STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

Michigan Quality Community Care Council,
Public Employer-Respondent,

-and-

SEIU Healthcare Michigan,
Labor Organization-Respondent,

-and-

PATRICIA HAYNES,
Individual-Charging Party

-and-

Case Nos. C12 I-183, C12 I-184,
CU12 I-042, and CU12 I-043

STEVEN GLOSSOP,
Individual-Charging Party.
_____/

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RESPONSE TO ORDER TO SHOW CAUSE

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BACKGROUND

The instant matter concerns one of three times that the Commission has failed to properly address its own subject-matter jurisdiction sua sponte in the last seven years. An examination of the events surrounding the other two cases provides important context for the current matter.

It is absolutely clear that the Commission has subject-matter jurisdiction only over public employees.[1] 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.

Subject-matter jurisdiction cannot be enlarged by the courts or by consent of the parties. *In re Hatcher*, 443 Mich 426, 433 (1993). Jurisdictional defects may be raised at any time, even on appeal. *Polkon Charter Twp v Pellegrom*, 265 Mich App 88, 97 (2005). Courts are required to question their own jurisdiction sua

[1] There is one caveat: Under the Michigan Labor Relations and Mediation Act, the Commission also regulates small-scale private-sector unionization not governed by the National Labor Relations Act. Nevertheless, the unionization in the instant matter does not involve private-sector unionization or private-sector employees; rather, it explicitly involves public-sector unionization.

sponte. *Straus v Governor*, 459 Mich 526, 532 (1999). In 2003, the Court of Appeals held that the requirement to examine jurisdiction sua sponte applied to the Tax Tribunal, an administrative agency:

> Petitioner asserts that the Tribunal erred in ruling sua sponte. However, our Supreme Court, in *Fox v University Board of Regents*, 375 Mich 238, 242 (1965), stated that a court (here the Tribunal):
>
> > At all times is required to question sua sponte its own jurisdiction (whether over a person, the subject matter of an action, or the limits on the relief it may afford.

General Products Delaware Corp v Leoni Twp, unpublished per curiam of the Court of Appeals, decided (May 8, 2003) (Docket No. 233432). The Commission has previously recognized the need to examine its jurisdiction: "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." *Michigan Council 25, American Federation of State, County, and Municipal Employees v Louisiana Homes*, 203 Mich App 213, 220 (1993).

The three instances in which the Commission failed to invoke these clear rules concern: (1) the home help workers involved in the instant matter; (2) home-based day care workers, R06 I-106; and (3) graduate students at the University of Michigan, R11 D-034.

Before addressing these three instances and their applicability to the instant matter, a couple of general propositions will be discussed. First, public-sector

unionism is not a federal constitutional right. In *Smith v Arkansas State Highway Employees, Local 1315*, 441 U.S. 463 (1979), the U.S. Supreme Court discussed workers' First Amendment right to join a union: "The First Amendment protects the right of an individual to speak freely, to advocate ideas, to associate with others, and to petition his government for redress of grievances. And it protects the right of associations to engage in advocacy on behalf of their members." *Id*. at 464. In that same decision, however, the court clarified that the states are not obligated to engage in collective bargaining with public-sector unions — in other words, that public-sector unions have no First Amendment right to engage in collective bargaining:

> The First Amendment right to associate and to advocate provides no guarantee that a speech will persuade or that advocacy will be effective. The public employee surely can associate and speak freely and petition openly, and he is protected by the First Amendment from retaliation for doing so. But the First Amendment does not impose any affirmative obligation on the government to listen, to respond or, in this context, to recognize the association and bargain with it.

Id. at 464-65. Thus, the decision whether to allow public-sector bargaining belongs to each state, and states can choose to permit anything from wide-spread public-sector bargaining to no public-sector bargaining at all.

Where a state does allow public-sector bargaining, the choice to allow mandatory agency fees, as under Michigan's MCL 423.210(2), leads to serious constitutional questions. Because a public-sector union takes many positions

during collective bargaining that have powerful political and civic consequences, the compulsory fees constitute a form of compelled speech and association that imposes "significant impingement on First Amendment rights." *Knox v Service Employees International Union, Local 100,* 132 SCt 2277, 2289 (2012).

