

STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

PATRICIA HAYNES and STEVEN GLOSSOP,

Charging Parties/Interested Persons-Employees,

and

Case No.

SEIU HEALTHCARE MICHIGAN,

Respondent - Labor Organization,

and

MICHIGAN QUALITY COMMUNITY CARE COUNCIL,

Respondent.

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**BRIEF IN SUPPORT OF
PATRICIA HAYNES'S AND STEVEN GLOSSOP'S CHARGE OF UNFAIR
LABOR PRACTICE AND DECLARATORY RULING REQUEST**

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JURISDICTIONAL STATEMENT

As will be discussed later in this brief, Charging parties/Interested persons Patricia Haynes and Steven Glossop are essentially making three claims about a purported “collective bargaining agreement” between the Michigan Quality Community Care Council (MQCCC), the putative public employer, and the Service Employees International Union Healthcare Michigan (SEIUHM), the purported bargaining agent. Briefly describing these claims will contextualize the jurisdictional question here; hence each of the three is summarized immediately below.

First, the Charging parties/Interested persons contend that the April 19, 2005 certification of home help providers was void ab initio, rendering improper the collection of so-called “union dues” and “agency fees” under the purported collective bargaining agreement since that practice began in October 2006 and compelling the collection’s immediate cessation, with the return of all such “dues” and “agency fees” for the last six months (a total of around \$2,900,000). Pursuant to this contention, Charging party/Interested person requests a cessation of the collection of so-called “union dues” and “agency fees” even if the Commission concludes that the return of the preceding six months of collections is inappropriate.

Second, the Charging parties/Interested persons contend that even assuming that home help providers were properly classified as public employees until March 12, 2012, the passage of 2012 PA 45 meant home help providers were no longer public employees, thereby rendering the April 9, 2012 extension of the purported collective bargaining agreement invalid and making the withdrawal of so-called “union dues” or “agency fees” after September 20, 2012 improper.¹

¹ As will be explained below, September 20, 2012 is the last effective date of the purported second collective bargaining agreement, and under the logic of a federal decision, also discussed below, the current collective bargaining agreement must run its course before 2012 PA 45 can preclude the withdrawal of any further “dues” and “agency fees.”

Third, the Charging parties/Interested persons contend that even assuming home help providers were properly classified as public employees following the passage of 2012 PA 45, the most recent extension of the purported collective bargaining agreement is invalid due to a conflict of interest between the purported employer and the purported union, with the April 10, 2012 passage of 2012 PA 76 precluding any resumption of the collection of “dues” or “agency fees” after September 20, 2012.

In effect, Charging parties/Interested persons begin by asking the Commission to assume primary jurisdiction in this matter in order to determine that it lacks — and has lacked — subject-matter jurisdiction. The seemingly paradoxical nature of this appeal has a straightforward explanation in the Commission’s failure to address its subject-matter jurisdiction before certifying home help workers as public employees in 2005.

The Commission’s subject-matter jurisdiction is limited to matters concerning public employees. Hence, the Commission’s jurisdiction hinges on whether home help 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 (1975) (“It is undisputed that [the Michigan Employment Relations Commission] has jurisdiction over the inmates’ claims if and only if those inmates are ‘public employees’ within the meaning given that term in [the Public Employment Relations Act].”). If Charging parties/Interested persons are correct and the Commission did not have jurisdiction over this matter during the union certification process in 2005, the question becomes where an aggrieved party should seek a determination that they are not public employees.

One potential answer is circuit court. Reviewing federal labor law for guidance, the United States Supreme Court has recognized the importance of providing judicial recourse for

claims that an administrative agency has improperly expanded its jurisdiction under the National Labor Relations Act (NLRA). In *Leedom v Kyne*, 358 US 184 (1958), the Supreme Court held that a group of employees could file an original action to challenge a National Labor Relations Board (NLRB) action “taken in excess of delegated powers.” *Id.* at 190. The NLRB had admitted to improperly including professional employees in a bargaining unit without allowing those employees to vote. The Supreme Court rendered its judgment after the employees filed suit in federal district court and the NLRB sought to have the action dismissed.

So it appears that an action in an appropriate circuit court would be allowed. The doctrine of primary jurisdiction, however, may require the circuit court to first allow the Commission to consider the issue.

The Michigan Supreme Court discussed primary jurisdiction at length in *Travelers Insurance Company v Detroit Edison Company*, 465 Mich 185 (2001). The court described this doctrine as, “[W]hether the questions . . . involved are administrative in character such as to preclude the state court from inquiring into and adjudicating them without application having first been made to the [Michigan Public Service Commission].” *Id.* at 194 (citation omitted). The doctrine was justified in part because, “Adhering to the doctrine of primary jurisdiction reinforces the expertise of the agency to which the courts are deferring the matter, and avoids the expenditure of judicial resources that can better be resolved by the agency.” *Id.* at 197. Further, the doctrine shows “respect for the separation of powers and the statutory purposes underlying the creation of the administrative agency.” *Id.* at 199. This promotes “the principle that courts are not to make adverse decisions that threaten the regulatory authority and integrity of the agency.” *Id.* Finally, “the doctrine exists to promote consistent application in resolving controversies of administrative law.” *Id.*

The doctrine of primary jurisdiction is generally not susceptible to waiver. *Id.* at 204-05. Regarding its application, the Michigan Supreme Court indicated “there is no fixed formula. . . . [T]he question is whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation.” *Id.* at 198 (citations omitted).

The Michigan Supreme Court has rejected two attempts by the Commission to assert primary jurisdiction in other cases. In *Smigel v Southgate Community School District*, 388 Mich 531 (1972), an action related to agency fees was filed in the circuit court. When the matter reached the Michigan Supreme Court, the Commission filed an amicus curiae brief to argue it had primary jurisdiction. *Id.* at 552. (Brennan, J., dissenting). The Michigan Supreme Court rejected that argument. In *In re Michigan Employment Relations Commission Order*, 406 Mich 647 (1979), the Commission attempted to assert jurisdiction over an employment relations matter involving the Michigan Supreme Court. A union had filed a petition to represent secretaries, janitors and other employees of the court. In a 4-3 decision, the Michigan Supreme Court held that MERC could not exercise jurisdiction over the court.

In contrast, in another case, the Court of Appeals has upheld the Commission’s claim of primary jurisdiction. The court recognized that the Commission’s primary jurisdiction over labor relations prevented a union’s attempt to use an Act 312 arbitration panel decision to preclude relitigation before the Commission of the interpretation of a collective bargaining agreement. *Jackson Fire Fighters Ass’n, Local 1306, IAFF, AFL-CIO v Jackson*, 227 Mich App 520 (1998).

These cases show both that the Commission is generally protective of its jurisdiction and that the doctrine of primary jurisdiction can apply to matters within the Commission’s purview, notwithstanding *Smigel*. *Smigel* simply stands for the proposition that where a question is purely

legal and does not involve the acquisition and analysis of factual material involving the Commission's expertise, the doctrine of primary jurisdiction does not apply.

The instant action is a charge of an unfair labor practice and/or a request for a declaratory ruling. Both involve the Commission's expertise.

In fact, under the Administrative Procedures Act (APA), an agency must provide a process for an "interested person" to seek a declaratory ruling:

On request of an interested person, an agency may issue a declaratory ruling as to the applicability to an actual state of facts of a statute administered by the agency or of a rule or order of the agency. **An agency shall prescribe by rule the form for such a request and procedure for its submission, consideration and disposition.** A declaratory ruling is binding on the agency and the person requesting it unless it is altered or set aside by any court. . . . A declaratory ruling is subject to judicial review in the same manner as an agency final decision or order in a contested case.

MCL 24.263 (emphasis added).

The Commission's administrative rules are located from R. 423.101 to R. 423.194. They do not include the word "declaratory." The Commission, however, is violating the APA if these rules do not contain a process by which an interested party may seek "a declaratory ruling as to the applicability to an actual state of facts of a statute administered by the agency or of a rule or order of the agency."

Regardless, the Commission has (primary) jurisdiction over determining whether home help providers are in fact public employees.

STATEMENT OF QUESTIONS INVOLVED

- I. Under PERA, are home help providers public employees of a public employer?**
- Charging party/Interested person: No.
Responding party SEIUHM: Yes.
Responding party MQCCC: Unclear.
- II. Can the interlocal agreement in the instant matter be used to expand the statutory definition of “public employee” to include home help providers?**
- Charging party/Interested person: No.
Responding party SEIUHM: Yes.
Responding party MQCCC: Unclear.
- III. Because the Commission lacked subject-matter jurisdiction, was the 2005 certification void ab initio?**
- Charging party/Interested person: Yes.
Responding party SEIUHM: No.
Responding party MQCCC: Unclear.
- IV. Was the April 9, 2012 extension of the collective bargaining agreement improper due to a conflict of interest?**
- Charging party/Interested person: Yes.
Responding party SEIUHM: No.
Responding party MQCCC: Unclear.

INTRODUCTION

Charging party/Interested person Patricia Haynes of Macomb County provides home help care to her children Melissa and Kevin and Charging party/Interested person Steven Glossop of Isabella County provides home help care to his mother Linda. Ex. 1. The Home Help Program (HHP) is part of Medicaid, a needs-based federal program that is administered in Michigan by the Department of Human Services (DHS) and the Department of Community Health (DCH).

As will be discussed below, organized labor faces significant legal impediments to unionizing home help providers in Michigan and other states. To circumvent this problem, labor leaders created a novel, flawed theory that providers' direct or indirect receipt of state money makes them "public employees" subject to public-sector unionization under state law.

In Michigan, the "employer of record" became the Michigan Quality Community Care Council (MQCCC).² The MQCCC was created out of an attempted interlocal agreement between the DCH and the Tri-County Aging Consortium (TCAC). The agreement purported to give MQCCC the power to bargain with a union of home help providers. Shortly after MQCCC's creation, Service Employees International Union (SEIU) petitioned the Commission to become the collective bargaining agent for home help providers.

