a public employer.

In *Terrien v Zwit*, 467 Mich 56 (2002), this Court determined whether family day care homes violated a restrictive covenant prohibiting "commercial, industrial, or business uses." The four-member majority held that the day care activity was clearly "commercial," since it was run for a profit and therefore violated the covenant. The dissenting justices did not dispute that family day care homes sought to make a profit; instead, the dissents questioned whether the operation of the day care activity was sufficiently intrusive to alter the character of the neighborhood. Believing it not to be, the dissents would have held either that the activity was not "commercial" under the covenant or that the covenant violated public policy. *Terrien* thus shows that being a day care provider is a commercial activity, although there is debate about the extent of the activity's intrusiveness.

Morin v Department of Social Services, 134 Mich App 834 (1984),[40] involved the question of whether a day care aide was an employee of the Department of Social Services (DSS) for the purposes of workers' compensation. The plaintiff was a certified day care aide hired by a parent whose child care costs were paid by the state while the parent participated in a work-training program. *Id*. at 836-37.

The day care aide, who was 16, was injured in a car accident while driving to drop the children off. The aide's father filed a workers' compensation claim and contended that the DSS was the employer.

Applying the "economic realities" test,[41] the Workers' Compensation Appellate Board held that the aide was an independent contractor, not a department employee. *Id*. at 837-38. The Court of Appeals agreed:

> [T]he relationship between DSS and [the aide] was more akin to that of employer-contractor than employer-employee. DSS exerted no control over [the aide]'s duties nor did DSS have the right to hire or fire [the aide]. While DSS was responsible for plaintiff's compensation, it is also clear that DSS intended payment to be made to [the aide] through [the parent] since the draft was made payable to both. Materials or equipment were supplied by [the aide] or [the parent] and not by DSS. [The aide] held herself out to the public as a babysitter, a job customarily performed in the capacity of a contractor, and [the aide] could and did perform the same service for others.

Id. at 841-42.

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[40] A rehearing was granted in *Morin* related to issues that are not relevant here. *Morin v Dep't of Social Services*, 138 Mich App 482 (1985).

[41] In *Clark v United Technologies Automotive Inc,* 459 Mich 681 (1999), this Court indicated that the "economic realities" test applied in the field of workers' compensation. That test has four factors: "(1) [the] control of worker's duties, (2) the payment of wages, (3) the right to hire and fire and the right to discipline, (4) the performance of the duties as an integral part of the employer's business towards the accomplishment of a common goal." *Id*. at 688. No single factor controls. *Id*. at 689. This Court further noted that "whether a business entity is a particular worker's 'employer,' as that term is used in the [Worker's Disability Compensation Act], is a question of law for the courts to decide if the evidence on the matter is reasonably susceptible of but a single reference." *Id*. at 693.

This Court adopted the *Morin* ruling as a baseline in *Walker v Department of Social Services,* 428 Mich 389 (1987), holding that unlike the day care aide in *Morin,* the home-care worker in *Walker* was an employee of the DSS for purposes of a workers' compensation claim. Key differences between *Walker* and *Morin* were noted: In *Walker*, the provider was hired directly by the agency; the agency set forth the duties of the job; and the agency visited the home on a monthly basis to check on the provider. *Id*. at 393-94.

The facts in *Morin* are nearly identical to those in the instant case. Although the subsidy is sent directly to the child care provider, bypassing the parent, it usually does not cover the full child care costs agreed on by the parent and the provider. Unlike the home care providers in *Walker,* the day care providers are hired by the parents; the times and compensation are decided by the parent and the provider; and the DHS does not perform monthly checks on day care providers.

The economic-realities test does not materially differ from the four-factored PERA test. As shown above, Plaintiffs are not employees of the MHBCCC under the PERA test. And *Morin* and *Walker* indicate that home-based day care providers are independent contractors, not public employees under the economic-realities test. Hence, to the extent that there is any difference between the two tests, the results would be the same: Plaintiffs are not employees of the MHBCCC.