In Michigan, the scope of public-sector unionism is governed by only two entities: (1) the Legislature through Const 1963, art. 4, § 48; and (2) the people through a constitutional amendment. By passing PERA in 1965, the Legislature began allowing those "public employees" not under the jurisdiction of the Civil Service Commission to unionize.[2]

Neither a court nor an administrative agency can exercise legislative power and alter legislation:

> Simply put, legislative power is the power to make laws. In accordance with the constitution's separation of powers, this Court "cannot revise, amend, deconstruct, or ignore [the Legislature's] product and still be true to our responsibilities that give our branch only the judicial power." While administrative agencies have what have been described as "quasi-legislative" powers, such as rulemaking authority, these agencies cannot exercise legislative power by creating law or changing the laws enacted by the Legislature.

[2] Proposal 12-2 was an attempt to place public-sector bargaining in the Michigan Constitution and potentially broaden the class of those who could unionize. It was rejected by the voters 57% to 43%.

In re Complaint of Rovas Against SBC Ameritech, 482 Mich 90, 98 (2008). In Michigan, to protect the separation-of-powers principle, agency interpretations of a statute are reviewed de novo. *Id*. at 102.

Michigan's de novo review standard stands in marked contrast to the federal administrative system, wherein the federal courts defer to agency interpretations of statutes under the doctrine from *Chevron USA Inc v Natural Resources Defense Council*, 467 US 837 (1984). But even under the generally deferential federal model, the federal courts will look at a decision that expands an agency's jurisdiction with heightened scrutiny. For example, in *Brown & Williamson Tobacco Corp v Food and Drug Admin*, 153 F3d 155 (1998), the Fourth Circuit stated: "[t]he more intense scrutiny that is appropriate when the agency interprets its own authority may be grounded in the unspoken premise that government agencies have a tendency to swell, not shrink, and are likely to have an expansive view of their mission." *Id*. at 162 (internal citation omitted).

Except for Michigan's rejection of *Chevron* deference, the legal principles set out above were all clearly established in 2005, the year the Commission was presented with the representation request in the instant matter. The proposed "number of employees in unit" in that representation request, 41,000, was huge.[3]

[3] The undersigned presumes that this unit was at least a couple times larger than any unit previously considered by MERC. The presumption is that the Detroit

(Note continued on next page.)

There was no geographical limitation to the unit other than the state's borders. Any home help provider in the state of Michigan was alleged to be within the bargaining unit. The proposed employer was the Michigan Quality Community Care Council, which was alleged to employ all "individuals who provide personal assistance services to elderly persons and persons with disabilities . . . under the Michigan Home Help Program and other programs and personal assistance services."

A strong argument can be made that any proposed 41,000-member statewide unit would be under the jurisdiction of the Civil Service Commission, not the Commission. But that was not that the only indication that the Commission's subject-matter jurisdiction was in doubt. As part of the original representation petition, the parties submitted a document that stated:

> 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.

While this document sought to alleviate a jurisdictional concern, it shows that the parties knew that jurisdiction was questionable (at best). The fact that parties

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School District teachers represented by the Detroit Federation of Teachers was the largest unit certified by the Commission. That unit was certified in 1967. *Abood v Detroit Bd of Educ*, 431 US 209, 211-12 (1977). Recent news reports have the unit at a little over 5,000 members.

cannot consent to jurisdiction is a second reason that the Commission should have examined the question in 2005. A third reason to examine jurisdiction in 2005 was that was the two states, Illinois and California, that had legally examined whether home help providers were public employees under their labor laws had both found that they were not. *Service Employees International Union, Local 434 v Los Angeles Co*, 275 Cal Rptr 508 (Cal Ct App 1991); and *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).

Despite the above, an election was held. The vote was 6,949 in favor with 1,007 opposed. SEIU Healthcare's predecessor was certified on April 19, 2005.

The second group to be certified without a jurisdictional determination was home-based day care providers. The representation in that matter was filed in September of 2006. Ex. 33. The proposed unit was 40,532 members and included everyone within the state who was a "home-based child care provider[] receiving reimbursement payments from the Michigan Child Care Development & Care Program." With this election, there were 5,921 votes in favor and 475 opposed. The results were certified on November 27, 2006.

Two lawsuits were eventually filed related to this certification. On behalf of three providers, the undersigned filed a mandamus action against the Department of Human Services in the Court of Appeals contending that the home-based day

care providers were not public employees. *Loar v Dep't of Human Services*, Court of Appeals No. 294087. During the entirety of the litigation, DHS pointedly refused to argue that home-based day care providers were public employees and argued procedural matters only.