Without making a jurisdictional determination about whether home help providers were public employees, the Commission ran a statewide election by mail and then certified SEIU as the collective bargaining agent. Eventually, a purported collective bargaining agreement was entered into. That agreement, and its subsequent modifications and extensions, has allowed what is now Service Employees International Union Healthcare Michigan (SEIUHM) to collect so-called "union dues" and "agency fees" from home help providers. The amount of the "dues" has

² The MQCCC is sometimes referred to as the "MQC3," the "QC3," or the "Michigan QCCC." In this brief, Charging parties/Interested persons refer to the council as the MQCCC, but retains the other abbreviations when quoting from a cited source.

been between 2.5% and 2.75% of the amount the provider receives. The money is taken out of a check that is issued by the state to pay providers on behalf of care recipients.

Since these withdrawals commenced in October 2006, over \$31,000,000 has been taken from providers. Because home help providers were not and are not properly categorized as public employees of the MQCCC, the diversion was improper. Charging parties/Interested persons seek the return of the amount taken in the last six months, the cessation of any further withholding, and a ruling that any further “dues” and/or “agency fees” would be improper.

Further, the Legislature sought to end this illegal diversion of money by defunding the MQCCC for fiscal 2011-2012. The diversions continued, however, and in March 2012, the Legislature passed 2012 PA 45, which adopted a 20-factor test for public employment, the application of which clarifies that home help providers are not public employees.

Following passage of that act, the Legislature addressed even more directly the central question here — i.e., Are home help providers public employees due to their indirect receipt of public monies? In passing 2012 PA 76, the Legislature clearly answered “no.”

It should also be noted that after the Legislature defunded the MQCCC, SEIUHM provided the MQCCC with financial assistance to help keep the council operational. Subsequently, the latest extension of the collective bargaining agreement was signed during a period in which the two parties to the agreement suffered a conflict of interest. This rendered the latest extension of the collective bargaining agreement inoperable, allowing 2012 PA 76 to be controlling in the instant matter. If either 2012 PA 76 or 2012 PA 45 is found to be controlling, the collection of so-called “union dues” and “agency fees” must cease with the expiration of the collective bargaining agreement on September 20, 2012.³

³ On June 21, 2012, a federal court ruled in a lawsuit against Michigan officials that the collection of so-called “union dues” and “agency fees” in Michigan’s home help provider unionization must continue until

STATEMENT OF FACTS

A. General definitions and facts

The HHP is part of the state Medicaid plan. Ex. 2. The program helps provide unskilled care to HHP recipients living independently:

Home help services . . . are provided to enable functionally limited individuals to live independently and receive personal care services in the most preferred, least restrictive settings. Individuals or agencies provide [home help services]. The services that may be provided consist of unskilled, hands-on personal care for twelve activities of daily living (ADL), (eating, toileting, bathing, grooming, dressing, transferring, mobility) and instrumental activities of daily living (IADL), (taking medication, meal preparation and cleanup, shopping and errands, laundry, housework).

Id. at 1. The instant matter is concerned with individual providers, not with agencies.

Michigan began the home help program in 1981, twenty-three years before the creation of the MQCCC. Ex. 3. Until 1997, this program was the sole responsibility of the DHS. That year, the funding was moved to the DCH. In fiscal 2002 through 2004, the HHP served 51,372, 53,812, and 55,382 care recipients, respectively. Ex. 1 at 3. In 2010, there were 53,516 care recipients. Ex. 4 at 3.

According to “Medicaid and Long Term Care,” a document issued by the Michigan State Long Term Care Ombudsman Program, the applicant must apply to the Medicaid program through the DHS. Ex. 5 at 8. The Medicaid program has income thresholds. *Id.* at 4. If the income-eligibility requirements are met and a physician certifies a need for the service, the DHS conducts an in-home visit with the care recipient and provider. *Id.* at 8-9. During the visit, the DHS determines which activities the recipient needs assistance with. The DHS then determines the number of weekly provider-hours it can pay for. *Id.* at 9.

B. Organized labor’s attempts to unionize home help providers in other

February 28, 2013, the termination date of the contract extension signed on April 9, 2012. The significance of this ruling will be discussed at various places throughout the brief.

states prior to Michigan

The instant matter 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 government helps compensate for a service rendered.

Organized labor has had problems seeking to organize home help employees, since these workers are not in a traditional employer-employee relationship. Organizing the workers under the National Labor Relations Act (NLRA) was not an option; the NLRA defined “employee” to exclude both those “in the domestic service of any family or person at his home” and “any individual having the status of an independent contractor.” 29 USC § 152(3). Further complicating matters for organized labor was the NLRA definition of “employer,” which excludes “any State or political subdivision thereof.” 29 USC. § 152(2).

With federal options thereby foreclosed, the SEIU attempted in the late 1980s to organize all the home help providers in Los Angeles county against the Los Angeles County government. When the county refused to meet and confer with the SEIU as a bargaining agent, the SEIU brought suit. The California Court of Appeals held that the home help providers were not employees under the controlling statute. *Service Employees International Union, Local 434 v Los Angeles Co*, 275 Cal Rptr 508 (Cal Ct App 1991). In making its decision, the appellate court looked to the common law test of what constituted an employee-employer relationship and held no such relationship existed between the home help provider and the county. *Id.* at 512-15.

Subsequently, the California Legislature enacted a statute 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). This public authority would be deemed “the employer of in-home supportive services personnel [who were] referred to [HHP] 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 one 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 next to allow the organization of home help providers, doing so in 2000 through a state constitutional amendment. See Ore Const art XV, § 11(f). The Voters’ Guide (not the ballot itself) contained an explanatory statement for the initiative that created the Oregon Home Care Commission and discussed a potential union of home help providers. Ex. 6.

In 2001, Washington passed a similar law through the initiative process, which in pertinent part is codified at Wash Rev Code § 74.39A.270. Again, while the official ballot did not discuss the unionization of home help providers, the Voters Pamphlet did. Ex. 7 at 14.

Some events in Illinois predated those in California. In 1985, the SEIU attempted to unionize all of the home help providers in Chicago and portions of Cook County. The state labor board help providers were not public employees, stating:

Embodied in . . . the Illinois Public Labor Relations Act (Act) . . . is a statement of the Act’s fundamental purpose and this Board’s resulting responsibility “to regulate labor relations between public employers and employees.” An application of this Act to the relationship between [the state agency] and the service providers would render this purpose meaningless. The facts herein present us with a very unique situation which is virtually impossible for us to regulate. There is no typical employment arrangement here, public or otherwise; rather, there simply exists an arrangement whereby the state of Illinois pays individuals (the service providers) to work under the direction and control of private third parties (the service recipients).

State of Illinois Dept of Cent Management Serv and Dept of Rehabilitation Serv and Serv Employees Int Union, AFL-CIO, 1985 WL 1144994 (Illinois State Labor Relations Board Dec

18, 1985); Ex. 8 at 2.

Despite this ruling on the controlling statute, on March 4, 2003, Governor Rod Blagojevich signed an executive order requiring state recognition of a union of home help providers under Illinois' Labor Relations Act. Illinois Exec Order 2003-8 (March 4, 2003) at 3; Ex. 9.⁴

C. Certification of Michigan Home Help Providers

Thus, in other states, two generic organizing drives were held to be insufficient by the adjudicative bodies (California and Illinois). Unionization of home help workers had occurred after traditional legislation (California), a constitutional amendment (Oregon), initiated legislation (Washington), and an executive order (Illinois). When it came to Michigan, a new method was chosen – use of an interlocal agreement.

In April 2004, DCH and the Tri-County Aging Consortium (TCAC) entered into a purported interlocal agreement creating the Michigan Quality Community Care Council (MQCCC). Ex. 10.

1. The interlocal agreement

Section 6.03 of the purported interlocal agreement⁵ recognized the “Consumers’ exclusive right to select, direct, and remove the Provider who renders Personal Assistance Services to that Consumer.” *Id.* at 17.

Section 6.11 stated: “[MQCCC] shall have the right to bargain collectively and enter into agreements with labor organizations. [MQCCC] shall fulfill its responsibilities as a public employer subject to 1947 PA 336, MCL 423.201 to 423.217[,] with respect to all employees.”

Section 6.05 listed a number of “PAYROLL MANAGEMENT AND DISBURSEMENT

⁴ In 2005, the Illinois Legislature codified the arrangement. 5 Ill Comp Stat 315/3(f), (n), (o); 5 Ill Comp Stat 315/7(4). A First Amendment legal challenge to this codification will be discussed below.

⁵ The failure of the “interlocal agreement” to satisfy constitutional requirements is discussed below.

SERVICES” that MQCCC was allegedly going to perform. Included were thing like obtaining an Employer Identification Number for providers, authorizing timesheets, withholding for taxes, generating paychecks, providing benefits, and issuing bonuses and raises.

MQCCC never performed any payroll services for home help providers. A December 21, 2004, Transfer Agreement kept all payroll matters with the DCH:

2. In order to assure smooth and efficient payment of fees to individual providers on behalf of Consumers in accordance with the requirement of the Home Help Program, [DCH] will continue the operation of the Provider payroll process service related to Home Help Programs.

Ex. 11 at p. 3. The DCH agreed to “not charge the [MQCCC] for its continuation under this Transfer Agreement for the payroll processing services that it currently provides for payment for covered Home Help Services.” *Id.* In the course of its existence, MQCCC did not manage the payroll and was not appropriated the hundreds of millions of dollars that annually finance the HHP. Rather, that money was appropriated to the DCH.

On November 23, 2004, DCH sent out a “Beneficiary Eligibility Bulletin” to home help providers announcing the creation of the MQCCC. The announcement did not mention that MQCCC would be acting as their employer. Instead, it claimed that MQCCC would “provide a support system,” assume responsibility “for the payment process,” and “[c]reate and maintain a registry(ies) of individual providers for beneficiaries.” Ex. 12 at p. 2.