3. Other states' cases

In *Rhode Island v State Labor Relations Board*, 2005 WL 3059297, No CA 04-1899 (November 14, 2005),[42] the Rhode Island Superior Court rejected an attempt to unionize 1,300

[42] An online copy of this decision can be found at http://www.courts.ri.gov/superior/pdf/04-1899.pdf (last visited March 20, 2010).

certified home-based day care workers. Unlike many states at the time, Rhode Island had no law or executive order creating an employer. The union still sought to organize against the state, and the state denied it was the employer.

The court looked at various factors to determine whether the providers were public employees. The court rejected the idea that a criminal background check is "indicative of state employment," since the state requires such checks of many non-public employees, including nurses, prospective attorneys, private school teachers, and camp counselors. *Id*. at * 6. The court also rejected a claim that the state had control of the work environment. It noted that applicable health, safety, and fire prevention requirements were universal to "all child care facilities, regardless of whether or not they involve state funding through DHS." *Id*. The court emphasized, "These are basic regulations that exist to ensure the safety of children." *Id.*

The court also underscored that the providers were free to decide whom to hire, how much to pay them, and their work hours. The state had only limited criteria regarding the hiring of assistants. *Id*. at *7.

The court set forth other factors tending to show a provider's independence:

> A provider's work is done at the provider's home with the provider's furnishings. The provider furnishes its own instrumentalities and tools. All of the work is performed at the provider's private residence, and the State does not have the right to assign any children to the provider. The provider unilaterally controls the hours and days of operation and may unilaterally change them at any time. The provider unilaterally decides when to take vacation, how much vacation time to take, and how often to take vacation. The provider decides whom to hire and how to pay assistants . . . . Finally, the State is not in business with home day care providers, and there is no tax involvement by the State other than its duty to report to the IRS any funding forwarded to a provider through DHS.

Id. at * 7.

The court concluded that regulation does not equal control: "Although the Court recognizes that home day care is a highly regulated industry, substantial regulation does not

necessarily equate to the control required to create an employer/employee relationship between the State and anyone who chooses to become a provider." *Id*.

Rhode Island v State Labor Relations Board strongly supports a holding that Plaintiffs are not employees of any public employer. The situation differs clearly from Michigan's only in that Michigan regulations limit providers to 20 vacation or personal days annually when children are being cared for in the providers' homes. R 400.1903(1)(a)(i). Regardless, the provider has unlimited discretion in using those days, and this minor difference is not sufficient to distinguish the case.

Hence, PERA, the case law interpreting it, Michigan law from other fields, and case law from other jurisdictions all show that home-based day care providers are not employees of a public employer.

II. The state constitution prevents the DHS from giving the MHBCCC the power to engage in collective bargaining with a public employee union purporting to represent home-based day care providers.

A. Standard of review

Same as Part I of the discussion.

B. Argument: failed "interlocal agreement" and common law

1. The "interlocal agreement" between the DHS and Mott Community College was improper.

The interlocal agreement reached between the DHS and Mott Community College is ineffective under the express terms of Const 1963, art 7, § 28. That provision states in pertinent part:

> The legislature by general law shall authorize <u>two or more counties, townships, cities, villages or districts, or any combination thereof</u> among other things to: enter into contractual undertakings or agreements with one another or with the state or with any combination thereof for the joint administration of any of the functions or powers which each would have the power to perform separately; share the costs and responsibilities of functions and services with one

> another or with the state or with any combination thereof which each would have the power to perform separately; transfer functions or responsibilities to one another or any combination thereof upon the consent of each unit involved; cooperate with one another and with state government; lend their credit to one another or any combination thereof as provided by law in connection with any authorized publicly owned undertaking.

Id. (emphasis added). An interlocal agreement requires at least two local governmental entities. The interlocal agreement that sought to create the MHBCCC was between "the DEPARTMENT OF HUMAN SERVICES, a principal department of the State of Michigan, and MOTT COMMUNITY COLLEGE, a Michigan public body corporate established under the Community College Act." Complaint, Exhibit 7 at 2. Thus, that document involves only one local government entity — Mott Community College — and the agreement does not meet the conditions of Const 1963, art 7, § 28.