In the second lawsuit, *Schlaud v Granholm*, 1:10-cv-00147-RJJ, the plaintiffs were home-based day care providers who alleged that their unionization as public-sector employees violated their First Amendment rights. In that proposed federal class action case, Governor Granholm and the Director of DHS were sued. While discussing the Commission and public employees, the defendants explicitly declined to assert that home-based day care providers are public employees:

> The regulatory agency created to administrate PERA is the Michigan Employment Relations Commission (MERC). MERC has the authority under PERA to determine appropriate bargaining units of public employees.[3]
>
> [3] . . . Defendants Governor Granholm and DHS Director Ahmed are not conceding that Plaintiffs are public employees.

Schlaud v Granholm, Case No. 1:10-cv-147 (WD Mich), Pacer Page ID ## 133-34 (May 5, 2010). Thus, Governor Granholm (through the Attorney General's Office, which was representing her) was unwilling to argue to a federal judge that home-based day care providers were public employees under PERA. This reluctance only

highlights the question of why the Commission failed to investigate its subject-matter jurisdiction before it held an election.[4]

The purported union in the day care matter was Child Care Providers Together Michigan. The American Federation of State, County and Muncipal Employees had 51% control of the CCPTM, and the United Auto Workers held the remaining 49%. The purported employer was the Michigan Home-Based Child Care Council, an agency produced by an interlocal agreement. A September 13, 2009 email from Nick Ciaramitaro — AFSCME's lobbyist, a member of the state bar, and a former representative in the Michigan House — shows that home-based day care providers' status as public employees was known to be murky (at best):

> As you know, CCPTM20and [sic] MHBCC [sic] are somewhat unusual entities. As our economy changes, representation of workers

[4] This litigation produced evidence that this unionization was a major policy goal of the Granholm Administration. According to an email from an attendee of a meeting between Governor Granholm, Gerald W. McEntee (then the national president of the American Federation of State, County and Municipal Employees), and and members of their staffs, Governor Granholm and her staff were intimately involved in the unionization of home-based day care providers as public employees and sought to hide the matter from the Legislature. Consider, for example, this passage detailing Governor Granholm's response to a plan that would have unionized home-based day care providers through an executive order: "The Governor clarified that the union would be bargaining with DHS under that scenario and asked if that would make the providers state employees. The Governor and [Kelly Keenan, her legal counsel] raised concerns that an executive directive would flag the issue in the legislature. . . ." *Schlaud v Granholm*, Case No. 1:10-cv-147 (WD Mich), Pacer Page ID # 1123 (March 11, 2011).

> must evolve. In most instances, employees of a particular employer band together in a union and negotiate wages, hours and terms and conditions of employment with a given employer. Here, a group of people who provide a critical public service as independent contractors are reimbursed for their labors by the State. In order to deal with working conditions, the Department of Human Services and Mott Community College, under the auspices of the Urban Cooperation Act, created a Council to act as an employer of record to negotiate provisions. Much of that contract however is dependent on legislative or administrative action by the State of Michigan. **In many ways this is an experiment with little guidance from statute and virtually no administrative or judicial precedent to follow.**

(emphasis added).

Publicity around the home day care and home help unionizations drew the Legislature's attention to the unionization process. On May 4, 2010, Commission Director Ruthanne Okun testified before the Senate Appropriation Subcommittee for the Department of Human Services, which at the time was chaired by Senator William Hardiman. The questioning largely centered on the unionization of the day care providers, although the unionization of the home help workers was briefly discussed as well. Director Okun indicated that the Commission did not examine its jurisdiction sua sponte and would look at jurisdiction only if a challenge was presented:[5]

> **Sen. Hardiman:** Ok. In the case of the MHBCCC, were they determined to be the employer in this case?

[5] A full transcript of this hearing was attached to the initial brief in this matter as Ex. 14.

Director Okun: In this particular case, the documents that were submitted to us indicated that they in fact were the employer, and neither side challenged that – nor did any person in the bargaining unit challenge the employment relationship.

Sen. Hardiman: So you received documents from the council, the MHBCCC, that they were indeed the employer of the childcare workers for whom you received petitions for. Is that correct?

Director Okun: I was not privy to – I was not – the election officer would have received the documents. I don't recall if they were from the employer or from the union, or from both. But, there was no question in this case presented to us as to who in fact was the employer.

Sen. Hardiman: When you say there was no question, meaning, as far as – would you say – DLEG or MERC was concerned, the council was the employer?