2. Presentation to the Commission

It is axiomatic that parties cannot consent to a tribunal’s subject-matter jurisdiction where none exists. *Gonzales v Thaler*, 132 S Ct 641, 648 (2012) (“Subject-matter jurisdiction can never be waived or forfeited.”). In *Lansing v Carl Schlegel, Inc*, 257 Mich App 627 (2003), the Michigan Court of Appeals upheld a Commission ruling limiting the Commission’s “subject-matter jurisdiction” to public employees. *Id.* 632. Despite these clear rules, in January 2005,

SEIU and the MQCCC filed a representation petition wherein the parties sought to consent that home help providers are “public employees” and that the Commission thereby had jurisdiction:

6. The Parties acknowledge that MERC has jurisdiction over questions related to the representation of such employees[,] as the individuals are employees, as defined by the PERA, of the **Michigan QCCC**, a public body corporate[,] even though the individual persons receiving care retain authority over their personal selection and retention of particular homecare workers.

Ex. 13 at p. 2 (emphasis in original).⁶

On May 4, 2010, MERC Director Ruthanne Okun testified before the Michigan Senate Appropriation Subcommittee on Human Services. In the context of discussing a similarly improper unionization of home-based day-care providers, Okun testified that where there is a consent election, the Commission does not question jurisdiction (i.e., whether the group is composed of public employees as defined under PERA). Ex. 14 at p. 3. Thus, the Commission never examined whether home help providers were public employees under PERA.

This omission is all the more surprising given that in Section 6 of the “addendum” filed with representation petition, SEIU and the MQCCC clearly alerted the Commission to a concern over its jurisdiction. This language should have prompted the Commission to undertake an analysis of its subject-matter jurisdiction regardless of the parties “consent.”

The Commission ran a mail vote. In a proposed bargaining unit of 41,000 workers, 6,949 voted in favor of unionization and 1,007 were opposed. Ex. 15. SEIU was certified as the collective bargaining agent on April 19, 2005.

D. First two purported “collective bargaining agreements” and collection of “dues and fees”

The first purported collective bargaining agreement was entered in April 2006. It indicated that consumers retained control over hiring and firing providers:

⁶ The quoted material appears in a document titled “Addendum to Consent Election Agreement,” but it appears the document was actually part of the original filing of the representation petition.

The parties reaffirm that Home Help Consumers have the sole and undisputed right to: 1) hire Providers of their choice . . . ; 2) remove Providers from their service at will and for any reason; and 3) determine in advance and under all circumstances who can and cannot enter their home.

The parties reiterate their prior acknowledgements that: the persons receiving service each, individually, retain control over the physical conditions at the work location and individually direct the performance of services and that such authority and control on the part of the individual consumers will not be, and is not, diminished in any way by this Agreement, nor by the outcome of any subsequent contractual negotiations between these parties.

Ex. 16 at 2. The parties were MQCCC and SEIUHM's predecessor, SEIU Local 79.

The "agreement" allowed the union to collect dues and agency fees:

- a) Uniform union dues will be deducted from the wages of all Providers who have been compensated for a minimum of 25 hours in the month and who have not elected to pay agency fees. Agency fees shall be deducted and remitted in the same fashion as union dues.

Id. at 5-6. The parties admitted that their wage schedule of hourly compensation rates for home help providers was merely their request to the Legislature, and that the actual compensation would be determined by the legislative process:

The following schedule of compensation improvements is premised on the proposed State Budget as presented by the Governor. The parties expressly understand that the proposed Budget, as presented, is subject to alteration. Therefore the compensation increases presented below are subject to change as the State Budget is finalized and adopted.

Id. at 7.

The second purported collective bargaining agreement was to be effective from October 1, 2009 to September 20, 2012. Ex. 17 at 21. It maintained the language regarding consumer control of hiring, firing, and control over the premises. *Id.* at 2. The dues language eliminated the minimum hours qualification and was otherwise modified to read:

1. The SEIU and MQCCC agree dues deductions is an internal process that must be preserved. However the parties want to clearly set forth in writing the dues calculation method determined by the SEIU. Full Union dues for this unit will be 2.75% of the Provider's compensation. In the event a new dues/fees

schedule is approved by formal action of the SEIU during the term of this Agreement, the MQCCC will be notified of the revised dues/fees so that proper amounts can be withheld.

Id. at 6. The state budget section remained substantively the same, but was changed to read: “The parties agree that the 2009/10 wage improvements will be determined by the 2009/10 State budget.” *Id.* at 9. This agreement was between MQCCC and SEIUHM.

Collection of the purported “dues” began in November 2006. As of March 29, 2012, the DCH had transferred \$31,317,790.40 to the SEIUHM as dues/agency fees. Ex. 18. This sum represents around \$480,000 per month.

E. Defunding of MQCCC, passage of 2012 PA 45 and 76, and collective bargaining extension

The issue of the labor movement’s expansive new view of public employment began to receive heavy public attention when the Commission’s certification of a purported public employee union of home-based day care providers was challenged in late 2009. The home help situation began to draw attention at that time as well. The legislature responded in two ways: (1) by defunding MQCCC; and (2) by passing two amendments to PERA’s definition of “public employee.” These revisions indicated rejection of organized labor’s new public employment theory that indirect recipients of state subsidies were public employees subject to unionization.

On June 21, 2011, the Michigan Legislature defunded the MQCCC for the 2011-12 Fiscal Year. There was no explicit line in the budget for this defunding; rather, the elimination was rolled into the general home-help appropriation line.

The statutory definition of “public employee” was amended twice in 2012. The first revision was 2012 PA 45, which amended MCL 423.201(1)(e) to add subsection (iii), which indicated that no one could be classified as a government agency employee who did not qualify as an employee of that agency under a 20-factor Internal Revenue Service employment test. The

law was enacted and became effective on March 13, 2012.⁷

There were some indications that the MQCCC was going to shut down after it was defunded. Ex. 19. Instead, it started accepting money from nongovernmental sources. By April 2012, it had accumulated \$22,000, of which the SEIU had provided \$12,000 (the SEIU amount was provided on January 18, 2012). Ex. 20. MQCCC moved its mailing address to the personal address of its purported director, Susan Steinke. Ex. 21 at p 1. Ms. Steinke contended she could work only a limited number of hours on MQCCC business, since she is collecting unemployment insurance. *Id.* at 3-5. On April 9, 2012, Ms. Steinke signed an extension of the collective bargaining agreement between MQCCC and the SEIU; the extension took the purported collective bargaining agreement from September 2012 to February 2013. Ex. 22.

Likely not coincidentally, April 9, 2012 was also the day that the Governor signed 2012 PA 76, which explicitly rejected the new labor employment theory and amended MCL 423.201(1)(e)(i) to clarify that those who receive “a direct or indirect government subsidy in his or her private employment” are not public employees. This second amendment to the public employee definition became effective on April 10, 2012.

F. Federal litigation regarding 2012 PA 76

Even with the passage of 2012 PA 76, the DCH did not stop processing the so-called “dues” and “fees” in question. The practice was ended (temporarily) only after a May 24, 2012 informal legal opinion from the Attorney General indicated that the enactment of 2012 PA 76 should terminate the withdrawals. Ex. 23.

On May 29, 2012, the SEIUHM filed a federal lawsuit against Governor Richard Snyder,

⁷ In order to have immediate effect, a law must be passed with a 2/3rds vote in both the Senate and House. Const 1963, art 4, § 27. The undersigned is aware of two lawsuits concerning this public act: (1) *Hammel v Speaker of the House of Representatives*, Court of Appeals No 309484, which challenges whether this law was properly given immediate effect; and (2) *Gould-Werth v Callaghan*, 4:12-CV-11700 (ED Mich), which also contains the same challenge. On August 16, 2012, the Michigan Court of Appeals rejected the claim that the law was improperly enacted. *Hammel*, 2012 WL 3537816.

State Treasurer Andy Dillon, and DCH Director Olga Dazzo in their official capacities. *SEIU Healthcare Michigan v Snyder*, Case No 12-cv-12332 (ED Mich).⁸ The three claims presented really concern a single issue: whether enforcement of 2012 PA 76 constituted an impairment of a contract — the collective bargaining agreement with its extension until February 2013 — under US Const, art I, § 10.

On June 21, 2012, Judge Nancy G. Edmunds issued an Opinion and Order granting the union a temporary restraining order and preliminary injunction that required that the DCH continue taking out “union dues and agency fees.” Ex. 24. The federal judge analyzed the impact of 2012 PA 76 (referred to as SB 1018 in the opinion), but no mention was made of 2012 PA 45. The opinion spent two full pages discussing whether home help providers were covered by the federal National Labor Relations Act. But no Michigan cases exploring the limits of public employment were cited. The entirety of the federal court’s analysis of the public-employee issue was the following:

Additionally, PERA’s broad definition of a public employee, before [2012 PA 76], clearly encompasses the home help providers. Even if one does not consider [the MQCCC] an employer, a public employee under PERA is a “person holding a position by appointment or employment . . . in any other branch of public service.” Mich. Comp. Laws § 423.201[(1)](e). A home help provider, paid through Medicaid and registered and regulated by a state-created agency, is within this broad umbrella of “public service.”

Ex. 24 at 11. Later, when discussing 2012 PA 76, the court stated erroneously that “the language of [MCL 423.201(1)(e)] was last amended in 1996.” *Id.* at 17. The court was apparently not aware of 2012 PA 45.

G. MQCCC and DCH statements about employment status

In 2010, DCH began requiring each home help provider to fill out a “Medical Assistance Home Help Provider Agreement,” also known as an MSA-4678. On page two of that form, the

⁸ The undersigned submitted an amicus curiae brief for the Mackinac Center for Public Policy in that case.

provider is informed that:

As an individual provider of Home Help services, I agree that the beneficiary is considered the employer. I will not be employed by the Department of Community Health (DCH), the Department of Human Services (DHS), or the State of Michigan.

Ex. 25 at 2. No mention is made of MQCCC. The form then sets forth various DCH and DHS requirements, and again no mention is made of MQCCC, but there is a reference to union dues:

- I agree that personal care services will be provided for a Michigan Medicaid beneficiary, as authorized by . . . [DHS] according to the DHS Adult Services Comprehensive Agreement.
- In order to receive payment, I agree to keep and submit to DCH, DHS or their designee, any and all records necessary to disclose the extent of services provided to the client.
- Under Section 3504 of the Internal Revenue Code, I agree to accept the . . . [DCH] as the acting agent of the beneficiary for the deduction of withholding taxes and union dues. I further agree to accept payments issued by DCH as payment in full and not seek or accept additional payments from the beneficiary or any other source. . . .
- . . .
- I agree to cooperate with DCH, DHS, or their designee regarding any audits, investigations or inquiries related to Home Help services provided.