The Address to the People regarding Const 1963, art 7, § 28 refers to local governments only, not state government, and explains the section's purpose is to solve metropolitan problems:

> This is a new section designed to encourage the solution of metropolitan problems through existing units of government rather than creating a fourth layer of local government. Local governments are allowed to join in a variety of ways to work out together the solutions to their joint problems.
>
> This is to be done by agreement of the units of government involved and no unit will be compelled to enter into any agreement. Possible abuses are prevented by providing overall control by general acts of the legislature. . . .

2 Official Record, Constitutional Convention 1961, p 3394. Even assuming that an interlocal agreement is valid with only one local government participating, it is unclear how the creation of the MHBCCC accords with the people's intent in enacting art 7, § 28 — i.e., finding local solutions to metropolitan problems.

2. Interlocal agreements do not confer legislative powers upon the contracting parties.

The Urban Cooperation Act indicates that "a public agency . . . may exercise jointly with any other public agency . . . any power, privilege, or authority that the agencies share in common and that each might exercise separately." MCL 124.504. The act requires interlocal agreements to be contracts, and it allows the parties to stipulate in the agreement:

> (g) The manner of employing, engaging, compensating, transferring, or discharging necessary personnel, subject both to the provisions of applicable civil service and merit systems, and the following restrictions:
>
> > (i) The employees who are necessary for the operation of an undertaking created by an interlocal agreement, shall be transferred to and appointed as employees subject to all rights and benefits. These employees shall be given seniority credits and sick leave, vacation, insurance, and pension credits in accordance with the records or labor agreements from the acquired system. . . . If the employees of an acquired system were not guaranteed sick leave, health and welfare, and pension or retirement pay based on seniority, the political subdivision shall not be required to provide these benefits retroactively.

MCL 124.505(g). The contract may also include a provision on the "manner in which purchases shall be made and contracts entered into." MCL 124.505(i).

Not surprisingly, the Urban Cooperation Act is silent about organizing for collective bargaining, since the subject is exhaustively covered by PERA. But under PERA, as noted in Part I, Plaintiffs cannot be considered employees of the MHBCCC, nor can that entity be considered their employer.

Furthermore, Const 1963, art 3, § 7 requires that "[t]he common law and the statute laws now in force, not repugnant to this constitution, shall remain in force until they expire by their own limitations, or are changed, amended or repealed." A review of the common law shows that public-sector bargaining was improper prior to the enactment of the 1963 Michigan Constitution.

On July 25, 1941, for instance, the Attorney General entered an opinion that would "apply with equal force to . . . all branches of the government while engaged in the performance of a governmental function." OAG, 1941-1942, p 247 (July 25, 1941).[43] In the opinion, the Attorney General stated: "In the industrial field collective bargaining has been adopted as a method of solving private labor disputes. However, because of fundamental concepts and principles of government, it is obvious that collective bargaining cannot apply to public employment and public labor which involves the expenditures of public funds." *Id*.

The Michigan Supreme Court has described the 1941 state of thought regarding public-sector collective bargaining: "The thought of strikes by public employees was unheard of. The right of collective bargaining, applicable at the time to private employment, was then in its comparative infancy and portended no suggestion that it ever might enter the realm of Public employment." *Wayne Co Civil Service Comm*, 384 Mich at 372.

In 1943, in *Fraternal Order of Police v Harris*, 306 Mich 68 (1943), the Michigan Supreme Court upheld the firing of a police officer who joined the Fraternal Order of Police. In May 1947, the Michigan Supreme Court upheld the firing of a police officer on identical grounds in *State Lodge of Michigan, Fraternal Order of Police v Detroit*, 318 Mich 182 (1947).