Director Okun: No one challenged the employment relationship – the employer-employee relationship. Nor did any person in the bargaining unit challenge the employment relationship. So, it was not something that we needed to look into.

Sen. Hardiman: So, someone in your office – the election officer is it? – received some documentation from the council stating that they were the employer of the 40,000 or so day care workers? Is that –

Director Okun: That is correct. The parties, together, had presented information to us that there was an employment relationship.

. . .

Sen. Hardiman: I'm a bit perplexed as to how these day care providers were deemed employees, and I guess I still am. It sounds like you're saying you received documentation that they were the employer, and they're saying they received authorization from MERC, saying that they were authorized to act as the employer, I believe. So, that still seems to be a mystery. Who would know precisely? Who would have that information?

Director Okun: We would if – again, it would be the information that they had presented to us with regard to employer-employment relationship. There probably was information, and again neither party objected to the fact that – there was nothing, no independent determination made by MERC. It never went to MERC. If there would be a question as to whether there was an employment relationship, it would need to be determined by the Michigan Employment Relations Commission. And there again, it was a consent election where the parties agreed as to who the employer and the employees were, who was in the bargaining unit, who wasn't in the bargaining unit, and then, therefore, they proceeded to an election.

Sen. Hardiman: So there was a consent from the council that these employees – say that again. The council consented to…

Director Okun: There was a consent election agreed to. In other words, indicating the employment relationship and that – who was in the bargaining unit and who would be eligible to vote. And it was that consent election. When that happens – when there's a consent election there never is an independent determination to – by the Michigan Employment Relations Commission. They're the only body that would have the authority to make that determination, and there were no hearings in this case. Had in fact someone wished to challenge the employment relationship, they would be welcome to do that, and then they would seek a hearing with the Michigan Employment Relations Commission.

Sen. Hardiman: And do you have – can you provide to this committee the documentation that stated initially that these day care workers were indeed employees of the council?

Director Okun: I can. I'm not certain if in this case there was a – an interlocal agreement in regards to that, or there was something presented with regard to the nature of the employment relationship. But, again, either party always has the opportunity to challenge the nature of the employment relationship, and if they do that they can seek a hearing with the Michigan Employment Relations Commission. And no one did seek a hearing in this case, and therefore

the parties entered into a consent election agreement, which allowed the election to move forward.

Sen. Hardiman: Well, there are two things here. One, we're talking about from 40 and I've heard up as high as 70,000 day care workers, and some of them didn't know they were being unionized until they received notification that they were in the union. So, I don't think they would seek any relief from that because they didn't know it. So, there must've been some documentation, from what you're telling me, that says that they were indeed employers – or that the day care workers were indeed employees of the council. So, if you could provide us with that documentation that would be helpful. I think the second thing is, are they public employees? Are these day care workers public employees of the council? You know, I guess that's at issue as well.

Director Okun: Again, no one challenged the nature of the employment relationship. It wouldn't be our position. When parties consent to an election, it would not generally be something that we would do to look into it unless one of the – again, someone in the bargaining unit, or someone brought it to our attention that there in fact was not an employment relationship.

. . .

Sen. Hardiman: If they're members of a bargaining union – if they work for a company, an entity – I can understand that. These are independent contractors, and you were given a petition and some documentation which we will see shortly because you'll give it to us. And so under the Public Employee Relations Act, they have to be public employees, therefore, before you can grant them collective bargaining rights. Is that correct?

Director Okun: Again, we would've assumed from the documents that we received that there was an employment relationship.

Director Okun's testimony seemed to indicate that either an employer or a member of a purported proposed bargaining unit could challenge the Commission's

jurisdiction. That very issue arose regarding a proposed unionization of graduate student research assistants at the University of Michigan.

The University of Michigan had allowed all of its graduate students, including RAs, to organize in 1974, and after a vote (and an initial failure on MERC's part to recognize a potential jurisdictional problem), the students did so. In the process of negotiations for a second contract, conflicts developed between the union and the University. The University sought the dismissal of a grievance, and the union filed an unfair labor practice charge contending that the University was demanding dismissal before it would execute a second contract. The University's sole defense was that MERC lacked jurisdiction because the graduate students were not public employees under PERA. *Regents of the University of Michigan and Graduate Employees Organization*, 1981 MERC Labor Op 777, 790. Eventually, it was decided that some types of graduate students – those teaching undergraduates – were public employees, while others – graduate student research assistants (GSRAs), generally those merely engaged in their own studies – were not. Neither side appealed.