Id.

In 2011, DCH sent out an informational sheet on federal tax treatment of home help payments. The document discussed an employment relationship between the care recipient and the care provider: no mention was made of the MQCCC. In pertinent part, the document states:

The IRS considers all payments in Independent Living Services (ILS) Programs as reportable for tax purposes. ILS Programs includes AHH and other similar programs formally considered as “chore” programs. DCH programmed [the DCH computer payroll system] to generate IRS Forms 1099 for AHH agencies and W-2’s for individual AHH providers including parents, who are AHH providers for their children. W-2’s for non-parent providers have been issued, since 1994, when the State of Michigan began acting as the filing agent.

The IRS recognizes the State of Michigan is serving as the reporting agent for the benefit recipients to address their household employer/employee W-2 reporting requirements. In that capacity, the State of Michigan sends payment as a dual check to both the beneficiary and the provider. **The relationship between the beneficiary and the provider is generally considered an employment**

relationship. . . . These payments are generally considered by the IRS payments for domestic services and, as such, are treated as wages to the provider (not the client but the helper). In the case of parent/child relationships within the AHH program, the payment is not taxable to the child. However, the payments may be taxable to the parent, as they are distributed to them just like they are to unrelated home help providers which are taxable.

Payments made to a parent employed by his or her child are not subject to the [Federal Unemployment Tax Act] tax, regardless of the type of services provided. . . .

Ex. 26 (emphasis added).

The MQCCC website does not contain claims that MQCCC is the employer of the providers; rather, it only mentions the consumers as employers. On its “About the Home Help Program” page, the MQCCC states:

Who Provides the Services?

Home Help Consumers employ thier [sic] own providers. Providers are not employed by DHS or the State of Michigan. Providers may be friends, relatives, neighbors, or employees of home help agencies. . . . Some DHS offices keep lists of people willing to perform these services.

Ex. 27. On its “Frequently Asked Questions” page, no mention is made of the MQCCC acting as an employer; rather, the MQCCC focuses on its registry. Further, the care recipient is labeled the employer of the providers, and MQCCC proposes to train the care recipients in using that power.

The MQCCC states:

Frequently Asked Questions

What does the QC3 do?

The QC3 offers a tool for finding, choosing, and hiring a Provider. This is the Registry, or list, of Providers. . . .

. . .

How will the QC3 help?

The QC3 will offer help and support to both Consumers and Providers in finding the best Provider for the Consumer.

For Providers, the QC3 offers tools to find work, use their skills, and to find other Consumers to care for.

For Consumers, the QC3 offers a tool for finding, choosing, and hiring a Provider. This is the Registry, or list, of Providers. **The QC3 may also provide information about how to act as an employer to Providers, and training in how to be an employer.**

What will NOT change?

The Consumer will still choose, hire, and train the Provider as is fitting for the needs of both parties. Consumers will also still be able to fire Providers. . . .

The QC3 does NOT:

Change the way Consumers get services.

Change how the DHS approves services and Providers. . . .

Change the Provider pay or how the Provider is paid.

Ex. 28 (emphasis added). The “FAQ: Providers” page makes no mention of employment. It mentions the registry and that it is the “Provider’s choice” whether to be on it. Ex. 29. The “FAQ Consumers” page again only mentions consumers as the employer and makes no mention of an MQCCC employment role:

The QC3 also offers Consumers information about being an employer of an in-home Provider. The QC3 will also help with training for Consumers who want to learn more about being an employer.

Ex. 30.

The MQCCC held some training sessions for would-be providers. As part of this session, slides were displayed. Under the section “What is the QC3,” a slide stated:

The main purpose of the QC3...

Is to maintain a Registry of available Home Help Providers. The main goals of the Registry are to assist Providers in finding Home Help work and to make it easier for Home Help Consumers to find Providers. . . .

Ex. 31 at 6 (emphasis in original). The next slide discussed “What the QC3 is not,” and it stated:

“We are not your employer. The consumer is your employer.” *Id.* at 7 (emphasis in original).

DISCUSSION

I. Under PERA, home help providers are not public employees of a public employer.

A. Argument

Michigan began allowing public-sector collective bargaining in 1965, with the enactment of PERA. Soon thereafter, the courts created a four-factor test to determine government employment. That test has been applied even as the Legislature has altered PERA's definition of "employee." An application of that test will show that home help providers are not government employees. Moreover, the last three amendments to PERA's "employee" definition show the Legislature meant to prevent novel organizing theories adding potential government employees.

1. Home help providers are not public employees under statutory definitions or case law.

a. Statutory definition of "public employee"

Currently, MCL 423.201(1)(e) states in pertinent part:

(e) "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) A person employed by a private organization or entity who provides services under a time-limited contract with this state or a political subdivision of this state or who receives a direct or indirect government subsidy in his or her private employment is not an employee of this state or that political subdivision, and is not a public employee. This provision shall not be superseded by any interlocal agreement, memorandum of understanding, memorandum of commitment, or other document similar to these.

...

(iii) An individual . . . whose position does not have sufficient indicia of an employer-employee relationship using the 20-factor test announced by the internal revenue service of the United States department of treasury in revenue ruling 87-41, 1987-1 C.B. 296 is not a public employee entitled to representation or collective

bargaining rights under this act.

As originally implemented in 1947 PA 336, the Hutchinson Act (which would eventually be transformed into PERA) merely mentioned “employee” in the prohibition of strikes provision:

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).

The enactment of PERA in 1965, which significantly altered state law concerning public employees, did not alter the definition of “employee” found in MCL 423.202. PERA was amended six times between its creation and 1994. None of the amendments altered the original definition in MCL 423.202.⁹

As part of 1994 PA 112, the employee definition was relocated to MCL 423.201(1)(e) and modified 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.

In 1996, MCL 423.201(1)(e)(i) was amended as part of 1996 PA 543 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, 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

⁹ 1965 PA 379; 1973 PA 25; 1976 PA 18; 1976 PA 99; 1977 PA 266; 1978 PA 441.

public employee.

Id. 1999 PA 204 added the irrelevant subsection (ii) to MCL 423.201(1)(e).

On March 13, 2012, subsection (iii), which adopted the 20-part IRS test for public employment and specifically excluded graduate student research assistants from being public employees, was enacted. On April 10, 2012, subsection (i) was modified to clarify that receipt of direct or indirect government subsidies does not make one a public employee. The amended language also stated explicitly that this provision could not be changed by an interlocal agreement. 2012 PA 76.

Thus, there are four relevant periods regarding the public employee definition: (1) the 1965 implementation of PERA to the 1996 amendment; (2) 1996 to March 13, 2012, when 2012 PA 45 became effective; (3) March 13, 2012, to April 10, 2012, when 2012 PA 76 became effective; and (4) April 10, 2012, to the present.

The certification took place in the second of these periods. The first and second purported collective bargaining agreements took place in period (2) as well. The purported collective bargaining extension took place in period (3).

b. Case law related to the meaning of “public employee” during periods (1) and (2) — i.e., from the passage of PERA to the passage of 2012 PA 45

Helpful guidance about the meaning of “public employee” is provided by case law during the period from PERA’s creation through the 1996 amendment to 2012 PA 45 — i.e., the periods (1) and (2) discussed above. Similar guidance is provided by case law from those periods regarding what constitutes a “public employer.” This case law will show that Michigan courts have relied on a four-factor test to determine whether there is a public employer-employee relationship, and that this test had been long established by 2005, when the Commission

improperly authorized a union election for home help providers.¹⁰ Under this test, Charging parties/Interested persons are not employees of MQCCC or any other putative public employer; rather, if they are employees of anyone, it is the home help consumers.

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 Court of Appeals set forth a four-factor test for identifying the 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 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. That led to a holding that the Road Commission — not either of the other two entities — was the public employer of the road workers. The Michigan Supreme Court, without applying the four-factor test, affirmed. *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), the Michigan Supreme Court faced the question of whether interns, residents and post-doctoral fellows who were “connected” with the University of Michigan Hospital were public

¹⁰ Much of the case law surrounding MCL 423.202 (where the public employee definition was located until 1994) 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 Prof 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. *Bd of Control of Eastern Michigan Univ v Labor Mediation Bd*, 384 Mich 561 (1971).

employees under PERA. The university claimed that the purported bargaining unit was comprised of students, not employees.

The Michigan Supreme Court disagreed. Without applying the four-factor test, it held that the personnel were both students and employees. Specifically, the court examined whether this group constituted employees. It noted that the university provided them with W-2 forms and withheld a portion of their pay 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. They performed many tasks for which their employer, the university, was compensated, and they were entrusted with important decisions, such as writing prescriptions, admitting and discharging patients, and performing surgeries with little to no supervision. *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. The court noted that: “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.

The Court of Appeals then examined the details of the Correctional Industries Act. While the court recognized that the act set up “trappings of conventional employment,” it held the act’s primary purpose was corrections, not employment. *Id.* at 332-33. Specifically, the Court of Appeals noted “education, counseling, treatment and recreation are viewed as the primary end served by providing work experience for inmates.” *Id.* at 336. Thus, although it did not apply the four-factor test, the court determined that the prisoners were not public employees.

Michigan courts have recognized doctrines involving multiple public-sector employers.

St Clair Prosecutor v AFSCME, 425 Mich 204 (1986). In *St Clair Prosecutor*, the Michigan Supreme Court adjudicated the question of who should serve as the public employer during collective bargaining with the county’s assistant prosecutors. In rendering its decision, the court recognized the concept of “coemployers.” *Id.* at 227.

The Michigan Supreme 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. The court 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, has the power “to control the number and remuneration” of the assistant prosecutors. *Id.* at 226. The court therefore held that the county prosecutor and the county board were coemployers and that both had a right to sit at the collective bargaining table. *Id.* at 227.