In June 1947, the Attorney General entered an opinion indicating that a road commission could not engage in collective bargaining with a union. OAG 1947-1948, No 29, p 170 (June 6, 1947).

On July 3, 1947, the Hutchinson Act was passed. It allowed "a majority of any given group of public employees evidenced by a petition signed by said majority and delivered to the labor mediation board" to have their grievances mediated by that board. 1947 PA 116 § 7. This

[43] The Attorney General did not assign numbers to opinions at that time.

act also stipulated that striking public employees could be dismissed from their jobs and stripped of their pension and retirement benefits. *Id*. at §§ 2, 4.

In August 1947, the Attorney General entered a third opinion indicating that public-sector collective bargaining was improper. OAG 1947-1948, No 496, p 380 (August 12, 1947). In March 1951, the Attorney General entered a fourth opinion indicating that public entities could not engage in collective bargaining with a union. OAG 1951-1952, No 1368, p 205 (March 21, 1951).

In 1952, the Michigan Supreme Court upheld the Hutchinson Act against a constitutional attack. *Detroit v Street Electric Ry & Motor Coach Employees Union*, 332 Mich 237 (1952). The Court held that under common law, there was no right for public employees to strike. *Id*. at 248.

Thus, prior to the Michigan Constitutional Convention of 1961, the common law regarding public-employee collective bargaining was that public entities could not engage in collective bargaining, that at least some employees (police) could be fired for joining unions,[44] and that public employees did not have a right to strike. Nothing in the language of either Const 1963, art 7, § 28 or the Urban Cooperation Act allows a contract between a state department and a local agency to change the common-law presumption against collective bargaining.

PERA was a significant change from the common law, and it allowed many public employees to engage in collective bargaining. Nevertheless, any expansion of the types of workers covered by PERA would be something "changed, amended, or repealed" from the common law, and it would necessarily require legislative action, since all state legislative power is vested in the Legislature. Const 1963, art 4, § 1.

[44] Following the enactment of PERA, the Court of Appeals ruled that police officers were entitled to join the labor union of their choice, since they were public employees under MCL 423.202 as it stood at the time. *Escanaba v Labor Mediation Board*, 19 Mich App 273 (1969).

Indeed, the necessity of legislative action is doubly emphasized in the case of public-sector bargaining, since the topic is addressed by Const 1963, art 4, § 48, which states: "The legislature may enact laws providing for the resolution of disputes concerning public employees, except those in the classified civil service." The Address to the People stated in pertinent part that this provision was meant "to make it clear that the legislature has the power to establish procedures for settling disputes in public employment. The section does not specify what the procedure shall be, but leaves the decision to future legislatures." 2 Official Record Constitutional Convention 1961, Address to the People, p 3377 (emphasis added).

In fact, in 1965, shortly after the new constitution was adopted, the Legislature exercised this power by enacting PERA and thus changing much of the law related to public-sector collective bargaining. PERA principally authorized public-sector collective bargaining, while retaining some portions of the Hutchinson Act, such as the prohibition on strikes by public employees.

If the state of Michigan wishes to permit the creation of a public-employee union of all private-sector day care providers who receive a state subsidy, it must accomplish this dramatic shift from the traditional employer-employee model through the passage of legislation. This is due to specific requirements of Michigan's constitution.[45]

In Michigan, such a sweeping change in public-sector labor law cannot be accomplished by the executive department either on its own or in conjunction with local government. This renders improper and illegal the DHS' garnishing of purported "union dues" from the CDC

[45] Note that in some states, legislative action is not required. For example, the Maryland Court of Appeals held that under Maryland's constitution, an executive order could allow a union to bargain collectively with the governor's designee on behalf of home-based day care providers. *Maryland v Maryland State Family Child Care Ass'n*, 966 A2d 939 (Md App 2009).

subsidies legally owed to home-based day care providers who look after children from qualified needy families.

III. The Court of Appeals improperly dismissed this action.

A. Standard of review

Same as Part I of the discussion.