In 2011, the same union that had sought to unionize the GSRAs in 1981 filed a representation petition. Initially, the Commission did not take notice of its prior decision. Before a consent election was held, the undersigned represented a GSRA (and ultimately a group of over 300 GSRAs) who sought to

challenge whether GSRAs were public employees. A twist was that this time, unlike in 1981, the Regents of the University of Michigan (the purported employer) wanted to consent to a public-employee designation for GSRAs.

The Commission ordered an evidentiary hearing to determine whether GSRAs should now be considered public employees. Both the Attorney General and the dissenting graduate students sought to intervene as parties to this hearing. But the Commission limited direct participation to the employer and the union, which were in agreement on the issue. This unique procedure was appealed to the Michigan Supreme Court, and that body held it did not have jurisdiction to decide the issue. *Univ of Michigan v Graduate Employees Org*, 807 NW2d 714 (Mich Feb 3, 2012). While agreeing with the holding, Justice Markman highlighted the flaws in the Commission's procedures and chastised it for showing hostility based on whether it perceived a party was opposed to public-sector unionism as a matter of general policy. *Id*.

The evidentiary hearing ground to a halt with the passage of 2012 PA 45, which specifically exempted GRSAs from PERA's definition of public employee.

The three unionizations discussed above have impacted 40,000 day care providers, 40,000 home help workers, and 2,000 GRSAs. The union/dues fees involved were around 9 million annually (with 6 million annually being the home-help number). These were significant and important questions about the bounds of

public employment and the Commission should have looked into all three matters without prompting.

The lengthy set of questions presented by the Commission indicates the difficulty that can ensue if jurisdictional matters are not addressed when they first arise. Hopefully, the Commissions' process of addressing jurisdictional matters (e.g. who can do so and when) will be clarified as a result of this matter and the other controversial unionizations.

The Commissions' questions are rearranged below to facilitate a clearer explanation.

<u>Question 5</u> – Are Charging Parties currently public employees within the meaning of PERA?

No. For the reasons stated at pages 16-30 in the initial brief filed in this matter, Charging Parties never were public employees. MERC lacked subject matter jurisdiction over them in 2005 and therefore should have dismissed the representation petition at that time.

Alternatively, for the reasons stated at pages 30-36 in the initial brief filed in this matter, if Charging Parties were properly considered public employees in 2005 they stopped being public employees on March 12, 2012 due to the passage of 2012 PA 45.

<u>Question 5 a.</u> – If Charging Parties are not currently public employees, exactly when did that change and what was the circumstances that caused the change?

It never changed. Charging Parties and similarly-situated home help providers were not public employees in 2005. Alternatively, if the Charging Parties were public employees in 2005 that changed with the passage of 2012 PA 45 on March 12, 2012.

<u>Question 5 b.</u> – If Charging Parties were not currently public employees, does the Commission have jurisdiction over a charge brought by them? Explain the basis for your answer and provide supporting legal authority.

While the Commission does not have subject matter jurisdiction over people who are not public employees, the doctrine of primary jurisdiction arguably gives the Commission the first opportunity to determine this.

At its most essential nature, the question of primary jurisdiction is whether a matter is close enough to an agency's core responsibilities that it should get the first opportunity to address questions related to it. With home help workers that essential question would be whether or not they are public employees.

Consider the day care matter. Despite DHS's unwillingness to argue the substantive point that would have won the case (i.e., that home-based day care providers actually were public employees), the Court of Appeals originally dismissed the action without discussing the merits. *Loar v Dep't of Human Services*, Court of Appeals No. 294087 (Dec. 30, 2009). The Michigan Supreme Court remanded to the Court of Appeals for "an explanation of the reason(s) for the denial of the plaintiff's complaint for mandamus." *Loar v Dep't of Human*

Services, 488 Mich 860 (2010). On remand, the Court of Appeals stated, in part: "Defendants did not have the clear legal duty to ignore the results of the union certification election." *Loar v Dep't of Human Services*, Court of Appeals No. 294087 (Sept. 22, 2010). The case was again appealed the Michigan Supreme Court but was mooted due to actions taken by the Snyder Administration.

The first-opportunity inclination was expressed in the Court of Appeals statement about not wanting to disturb the results of a union certification election. But, the couple of cursory orders from a case that was eventually mooted do not constitute a sufficient foundation to determine if challenges to subject matter jurisdiction determinations of an agency should originally be filed with the agency or in Circuit Court (or the Court of Appeals for a mandamus claim).