Genessee County Social Services Workers Union v Genessee County, 199 Mich App 717 (1993) raised questions similar to *St. Clair Prosecutor*. 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 the Commission’s *St. Clair Prosecutor* gloss that limited coemployer status to those who could hire and fire a worker due to a statutory grant.

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 under PERA in the case of stagehands at the Saginaw Civic Center. The stagehands performed work for the city, but the Saginaw Stage Employees 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 union filed a claim with the Commission contending that its workers were city

employees. The Commission agreed.

The Court of Appeals applied the four-factor test. *Id.* at 134-35. It reversed the Commission's finding and held that the union members were not city employees because the union, not the city, controlled the activity of the workers.

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 determination that it, and 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 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 248. The local education unions claimed that under the state school code, a consortium could not be an employer. The court 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 shares in common and which each might exercise separately." *Id.* at 250. Having determined that a consortium could have employees, the Court of Appeals affirmed the Commission's determination that the consortium, rather than the individual school districts, was the proper employer. The four-factor test was not used.

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*, was 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 was asked to decide whether the Michigan Department of Mental Health (DMH) was a joint employer of residential care workers at three private facilities operated by Louisiana Homes under an agreement with the state of Michigan.

The Court of Appeals held that DMH was a joint employer:

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.

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 (NLRB) had denied the union the ability to organize under the NLRA, specifically because “an employer health-care institution like Louisiana Homes” was too closely affiliated with Michigan’s DMH, an arm of the state. 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 impact of this decision was 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. *AFSCME*, 215 Mich App at 15.

According to the Michigan Senate Fiscal Agency's Bill Analysis for 1996 PA 543, *Louisiana Homes* and *AFSCME v Department of Mental Health* triggered the 1996 amendment to MCL 423.201(1)(e). 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.

In the time between the 1996 amendment and the enactment of 2012 PA 45 (i.e., period (2)), 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 (ISD), a unionization attempt that this Commission denied.

The Court of Appeals applied the four-factor test to hold 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.

c. Other case law

In *Harris v Quinn*, 656 F3d 692 (7th Cir 2011), a suit brought against the state of Illinois by home help providers, the Seventh Circuit held that the First Amendment was not violated when the unionization of the providers led to a union security clause that required the payment of either dues or agency fees. The court referred to the 1985 Illinois labor board decision¹¹ and the subsequent executive order contrary to the labor board’s holding. *Id.* at 695. The court also acknowledged the executive order in the Illinois unionization and the passage of a state law indicating that the home help providers were “employees solely for purposes of collective bargaining under Illinois law.” *Id.* at 697.¹²

The Seventh Circuit refused to accept that statutory contention; rather, it claimed the need to “consider the relationship itself and decide whether the State is an employer for purposes of compelling support for collective bargaining.” *Id.*

The Seventh Circuit found the State of Illinois to be joint employers with the consumers:

While the home-care regulations leave the actual hiring selection up to the home-care patient, the State sets the qualifications and evaluates the patient’s choice. And while only the patient may technically be able to fire a personal assistant, the State may effectively do so by refusing payment for services provided by personal assistants who do not meet the State’s standards. When it comes to controlling the day-to-day work of a personal assistant, the State exercises its control by approving a mandatory service plan that lays out a personal assistant’s job responsibilities and work conditions and annually reviews each personal assistant’s performance. Finally, the State controls all of the economic aspects of employment: it sets salaries and work hours, pays for training, and pays all wages—twice a month, directly to the personal assistant after withholding federal

¹¹ This was holding was discussed above in the Statement of Facts, Part B.

¹² Note that the Seventh Circuit decision could be read to imply that the state law preceded the executive order in the unionization of Illinois home help care providers. *Id.* at 695. In fact, the executive order, dated March 4, 2003, preceded the state law, which became effective July 16, 2003. It is questionable how an executive order could overcome the Illinois labor board’s interpretation of the statute, but clearly legislation could, assuming the legislation were constitutional.

and state taxes. In light of this extensive control, we have no difficulty concluding that the State employs personal assistants.

Id. at 698 (citations omitted). The court then held that if one joint employer is a governmental entity, compelled support for the union was appropriate under the United States Supreme Court's decision in *Abood v Detroit Board of Education*, 431 US 209 (1977). *Harris*, 656 F3d at 698.

The Seventh Circuit clarified that the employment relationship with the State was key:

We once again stress the narrowness of our decision today. We hold that personal assistants in the Illinois home-care Medicaid waiver program are State employees solely for purposes of applying *Abood*. We thus have no reason to consider whether the State's interests in labor relations justify mandatory fees outside the employment context. We do not consider whether *Abood* would still control if the personal assistants were properly labeled independent contractors rather than employees. And we certainly do not consider whether and how a state might force union representation for other health care providers who are not state employees, as the plaintiffs fear. We hold simply that the State may compel the personal assistants, as employees—not contractors, health care providers, or citizens—to financially support a single representative's exclusive collective bargaining representation.

Id. at 699. Essentially, the Seventh Circuit contradicted the 1985 Illinois state labor board's finding and held that the Illinois equivalent of DCH and/or DHS was an employer.

Here, however, even if the Seventh Circuit's reasoning were sound, the court's holding would not change the Charging parties/Interested persons' claim.¹³ If Charging party/Interested person were *arguendo* employees of the DCH of DHS, they would be regulated not by the Commission, but rather by the Civil Service Commission. Const 1963, art 11, § 5. Thus, the Commission's 2005 certification would still be improper.

The Michigan Supreme Court has held that for purposes of worker's compensation an individual who did work similar to home help workers was a public employee of what is now

¹³ The United States Supreme Court has distributed *Harris* three times for conference without deciding whether or not to grant certiorari. After the latest distribution, the Solicitor General was asked to file a brief expressing the views of the United States. <http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/11-681.htm>

DHS. *Walker v Dep't of Social Services*, 428 Mich 389 (1987). There is one key factual distinction between the employee in *Walker* and home help workers. In *Walker*, the Michigan Supreme Court noted that the worker had been hired by DHS's predecessor. *Id.* at 394. With home help workers, the care recipient is the one who does the hiring. This distinction has prevented home help workers from receiving workers' compensation when they are injured while performing services for the care recipient. See *Grossman v Michigan Dep't of Community Health*, WCAC Case No 05-0251 (discussing *Walker* and finding home help worker is not employee of the State). Just as with *Harris*, even if there were a controlling opinion holding that home help workers were employees of a State agency, that would merely give the Michigan Civil Service Commission jurisdiction, it would not provide subject matter jurisdiction to this Commission under PERA.

2. Analysis of public-employee status in periods (1) and (2) — i.e., from the passage of PERA to the passage of 2012 PA 45

In 2005, when the Commission improperly authorized the certification election for home help providers, the statutory language and the body of case law concerning public employees under PERA were clear. Both show that home help workers were not employees of the MQCCC or any other public employer, such as DCH or DHS. If they were public employees, they would have been employees of the DCH or DHS, not the MQCCC.

Under the statutory language of MCL 423.201(1)(e)(i) as it existed in periods (1) and (2), only those with long-term continual employment with a public employer were to be considered public employees. Home help providers did not meet that criterion. Assuming there is a contractual relationship between a public employer and the provider, it is at best indirect, between a state agency and the provider through the consumer. Home help providers do not contract with the state or MQCCC to make their services available. 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 1996 revision of the MCL 423.201(1)(e) was an attempt to reduce the pool of workers who could be organized into public employee unions. The Legislature was attempting to foreclose avenues to public employment, not open up novel ones.

A review of the four-factor test likewise shows that no public employment relationship is involved here. Under the test, a potential public employer is evaluated on these criteria:

(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 they have the power and control over the employee's conduct.

Wayne Co Civil Service Comm, 22 Mich App 294.

Applying this test, it is not the MQCCC that engages a particular provider; rather, it is the HHP consumers, a point that is explicitly acknowledged by the "collective bargaining agreement" between the MQCCC and the SEIU. Ex. 16 at 2. It is not the MQCCC that pays the home help providers; rather, it is the HHP consumers with the DCH's administrative assistance, as discussed in the DCH 2011 tax treatment letter. Ex. 26. It is not the MQCCC that has the power of dismissal over the provider; rather, it is the HHP consumers, as affirmed in the "collective bargaining agreement" and conveyed on the MQCCC website. Ex. 28 at 1. It is not the MQCCC that controls the hours that care will be provided to consumers; rather, it is the consumer, the provider, and the DHS, as noted in the "Medicaid and Long Term Care" ombudsman's document. Ex. 5 at 9. It is not the MQCCC that exercises control over the providers' work conduct; rather, it is the consumers, as explicitly stated in the collective bargaining agreement. Ex. 16 at 2. Hence, the MQCCC in no way qualifies as a public employer of home help providers under the four-factor test, and there is nothing to substantiate the claim that home help providers are public employees of the MQCCC.

It is true that as with the medical interns in *Regents of University of Michigan*, home help

providers do have a portion of their compensation withheld for “the purposes of federal income tax, state income tax, and social security coverage.” Before 2010, the tax treatment of home help providers was less clear, but as of that tax year, they all received W-2s. Ex. 26. But the W-2s list the consumer, not the MQCCC (or the DCH), as the employer. The DCH, not the MQCCC, is the entity running paycheck withdrawals for those home help providers who have taxes withheld. Also, unlike *Regents of University of Michigan*, no governmental unit charges or collects fees for the providers’ services.

Once again, there is nothing to substantiate the claim that home help providers are public employees of the putative public employer MQCCC. The certification of home help employees occurred in 2005, which was in period (2), the time between the 1996 PERA amendment and the passage of 2012 PA 45. The statute and the case law as they existed at that time clearly indicate that home help providers were not public employees of the MQCCC.

Nor can home help providers be considered public employees of the MQCCC under the joint-employer doctrine. This doctrine is meant to determine whether two employers should be combined into a single management entity for bargaining purposes. *St Clair Prosecutor*, 425 Mich at 224 n. 2 (citing *Pulitzer Publishing Co v NLRB*, 618 F2d 1275, 1279 (8th Cir 1980)). In order to establish the existence of a joint-employer relationship, the same four-factor analysis must be applied to each of the putative joint employers. As already shown, the MQCCC does not possess a single element of a potential employment relationship with home help providers and therefore cannot be part of a joint-employer entity.