B. Argument: mandamus elements and Court of Appeals

Mandamus has four elements:

> (1) the party seeking the writ has a clear legal right to performance of the specific duty sought, (2) the defendant has the clear legal duty to perform the act requested, (3) the act is ministerial, and (4) no other remedy exists that might achieve the same result.

Citizens Protecting Michigan's Constitution v Secretary of State, 280 Mich App 273, 284 (2008). Defendants' admission that "DHS did not — indeed *could not* — grant MHBCCC the power to collectively bargain" cedes the first and second elements.[46] Regardless, Plaintiffs' arguments in Part I and Part II of the discussion show that Plaintiffs have a clear common-law right not to be placed into a public employees union absent an act of the Legislature.

The third element is also satisfied: The issuance of a check is plainly a ministerial act, and this Court has ruled it proper to issue a writ of mandamus related to an "unconstitutional diversion of monies." *Kosa v State Treasurer*, 408 Mich 356, 383 (1980). Finally, no other remedy for the illegal diversion exists.

The Court of Appeals erred when it dismissed this action without explanation. In *Anderson v Hayes*, 483 Mich 873 (2009), Justice Markman chastised a trial court for making a

[46] It may be that Defendants are implicitly claiming that any illegal activity lies not in their participation in the creation of the interlocal agreement, but in the actions of MERC. That "empty chair" defense gets Defendants nowhere. Defendants would still be conceding that Plaintiffs' rights were being violated, even as Defendants continued the harm by diverting "dues" from the CDC subsidy checks. If Defendants are aware of an illegality, they should not be furthering it.

valuation determination in a single sentence without discussing the rationale for the decision. He indicated that in order for appellate courts to do their job, the reviewing court must have some inkling of the lower court's reasoning:

> [T]he judicial process is largely a process of analysis, not of results. Both the parties and reviewing judges in the appellate process are entitled to something more on the part of the trial court than a conclusory statement.
>
> . . . Although a trial court is, of course, not obligated to comment on every matter in evidence, it is obligated, I believe, to explain at least minimally its decisions on the principal issues before it. Here, the trial court's single sentence of non-explanation did not satisfy this obligation. For these reasons, I would remand this case to the trial court for it to explain the rationale for its decision.

Id. (Markman, J., dissenting from denial of leave to appeal; emphasis added).

In *Citizens Protecting Michigan's Constitution v Secretary of State*, 482 Mich 960 (2008), Justice Kelly — now Chief Justice Kelly — indicated that the courts have a duty to Michigan's citizens to provide guidance on important constitutional questions. A decision that offers no guidance on "essential questions" is in fact neglecting the courts' "duty to the citizens of Michigan to serve as the final arbiter of the law." (Kelly, J., dissenting from denial of leave to appeal).

Two highly publicized cases involving novel constitutional issues were filed as original mandamus actions at the Court of Appeals. In both, that court issued an opinion, although in one case, it did so only after an order from this Court. Both cases involved elections, but statutes and court rules concerning mandamus do not limit that relief to election issues.

In *Michigan United Conservation Clubs v Secretary of State*, 463 Mich 1009 (2001), this Court reviewed a summary dismissal for lack of ripeness from the Court of Appeals. The case concerned the plaintiffs' request that the Secretary of State reject a referendum on recent legislation that transformed Michigan into a "shall issue" state regarding concealed weapons permits. Plaintiffs claimed that an appropriation passed in that legislation prevented that act from

being subject to a referendum under Const 1963, art 2, § 9. This Court rejected the ripeness argument and tellingly chose not to decide the merits in the first instance. Instead, this Court remanded the action to the Court of Appeals "for plenary consideration of the complaint for mandamus."

The second case was *Citizens Protecting Michigan's Constitution v Secretary of State*, 280 Mich App 273 (2008). It too was an original action for mandamus on a novel constitutional question, and it generated a twenty-page opinion from the Court of Appeals. Interestingly, immediately after setting out the elements for mandamus, the Court of Appeals cited MCR 7.216(A)(7), which states the court may "enter any judgment or order or grant further or different relief as the case may require." *Citizens Protecting Michigan's Constitution*, 280 Mich App at 284. Thus, the Court of Appeals appeared ready to consider the merits of the plaintiffs' legal claim even if mandamus were not the right cause of action.