The is no Michigan case law directly on point whether a party must file at an agency to contest jurisdiction where that same agency previously had the opportunity to examine its own jurisdiction sua sponte and failed in its duty to do so. But at pages vii-ix of Charging Parties' initial brief, primary jurisdiction is discussed. Charging Parties contend that case law is sufficient to bring this matter to this tribunal.

In answering Question 5. b. itself, the Commission needs to address the subject matter jurisdiction issue (i.e., whether home help workers are or ever were public employees) directly and fully. It may be that all this tribunal can do is

indicate that home help workers are not public employees and that any further relief Charging Parties may seek must be sought in another forum. The Commission needs to determine whether it wants jurisdictional challenges to go to another forum or to begin here (even if full relief cannot be afforded).

Given that this is the third time that this issue has arisen in the last seven years and that nearly 80,000 individuals and tens of millions of dollars of potentially improper dues and fees have been involved, it is time for a clear answer to this question of who may make jurisdictional challenges, when they may make those challenges, and the process for doing so.[6]

<u>Question 6</u> – Does the Commission have the authority to retroactively set aside findings made in 2005 with respect to the status of home help providers as public employees? Explain the basis for your answer and provide supporting legal authority.

<u>Question 7</u>- Does the Commission have the authority to overturn a representation election? If so, does the Commission have the authority now to overturn an election that occurred in 2005? Explain the basis for your answer and provide supporting legal authority.

<u>Question 14</u> – Why isn't a petition for decertification the appropriate means to resolve Charging Parties' complaint? Explain the reason for your answer.

These questions all really concern one issue – the consequence of the Commission correctly determining that it lacked subject matter jurisdiction in

[6] Charging parties recognize that the Michigan Supreme Court has held that the Commission does not have exclusive jurisdiction over fair representation cases. *Demings v City of Ecorse*, 423 Mich 49 (1985). There, the Michigan Supreme Court held that circuit courts and the Commission had concurrent jurisdiction.

2005. As an initial matter, Question 6 presumes something that appears to be without any evidentiary support – that there were "findings made in 2005 with respect to the status of home help workers as public employees." To support such a statement, one would have to presume that the Commission actually considered its jurisdiction in 2005 and found it so obvious that home help workers were public employees that no one would question it.

This presumption is belied by a number of things: (1) the parties themselves recognized the jurisdictional issue and sought to consent to the Commission's jurisdiction; (2) Director Okun's testimony to the Senate in which she admits that where no challenge to jurisdiction is made that the Commission no longer looks at the issue; (3) Michigan law at the time on what constituted a public employee under PERA; and (4) the case law from other jurisdictions (California and Illinois) that had considered similar situations and held that home help workers were not public employees.

The consequence of a tribunal or court acting without subject matter jurisdiction is clear – any action it takes other than of a dismissal is void:

> 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.").

Here, the Commission ran an election, and with a majority of those voting favoring unionization, certified SEIU as the collective bargaining unit. Based on this certification, the union entered into a collective bargaining agreement with the MQCCC that, in part, allowed the collection of union dues.

The certification issued as a result of the election is void since the Commission lacked jurisdiction in 2005. It is as if the election is "of no more value than as though [it] did not exist." Because the certification does not exist, there is no need to use the decertification process.

<u>Question 1</u> – Does the charge state a claim upon which relief can be granted under the Public Employment Relations Act (PERA)? Explain the basis for your answer and provide supporting legal authority.

As noted above, home help providers and any other individual who could be required to paying agency fees are exposed to a "significant impingement on First Amendment rights." Constitutional rights cannot be taken without due process.

Charging Parties are essentially presenting three issues to the Commission: (1) the 2005 certification was void ab initio since the home help workers were not public employees; (2) even if the home help workers were actually properly

classified as public employees in 2005, the April 9, 2012 collective bargaining agreement extension was improper since the 20-factor test from 2012 PA 45 made it clear that home help workers were no longer public employees; and (3) a second reason that the April 9, 2012 collective bargaining agreement extension was improper was due to the conflict of interest that arose when SEIU Healthcare gave MQCCC $12,000 to help keep it operating.