Nor, for the same reason, would the coemployer doctrine apply. There is no indication that the MQCCC meets any of the criteria from the four-factor test. Therefore, the MQCCC cannot qualify as one of a group of coemployers. Further, because MQCCC cannot hire and fire

the providers, it cannot be a coemployer under *Genessee County Social Services Workers Union*.

Only the HHP consumer is undisputedly an employer. Assuming arguendo that a joint-employer or coemployer arrangement existed, the arrangement would not involve the MQCCC. Instead, it would involve the consumer and either the DHS, with its joint role in helping establish hours of care, or the DCH, with its role in issuing checks. The MQCCC, in contrast, does not rise even to these minimum potential qualifications.¹⁴

The consequences of the fact that home help providers were improperly certified in 2005 as public employees of MQCCC will be discussed below in Argument III.

3. The 20-factor IRS test and Period (3) — i.e., from the passage of 2012 PA 45 to the passage of 2012 PA 76.

Not surprisingly, given how recently 2012 PA 45 was passed, there is no Michigan case law on the application of the 20-factor IRS test. The United States Supreme Court discussed the proper statutory interpretation method when looking at a statute that uses the term “employee” where the “statute containing the term does not helpfully define it.” *Nationwide Mutual Ins Co v Darden*, 503 US 318, 322 (1992). The Supreme Court rejected the idea that where “employee” is not clearly defined, the courts should look at a statute’s broad “remedial purposes.” *Id.* at 326-27. Instead, courts are to apply the common-law test for identifying an “employee,” and the Supreme Court cited the IRS 20-part test as a helpful tool. *Id.* at 324.

The 20-factor test is most often used to determine whether a particular individual is either an independent contractor or an employee. Each factor is meant to weigh more toward one or the other, and the 20 factors are considered as a whole. The more control a potential employer has

¹⁴ In the Court of Appeals’ first *Louisiana Homes* ruling, the court held that licensing requirements and grant money alone are not sufficient to create an employment relationship. *Louisiana Homes*, 192 Mich App at 193. In the instant matter, the MQCCC does not reach even that threshold: It acts neither as a licensor nor as a payroll administrator.

over a worker, the more grounds for finding employment, rather than a contract relationship.

The 20 factors will now be addressed in the order the IRS presents them.¹⁵ As will become obvious, the test, which is constructed primarily to discriminate between employers and contractors, lists some factors that do not apply to the MQCCC at all, either as a potential employer or as a potential contractor.

a. Instructions

The MQCCC has no say over when, where, or how a home provider is to perform services for a consumer. This factor does not suggest an employer-employee relationship between the MQCCC and home help providers.

b. Training

The MQCCC merely offers voluntary training opportunities; there is no training requirement. Again, this does not suggest an employment relationship between the MQCCC and home help providers.

c. Integration

This factor considers whether the worker's services are integrated into the business' operation. This factor is really not applicable in the instant matter, since the MQCCC does not offer services for sale and thus has no traditional business operation. To the extent that a public service is involved, it is provided by the DHS and by the DCH (which is the designated Medicaid agency), not the MQCCC.

d. Services rendered personally

Under this test, the MQCCC would have more of an employer relationship with home help providers if it were equally involved in *how* the providers provided service as it would be in *whether* the provider provided the service. The MQCCC, to the extent that it has any relationship

¹⁵ These are attached as Exhibit 32.

with the providers at all, is primarily interested in designating and enumerating them for collective bargaining purposes. It does not attempt to enforce methods of service delivery and has no power to do so. This factor does not suggest an employment relationship.

e. Hiring, supervising, and paying assistants

A worker's hiring of assistants is one indicator of independent contractor status. Individual home help providers, by definition, do not hire home help assistants. By the same token, the MQCCC does not hire home help assistants either, and thus the MQCCC does not exhibit the behavior of an employer with regard to home help providers. To the extent hiring occurs, it occurs between the HHP consumers and the home help providers.

f. Continuing relationship

A continuing relationship between the worker and a putative employer tends to show employment. Here, the provider has a continuing and very personal relationship with the consumer, providing such services as feeding, toileting, bathing, grooming and dressing in the HHP's consumer's home. The home help provider has no such relationship with the MQCCC.

g. Set hours of work

The hours of care are set after a doctor identifies a need; the DHS means-tests the consumer; and the DHS determines which tasks the consumer needs to have performed and how many hours are required to perform them. The MQCCC has no role in this process.

h. Full time required

An employer is usually in a position to claim full-time work from an individual and effectively to preclude that person from working elsewhere. The MQCCC has no such relationship with a home help provider. (To some extent, in contrast, the HHP consumer does.)

i. Doing work on the employer's premises

The home help provider works in the consumer's home, not at the MQCCC. Thus, this

factor does not suggest the MQCCC is the home help provider's employer.

j. Order or sequence set

The MQCCC has no role in determining the order in which providers supply their services to consumers. Nor does the MQCCC have the ability to influence that order. Again, this factor does not suggest the MQCCC has an employment relationship with home help providers.

k. Oral or written reports

Providers do not give any oral or written reports to the MQCCC, again suggesting the lack of an employee-employer relationship.

l. Payment by hour, week, month

Providers are paid monthly, which generally points to an employer-employee relationship. But the providers are not paid by the MQCCC; rather, the DCH issues a check from the State of Michigan to the provider and consumer. Ex. ___ The MQCCC does not issue any payment, and it does not have a budget sufficient to compensate providers. To the extent that the method of payment shows an employment relationship between anyone other than the provider and consumer, it would be between the provider and the DCH.

m. Payment of business and/or traveling expenses

The MQCCC does not pay either business or traveling expenses for home help providers, again failing to suggest an employment relationship.

n. Furnishing of tools and materials

The MQCCC does not furnish any tools or materials to home help providers. Furnishing such tools or material would tend to suggest an employer-employee relationship.

o. Significant investment

This factor looks at whether the worker invests in facilities that he or she uses in

performing services. Typically, a worker's lack of investment in facilities points to employment, since it indicates the worker's dependence on the employer for maintaining the means of performing the work and receiving income.

This factor suggests an employee-employer relationship between a home help provider and the HHPs consumer, since the "facility" is the consumer's home. This factor does not suggest an employee-employer relationship between a home help provider and the MQCCC, since the MQCCC provides no home help facilities for providers.

p. Realization of profit or loss

Typically, a worker must have a risk of loss in order to be an independent contractor. Generally, this risk is realized through investments and expenses — for example, salaries for subordinate employees. Home help providers normally will not suffer a loss, but if this suggests an employment relationship, it suggests employment by the consumer, the DCH or both. It does not indicate employment by the MQCCC, which does not pay the home help provider.

q. Working for more than one firm at a time

An independent contractor is more likely to perform services for multiple clients. A minority of home help providers do provide services for more than one HHP consumer. The MQCCC is powerless to limit the number of consumers a home help provider works for.

r. Making service available to the general public

Offering services to the general public is more typical of an independent contractor. Most home help providers, however, work with a single consumer. Again, to the extent that this suggests an employment relationship, it is between the home help provider and the consumer, not between the home help provider and the MQCCC.

s. Right to discharge

By the express terms of the purported collective bargaining agreement, and by the repeated statements of the DCH and the MQCCC, only the consumer has the right to discharge a provider. The MQCCC does not. This factor does not suggest an employer-employee relationship between the MQCCC and home help providers.

t. Right to terminate

A worker's ability to end the relationship without incurring liability generally indicates an employer-employee relationship. In the case of home help providers, providers can stop providing care without liability.

But again, the relationship in question is between the provider and the consumer, not between the provider and the MQCCC. This factor does not indicate an employee-employer relationship between home help providers and the MQCCC.

Now consider the 20 factors as a whole. Note that in general, an application of the 20-factor test finds that a worker is either an independent contractor or an employee. In the instant case, however, as the analysis above indicates, home help providers have *neither* relationship with the MQCCC. Not only are they not employees of the MQCCC; they are not even independent contractors with the MQCCC.

The 20-factor analysis shows that home help providers and the MQCCC have no employer-employee relationship. The State of Michigan does recognize an employer-employee relationship, but it is between the consumer and the provider, as indicated by the State's current role as the consumers' tax reporting agent and issuance of W-2s to all home help providers on behalf of HHP consumers. Indeed, no mention is made of the MQCCC on the 2011 DCH tax-explanation document mailed to the home help providers explaining tax withholdings. Ex. 26.

A finding that home help providers are employees of the consumers does not foreclose a

finding that there could be a coemployer or joint employer. *Vizcaino v United States Dist Court for the Western Dist of Washington*, 173 F3d 713, 723-25 (9th Cir 1999). But under the language added to PERA by 2012 PA 45, each potential employer must now be judged on the 20-factors, which definitively shows that the MQCCC is not an employer of home help providers.

4. The effect of the federal decision and 2012 PA 45 on the April 9, 2012 extension of the collective bargaining agreement

2012 PA 45 conclusively ended any confusion over the employment status of home help providers; as of the effective date of that act, they are not public employees subject to unionization under PERA. The only issue potentially complicating home help providers' current employment status is the federal court's opinion.

Note first that even if the federal court ruling were found to be well-grounded, it would be only persuasive, not binding, under doctrines of claim and issue preclusion.

Claim preclusion (aka *res judicata*) applies where:

(1) there has been a prior decision on the merits, (2) the issue was either actually resolved in the first case or could have been resolved in the first case if the parties, exercising reasonable diligence, had brought it forward, and (3) both actions were between the same parties or their privies.

Bennett v Mackinac Bridge Auth, 289 Mich App 616, 630 (2010). Issue preclusion (aka collateral estoppels) applies where:

(1) a question of fact essential to the judgment was actually litigated and determined by a valid and final judgment, (2) the same parties had a full and fair opportunity to litigate the issue, and (3) there was mutuality of estoppel.

Estes v Titus, 481 Mich 573, 585 (2008).