In the instant case, it is unclear what flaw the Court of Appeals found in Plaintiffs' case. If the perceived flaw was in the request for mandamus, the court should have delivered an opinion. There is a dramatic difference between a conclusion that Plaintiffs could seek relief through another cause of action and a conclusion that Plaintiffs were mistaken about one of the first three elements — i.e., that either day care providers are covered by the current statutory definition of public employee, that the Michigan constitution allows for an executive agency to alter legislation through an interlocal agreement, or that printing and mailing a check is not a ministerial act. Indeed, a summary dismissal based solely on the fourth element would be troubling. In essence, because of Plaintiffs' perceived technical failure to name the right cause of action, the court would be refusing to invoke MCR 7.216(A)(7) and rule on "essential questions." It would neglect its "duty to the citizens of Michigan" and allow a fundamentally

unconstitutional activity to harm 40,000 to 70,000 home-based day care providers and further allow an improper diversion of more than $3 million annually.

The instant case is similar to *Citizens Protecting* and *Michigan United Conservation Clubs*. All three involve highly publicized matters and novel questions of constitutional law. But here, the Court of Appeals entered a one-sentence order dismissing the complaint, despite the fact that the Plaintiffs and this Court are entitled to "something more . . . than a conclusory statement." The Court of Appeal's summary dismissal has failed to forward "the process of analysis" that constitutes the judicial function. The parties and this Court are, in effect, left at the starting blocks. This application must lay out the entirety of the matter, instead of a focused analysis on true points of conflict.

Aside from the cases discussed above, Plaintiffs have reviewed orders of this Court from 1997 (Michigan Reports 454) to the present and found dozens of cases that were remanded to the Court of Appeals for a fuller explanation of its reasoning. These orders are typically found in the section titled "summary dispositions."[47] A representative sample of these cases includes *Casadei v Oakwood Hospital*, 454 Mich 876 (1997) (remanding for "further explanation" of holding); *Coburn v Coburn*, 456 Mich 921 (1998) (remanding for "explanation of the reasons" behind conclusion); *Seaton v Wayne Co Prosecutor*, 459 Mich 878 (1998) (remanding for "amplified opinion"); *Parnell v American Buslines, Inc*, 461 Mich 882 (1999) (remanding for "further explanation of the orders in this case"); *People v Bell*, 465 Mich 927 (2001) (remanding so that Court of Appeals can "amplify its opinion"); *Huizingh v Allstate Ins Co*, 465 Mich 951 (2002) (remanding for "further explanation of . . . order" and requiring specific statement of "the

[47] These cases do not include situations where this Court asks the Court of Appeals to review its existing opinion in light of an additional case, or where this Court orders a case to be considered as on leave granted from a lower trial court.

standards of review used"); *Kircher v Steinberg*, 467 Mich 858 (2002) (remanding for "explication of the reasons" for holding); *Goethals v Farm Bureau Ins*, 471 Mich 892 (2004) (remanding for "clarification of . . . decision"); *Black v Daimlerchrysler Services North America, LLC*, 475 Mich 856 (2006) (remanding for "clarification of . . . order"); and *Gillespie v Russell Filtration, Inc*, 477 Mich 865 (2006) (remanding for "explanation of the conclusion").

The foregoing shows that the Court of Appeals erred in its summary dismissal of this action.

RELIEF REQUESTED

For the reasons set forth above, Plaintiffs request that this Court enter a writ of mandamus against Defendant DHS to prevent further improper diversions of the home-based day care providers' subsidy checks to purported "union dues" or grant leave to appeal. Alternatively, Plaintiffs request a remand to the Court of Appeals for merits briefing and the issuance of an opinion.

Respectfully Submitted,

_____

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