While there is nothing explicit in PERA, the Commission's rules indicate that either a party or the tribunal sua sponte may raise the issue of lack of jurisdiction over a party. R. 423.165. Charging Party is seeking a determination that they were not and are not public employees under PERA so that they can entirely avoid the "significant impingement" of having to pay agency fees. It was the erroneous (and void) certification that allowed the process to begin. The doctrine of primary jurisdiction is what is believed to give the Commission the first opportunity to consider this matter whether it be deemed an unfair labor practice charge or a declaratory request.

The Michigan Supreme Court has stated: "We have long recognized that Michigan's public employment relations act . . . is modeled on the NLRA. Although not controlling, we look to federal precedents developed under the NLRA for guidance in our interpretation of the PERA." *Gibraltar School Dist v Gibraltar-MESPA-Transportation,* 443 Mich 326, 335 (1993).

The Court of Appeals has recognized a conflict-of-interest claim related to PERA. *Northern Michigan Education Ass'n v Vanderbilt Area Schools*, 87 Mich App 604 (1979). The NLRA considered a conflict of interest case due to payments made by an employer to union officials. *Local 1814, International Longshoreman's Association, AFL-CIO v NLRB*, 735 F2d 1384 (DC Cir 1984). So the conflict of interest claim is the most traditional charge being presented to the Commission.

<u>Question 2</u> – Does the charge allege a violation of § 10 of PERA? Explain the reason(s) for your answer.

a. If the charge does state a violation of § of PERA, indicate:

i. The provision(s) of § 10 that Charging Parties allege have been violated[.]

ii. For each provision of § 10 allegedly violated, provide:

1. A clear and complete statement of the facts which allege a violation of PERA, including the date of each particular act. Identify the Respondent(s) you believe to be liable and the names of the agenct of the Respondent(s) who engaged therein. Provide the specific language of the provision alleged to have been violated and an explanation of how the alleged actions by Respondents' agents violated the provision.

For the 2005 certification issue – Respondent MQCCC violated MCL 423.210(1)(b) by assisting in the creation of a mandatory public sector bargaining unit when none was appropriate. The MQCCC official who signed the January 19, 2005 Addendum, which clearly showed the lack of jurisdiction, is the official who

engaged in this activity. By agreeing to Commission jurisdiction where there was none, the MQCCC official improperly assisted in creating a mandatory collective bargaining relationship.

For the April 9, 2012 collective bargaining agreement extension in violation of 2012 PA 45 – Respondent MQCCC violated MCL 423.210(b) by assisting in the creation/extension of a mandatory public sector bargaining unit where none was appropriate. MQCCC Director Susan Steinke is the official who signed this April 9, 2012 extension that was in violation of 2012 PA 45. 2012 PA 45's 20-factor test made it clear that home help workers were not public employees, yet Director Steinke signed an agreement that allowed so called "dues" or "agency fees" to be taken from Charging Parties' paychecks.

For the April 9, 2012 collective bargaining agreement extension during a period of conflict of interest – Respondent SEIU Healthcare violated MCL 423.210(3)(a)(i) by failing to let the public employees "negotiate or bargain collectively with their public employers through representative of their own free will." Bob Allison appeared to be the agent of SEIU Healthcare responsible for forwarding the $12,000 to MQCCC in January 2012. SEIU Healthcare Michigan President Marge Faville-Robinson is the person who signed the April 9, 2012 collective bargaining extension and apparently engaged in bargaining during a period of conflict of interest.

Respondent MQCCC violated MCL 423.210(b) by assisting in the creation/extension of a mandatory public sector bargaining unit where none was appropriate. MQCCC Director Susan Steinke is the official who signed this April 9, 2012 extension despite MQCCC having recently received $12,000 from SEIU Healthcare Michigan.

<u>Question 3</u> – Explain whether the Commission has subject matter jurisdiction over a charge that does not allege a violation of § 10 of PERA. Explain the basis for your answer and provide supporting legal authority, including any case law specifically addressing the issue of the Commission's jurisdiction over unfair labor practice charges that do not allege a violation of §10 of PERA.

Yes, the Commission can have jurisdiction over a charge that does not allege a violation of § 10 of PERA. Duty of fair representation claims, have a "judicial origin" and are not found in the text of §10:

> The Court's reliance on the judicial origin of the right of fair representation should not be misunderstood. The Court was not saying that the right is purely a common-law right. The right is "the product of a federal common law of statutory origin." How this hybrid is classified is not of critical importance. It does not appear that the Court was concerned with whether the right of fair representation is a pure common-law right or a common-law right statutorily derived. What was important is that the right was originally devised and enforced by courts. The NLRB had no involvement in the creation or early enforcement of the right of fair representation; the board merely "adopted and applied" the judicial doctrine.