Neither doctrine applies. In the federal action, home help providers who did not believe the unionization was proper were not present. The parties sued by the SEIU were all governmental officials. It is true that the federal court ruling did contain a short section on the public-employee issue, but the analysis did not cover the controlling cases or statute. The ruling

missed 2012 PA 45 completely. This is not too surprising, given that the opinion was issued in the rush of a request for a temporary restraining order and a preliminary injunction. The public-employee issue was only one of a myriad of matters that the court considered.

The federal court's opinion was predicated on the view that a valid collective bargaining agreement existed between MQCCC and SEIUHM. The court then concluded that under the Contract Clause of the federal constitution, the collective bargaining agreement should be enforced for the full duration of the contract. By extension, the court also assumed the validity of the April 9, 2012 extension of the contract — already signed when she ruled — from September 21, 2012, to February 28, 2013.

The federal court's failure to consider 2012 PA 45, however, is pivotal. Examining 2012 PA 45 and applying the court's own logic to the case produces a very different result — specifically, that the SEIU's ability to continue collecting dues under the collective bargaining agreement will end on September 20, 2012, not on February 28, 2013. The reasoning is straightforward. As shown above, 2012 PA 45 invoked a 20-factor IRS employment test, which, upon examination, clearly demonstrates the MQCCC is not the employer of home help providers. As a result, as of March 13, 2012 (the effective date of 2012 PA 45), home help providers could no longer be considered public employees (assuming they ever could have been). Hence, even if the collective bargaining agreement was valid prior to the passage of 2012 PA 45, the April 9, 2012 extension of the second so-called collective bargaining agreement between the MQCCC and SEIUHM was illegal, because its basis in PERA had been removed by 2012 PA 45. Thus, even under federal court's construction, which looked only superficially at the statute and the original certification, the April 9, 2012 extension is void and the so-called collective bargaining agreement will expire on September 20, 2012. Any so-called “dues” or “agency fees”

being collected from the Charging parties/Interested persons must cease on that date.

II. The interlocal agreement in the instant matter cannot be used to expand the statutory definition of “public employee” to include home help workers.

A. Argument

1. The purported “interlocal agreement” between the DCH and TCAC was improper.

The interlocal agreement reached between the DCH and TCAC 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 two or more counties, townships, cities, villages or districts, or any combination thereof 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;

Id. (emphasis added). An interlocal agreement requires at least two local governmental entities.

The interlocal agreement that sought to create the MQCCC was between “the DEPARTMENT OF COMMUNITY HEALTH, a principal department of the State of Michigan, and the TRI-COUNTY AGING CONSORTIUM, a Michigan public body corporate and politic.” Ex. 10 at 2.

Thus, that document does not involve any local government entity: TCAC is not a county, township, city, village or district, and neither is the DCH. Hence, the agreement does not meet the conditions of Const 1963, art 7, § 28.

2. The interlocal agreement did not confer on the contracting parties (and by extension, the Commission) legislative power to expand PERA’s definition of “public employee” to include home help providers.

The Urban Cooperation Act indicated 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” MCL 124.505(g).

Not surprisingly, the Urban Cooperation Act is entirely silent about the concept of collective bargaining, since that subject is exhaustively covered by PERA. But under PERA, as noted above in Argument I, home help providers cannot be considered an employee of the MQCCC, nor can that entity be considered their employer.

Furthermore, Const 1963, art 3, § 7 requires that: “The 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 departments, boards, commissions, and other agencies of state government, counties, municipalities, boards of education; in fact any and all branches of the government while engaged in the performance of a governmental function.” OAG, 1941-1942, p 247 (July 25, 1941).¹⁶ In this 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. . . .

Id. See also OAG 1947-1948, No 29, p 170 (June 6, 1947); OAG 1947-1948, No 496, p 380 (August 12, 1947); and OAG 1951-1952, No 1368, p 205 (March 21, 1951).

The Michigan Supreme Court has described the prevailing view of public-sector collective bargaining in 1941: “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

¹⁶ The Attorney General did not assign numbers to opinions at that time.

comparative infancy and portended no suggestion that it ever might enter the realm of Public employment.” *Wayne Co Civil Service Comm v Bd of Supervisors*, 384 Mich 363, 372 (1971).

In 1943, in *Fraternal Order of Police v Harris*, 306 Mich 68 (1943), the Michigan Supreme Court upheld the firing of a police officer for joining the Fraternal Order of Police. The majority stated that “those who enforce the law, must necessarily surrender, while acting in such capacity, some of their presumed private rights,” such as the right to join an association. *Id.* at 79. See also *State Lodge of Michigan, Fraternal Order of Police v Detroit*, 318 Mich 182 (1947).

On July 3, 1947, the Hutchinson Act was passed. This act stated that striking public employees could be dismissed from their jobs and stripped of benefits. *Id.* at §§ 2, 4. 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 Constitution of 1963, the common law regarding public-employee collective bargaining was that public entities could not engage in mandatory collective bargaining; that at least some employees (police) could be fired for joining unions;¹⁷ 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 state department through a contract with a “local agency” like TCAC to change the common-law presumption against collective bargaining.

PERA was a significant change from the common law, and it allowed many workers to be classified as public employees who could engage in collective bargaining. Nevertheless, any

¹⁷ In *Escanaba v Labor Mediation Board*, 19 Mich App 273 (1969), following the enactment of PERA, this Court stated 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.

expansion of the people covered by PERA would be a further change, amendment, or repeal of the common law, and it would necessarily require legislative action. This is so because all legislative power of the State is vested in the Legislature. Const 1963, art 4, § 1.

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 1965, shortly after the new constitution was adopted, the Legislature used this power with the enactment of PERA, changing much of the law related to public-sector employment by authorizing public-sector collective bargaining. The Legislature nevertheless retained some portions of the Hutchinson Act, such as the prohibition of strikes by public employees.

If the state of Michigan wishes to permit the creation of a public-employee union of all private-sector home help providers, it must accomplish this dramatic shift from the traditional employer-employee model through the passage of legislation (or a constitutional amendment). This is due to specific requirements of Michigan’s Constitution. The failure to comply with these requirements renders improper and illegal the DCH’s garnishing of purported “union dues” from the Medicaid subsidies issued to HHP consumers for the payment of home help providers.

III. Because the Commission lacked subject-matter jurisdiction over home help providers, the 2005 certification was void ab initio.

A. Argument

It is undisputed that a purported union election occurred in 2005. The effect of the election is entirely dependent on the central legal issue in this case: whether home help providers are public employees. The conclusion that they are not public employees either under PERA or through some heretofore unknown transformative power of interlocal agreements means that the Commission's certification was void for lack of subject-matter jurisdiction.

In *Lansing v Carl Schlegel, Inc*, 257 Mich App 627 (2003), the Court of Appeals upheld a Commission ruling that the Commission's "subject-matter jurisdiction" is limited to public employees. *Id.* at 629. The Court of Appeals stated that PERA "addresses the bargaining rights and privileges of public employees, using the term 'public employee' to distinguish those individuals covered under PERA from private employees." *Id.* at 631.

The Commission's lack of subject-matter jurisdiction would void its certification of the SEIU as the bargaining agent for home help providers:

When there is a want of jurisdiction over the parties, or the subject-matter, no matter what formalities may have been taken by the trial court, the action thereof is void because of its want of jurisdiction, and consequently its proceedings may be questioned collaterally as well as directly. **They are of no more value than as though they did not exist.**

Jackson City Bank Trust Co v Fredrick, 271 Mich 538, 544-45 (1935) (emphasis added); see also *Bowie v Arder*, 441 Mich 23, 54 (1992) ("When a court lacks subject matter jurisdiction to hear and determine a claim, any action it takes, other than to dismiss the action, is void.").

As a result of the lack of legitimate certification, no collective bargaining unit exists; home help providers are not governed by a collective bargaining agreement; there is no authority requiring them to pay "dues" or "agency fees"; and so-called "dues payments" taken from checks

were and are improper. Charging parties/Interested persons should be permitted to retrieve up to six months of money previously collected as so-called “union dues” and “agency fees.” Alternatively, should the Commission find that there is no mechanism for seeking return of these improperly collected monies, this Commission should still declare the 2005 certification was void ab initio and halt collection of all future “union dues” and “fee payments.”

1. The effect of the federal decision and the state of PERA in 2005 on the April 9, 2012 extension of the collective bargaining agreement

As noted above, the doctrines of claim and issue preclusion make the federal court’s opinion merely persuasive, not binding, in the instant matter. Charging Parties/Interested Persons lack privity with any of the three state defendants in the federal suit.

It is true that the opinion did contain a short section discussing MCL 423.201(1)(e) as it existed in 2005. But this analysis was cursory. No mention was made of the four-factor test. No discussion was made of any Michigan case law on the subject or on the legislative history of PERA. Although the Michigan Court of Appeals has stated that there is no “all-inclusive operational definition of the term ‘public employee’” in PERA, *Prisoners’ Labor Union*, 61 Mich App at 330, the federal judge decided this matter solely on the basis of a short, conclusory textual analysis of that same statute.

The unionization of 41,000 home help providers in 2005 was a significant legal event in Michigan due not only to the unprecedented size of the so-called bargaining unit, but also to the novel labor theory applied to achieve it. The fact that this Commission did not explore the issue of whether these workers were public employees is startling. It stands in stark contrast to the Commission’s actions in the second *Loiusiana Homes* decision, where the Court of Appeals praised the Commission for addressing a jurisdictional matter sua sponte: “Our review of the MERC’s written decision discloses that the MERC recognized that its jurisdiction might be

questioned, and, therefore, it, sua sponte, undertook to address the issue of NLRA preemption before proceeding to a decision on the merits.” *Louisiana Homes*, 203 Mich App at 220.

This body exists to decide questions of precisely this kind. The Commission’s failure to address the issue of public employment in the case of home help providers has relegated the initial determination of this important state labor question to a federal judge. Unfortunately, the federal court’s analysis is not sufficient given the complexity of the issues involved. In light of the amount of the money that has since been diverted and the political tumult that has ensued, the Commission should (finally) consider whether the 2005 certification was ever proper within the full context of PERA’s history and the relevant case law.

A determination that the 2005 certification was improper would, under the logic of the federal court’s analysis of the Contract Clause, render the collection of “union dues” and “agency fees” improper, since there would be no valid collective bargaining agreement to authorize them.

2. Laches

SEIU Local 79 may contend that laches applies to any claim seeking a return of “dues” or “agency fees.” The Michigan Supreme Court has stated, “The doctrine of laches is concerned with unreasonable delay, and it generally acts to bar a claim entirely, in much the same way as a statute of limitation.” *Mich Educ Employees Ins Co v Morris*, 460 Mich 180, 200 (1999). But, the doctrine of laches does not apply if a claim is within the statute of limitations. *Id.* MCL 423.216(a) allows unfair labor practice charges to be brought within 6 months. Thus, a return of any fees within that period can clearly be sought.

Further, absent express statutory authority, administrative agencies lack the power to

apply equity.¹⁸ *Delke v Scheuren*, 185 Mich App 326, 332 (1990). PERA does not provide the Commission with equitable power, and in fact, MCL 423.216(h) indicates that equity is to be sought at an appropriate circuit court.

IV. The April 9, 2012 extension of the collective bargaining agreement was improper due to a conflict of interest.

A. Argument

1. An exchange of significant sums of money between an employer and a collective bargaining agent during the conduct of negotiations voids any agreement made during that period.

The collective bargaining agreement extension signed on April 9, 2012, sought to continue the agreement from September 21, 2012, to February 28, 2013. As noted above, the MQCCC was not funded by the Legislature in fiscal 2011-2012. To cut costs, the MQCCC moved to its director's home. The council also accepted a \$12,000 gift from the SEIU in January 2012. The issue presented is whether this gift caused an inherent conflict of interest that would void the collective bargaining extension.

It is proper to disqualify a party from the collective bargaining process when there is a "clear and present danger of a conflict of interest interfering with the bargaining process." *NLRB v North Shore Univ Hospital*, 724 F2d 269, 273 (1983). Further, "It is well settled that a union may not represent the employees of an employer if a conflict of interest exists on the part of the union such that good-faith collective bargaining between the union and the employer could be jeopardized." *Massachusetts Society for Prevention of Cruelty to Children v NLRB*, 297 F3d 41, 48-49 (1st Cir 2002). Typically in these cases, it is the employer who alleges a conflict of interest. The employer then faces a "considerable" burden to mount a conflict-of-interest disqualification

¹⁸ Indeed, the Commission's inability to apply equitable principles to the instant matter is precisely why Charging Parties/Interested persons are precluded from seeking the return of all improperly charged "dues" or "agency fees" under unjust enrichment or any other equally applicable equitable principle.

against a bargaining agent. *Id.* at 49.

In *Local 1814, International Longshoreman's Association, AFL-CIO v NLRB*, 735 F2d 1384 (DC Cir 1984), an employer gave kickbacks to high-level union officials. Over three consecutive years, these kickbacks amounted to \$15,000, \$16,000, and \$28,700, respectively. *Id.* at 1389. The NLRB noted, “[A]t or about the same time . . . contract modifications” were being negotiated, “concealed payments of large sums of money were changing hands.” *Id.* The board held, “*We find that these concurrent actions operated to taint and undermine the bargaining relationship between [the parties] and the contract which was negotiated by them while the payments were being made.*” *Id.* at 1392 (emphasis in DC Cir opinion). Due to the taint of the monetary exchange, the NLRB ordered an end to the union’s certification and a termination of the collective bargaining agreement negotiated during that time. The union and the employer were further ordered to return all dues paid by employees under the collective bargaining agreement negotiated during this period. *Id.*

In the instant matter, the conflict is obvious. The MQCCC needed money to survive and do even minimal things like make a token payroll. In turn, SEIUHM needed the continued existence of the MQCCC, so that the union would have something to nominally “bargain” against in order to extend the contract and continue collecting dues money.

Thus each had an incentive to protect the other. This incentive could easily have prevented the best possible agreement from being negotiated for home help providers. The suddenness of the six-month extension of the previous terms is itself curious. It is not difficult to believe — and under conflict of interest doctrines, should be presumed — that the SEIU was more interested in surviving as a collective bargaining agent than in pursuing providers’ best interests, even as the MQCCC was more interested in its survival than in engaging in effective

collective bargaining.

The April 9, 2012 extension of the collective bargaining agreement should be voided as the product of a conflict of interest. The collection of so-called “union dues” and “agency fees” after September 20, 2012, would therefore be improper. Furthermore, no new collective bargaining agreements or extensions would be valid due the passage of 2012 PA 76. Clearly, even if home help providers qualified as public employees prior to the passage of that act, 2012 PA 76 would change their status on April 10, 2012, the act’s effective date.

Hence, at the very least, the collection of so-called “union dues” and “agency fees” should end on September 20, 2012, and further such collections from home help providers should be prevented in the future.

2. Impact of the federal decision in light of the conflict-of-interest analysis.

As noted above, due to the lack of privity, the doctrines of claim and issue preclusion make the federal court’s opinion merely persuasive, not binding, here.

Again, the court’s opinion was predicated on the view that a valid collective bargaining agreement existed between the MQCCC and SEIUHM. The federal judge then concluded that under the Contract Clause of the federal constitution, the collective bargaining agreement should be enforced for the full duration of the contract. The judge also implicitly assumed the validity of the April 9, 2012 extension of the contract.

But it has now been shown that this collective bargaining extension should be voided due to a conflict of interest between the negotiating parties. Thus, even were this body to consider itself bound by the federal court’s Contract Clause reasoning, the payment of dues and fees must end on September 20, 2012, since that is the last day anyone can claim there was a valid contract.

CONCLUSION

The 2005 certification was void ab initio. Therefore, the removal of “dues” and “agency fees” has been improper from the start. But Charging Parties/Interested Persons are not seeking a return of all dues and fees collected. Rather, Charging Parties/Interested Persons are seeking all dues and fees collected within the last six months, the statute of limitations for an unfair labor practice. Alternatively, if the money improperly collected as “union dues” and “agency fees” cannot be returned, the Commission should still declare the 2005 certification void ab initio and halt the collection of all so-called “union dues” and “agency fees” prospectively.

If the Commission chooses (again) not to examine the subject-matter jurisdictional question of whether home help providers were public employees at the time of the certification, the collection of dues and fees should still stop after September 20, 2012, for two reasons.

The first reason is the passage of 2012 PA 45. Application of the 20-factor test incorporated in the act conclusively shows that home help providers are not public employees of the MQCCC, the purported public employer. Since the effective date of this act (March 13, 2012) predated the contract extension (signed April 9, 2012), the contract extension was void because the extension was in violation of the law of the state at the time it was signed.

If the Commission does not find 2012 PA 45 controlling, the collection of dues and fees should still stop after September 20, 2012, for a second reason: the conflict of interest surrounding the April 9, 2012 extension and the subsequent passage of 2012 PA 76. The contract extension occurred during a time in which a significant amount of money was transferred from the SEIU to the MQCCC. Thus, the extension is void due to a conflict of interest. Without the April 9, 2012, extension, 2012 PA 76 would render improper any renewal of the collective bargaining agreement after April 10, 2012, the act’s effective date. Thus, when the second so-

called collective bargaining agreement expires on September 20, 2012, the collection of so-called “union dues” and “agency fees” must be terminated. No future extension is possible because of 2012 PA 76 (and 2012 PA 45, if properly interpreted).

The Commission could be concerned about the federal court ruling discussed in this brief. Even though the federal court’s ruling is merely persuasive due to a lack of privity, it is nevertheless true that a federal court has invoked the Contract Clause of the federal constitution to maintain the flow so-called “union dues” and “agency fees” until February 28, 2013, the putative end of the extension of the so-called collective bargaining agreement.

But the Commission can still apply its expertise to the state labor law question of whether the original certification was valid. As detailed above, it was not. Also the Commission can apply its expertise to the state labor law question of whether the collective bargaining contract extension was valid. For multiple reasons, also discussed above, it was not.

A focus on the state labor law issues leaves the federal court’s Contract Clause analysis intact. If the Commission determines that the original certification was in fact invalid, then the Contract Clause analysis is not challenged; rather it is rendered moot because there was no valid contract to begin with. Similarly, if the Commission were to rule only that the contract extension was invalid (either under 2012 PA 45 or due to the conflict of interest), the federal court’s Contract Clause analysis again remains intact, but now applies only to an earlier, still “valid” iteration of the contract — one that ends on September 20, 2012, rather than February 28, 2013.¹⁹

¹⁹ The Commission should note its decision will have an additional impact if the people approve Proposal 4 of 2012, a proposed constitutional amendment to appear on the Michigan ballot in November. That amendment would essentially place the MQCCC in the constitution (although it would be named the Michigan Quality Home Care Council). Home help providers would be allowed to unionize. Further, Proposal 4 would perpetuate the union’s status as a collective bargaining agent for home help providers unless the collective bargaining is recognized as having expired prior to the November election:

[The Home Care Council] shall assume and succeed to the authorities, duties and obligations of

RELIEF REQUESTED

For the above reasons, the Commission should declare the original certification void ab initio, order the return of the last six months of so-called “union dues” and “agency fees,” and declare improper any future collection of so-called “union dues” and “agency fees.” Alternatively, the Commission should terminate the collection of so-called “union dues” and “agency fees” after September 20, 2012 and declare improper any future collection of so-called “union dues” and “agency fees.”

Respectfully Submitted,

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the Michigan Quality Community Care Council to the extent consistent with this Section, including any obligations to recognize provider representatives and to honor any unexpired agreements (to the extent of a term not to exceed 3 years) with such representatives, as last incurred or entered into by that Council prior to the adoption of this Section.

http://www.michigan.gov/documents/sos/MI_Quality_Homecare_392138_7.pdf at ¶ 4 (emphasis added). Thus, if the proposal passes and the Commission finds that either the original bargaining agreement or the recent contract extension is invalid, a new signature drive and a new certification election would be necessary before a new union could be certified as a collective bargaining agent. If, on the other hand, the proposal passes and the Commission holds the contract extension to be valid, a decertification drive by home help providers would be necessary before the unionization could be terminated.