Demings, 423 Mich at 59. Yet, the Michigan Supreme Court classified fair representation claims as a subset of unfair labor practice charges:

> The agency's lack of expertise concerning the matters at issue in a fair representation action is the second reason the Court gave for allowing the courts' concurrent jurisdiction. Agency expertise has been a primary justification for exclusive jurisdiction of **other unfair labor practices**. Fair representation actions, however, involve review of the union's administration of the grievance machinery.

Id. at 60 (emphasis added).

In the instant matter, Charging Parties should not need to rely on judicially created claims since they can make out an unfair labor practice charge under MCL 423.210 for the reasons stated in response to question 2.

If Charging Parties cannot meet the requirements of MCL 423.210, the Commission should consider creation of an unfair labor practice charge that would allow those non-public employees who have improperly been placed in a mandatory collective bargaining unit to challenge that determination just as the courts created a claim to allow for fair representation claims.

Question 4 – If the allegations in the charge do state a violation of §10, is the charge barred by the statute of limitations? Explain the basis for your answer and provide supporting legal authority.

No. Again, there are three issues being presented to the Commission. The first is that the 2005 certification was void ab initio since home help workers were not public employees. MCL 423.216(a) allows six months for unfair labor practice charges. But, because the certification was void when it occurred there is nothing to start the six-month clock. A ruling to the contrary would mean that the

certification became valid on the sixth month and first day, but that is counter the case law on void actions.

The second and third issues presume concern the April 9, 2012 collective bargaining extension. This matter was filed within six months of April 9, 2012.

<u>Question 9</u> – In the absence of specific Commission rules setting forth procedures for declaratory rulings, does the Commission have the authority to issue a declaratory ruling? Explain the basis for your answer and provide supporting legal authority.

The Commission has not specifically promulgated rules setting forth the procedures for a declaratory ruling under the Administrative Procedures Act. However, under R 338.81, the Commission, as a department within the Department of Licensing and Regulatory Affairs, may issue a declaratory ruling.

The Commission was originally created by 1939 PA 176 and placed under the authority of the Department of Labor. "The employment relations commission is created within the department of labor." MCL 423.3.

Pursuant to Executive Reorganization Order 1996-2, MCL 445.2001, the Department of Labor, under which the Commission had acted, was abolished. The rule-making authority was transferred to the newly created Department of Consumer and Industry Services (CIS). See, MCL 445.2001(3)(f):

> 3. All the statutory authority, powers, duties, functions and responsibilities related to the promulgation of rules by boards and commissions in the Department of Labor, including, but not limited to, the following boards and commissions:

. . .

f. The Employment Relations Commission;

. . .

are hereby transferred from the Department of Labor to the Director of the Department of Consumer and Industry Services.

CIS promulgated a number of rules that pertain to declaratory rulings and contested proceedings. Specifically, R 338.81 provides that any interested party may request a declaratory ruling regarding any order or decision of an agency or commission within the CIS.

R 338.81 Declaratory rulings.

Rule 1. (1) The following provisions set forth the form and procedure for the submission, consideration, and disposition of a request for declaratory ruling in the Department of Consumer and Industry Services, hereinafter referred to as the "department":

(a) Any interested person, hereinafter referred to as "applicant," may request a declaratory ruling as to the applicability to an actual state of facts of a statute, rule, final order or decision administered, promulgated, or issued by any bureau, office, commission, council, board, or agency, hereinafter referred to as "agency," within the department. . . .

The Commission is a "commission" that was within the CIS (the "department") when this rule was promulgated, and is therefore subject to this administrative rule.

CIS was renamed as the Department of Labor and Economic Growth (DLEG) pursuant to Executive Reorganization Order 2003-1, MCL 445.2011. In 2011, another renaming took place, this time DLEG became Department of Licensing and Regulatory Affairs (LARA). See Executive Reorganization Order 2011-4, MCL 445.2030.

Therefore, R 338.81 remains in effect with the only change being that references to the CIS now apply to LARA.

<u>Question 10</u> – Do Charging Parties' filings in this case comply with 2001 AACS 338.81? Explain their compliance or lack of compliance and the effects thereof on the Commission's authority to issue a declaratory ruling in this matter.

The Charging Parties' filings in this matter have complied with R 338.81. The filing's requirements are set forth in R 338.81(1). The first requirement under (1)(b) is that filings be submitted to the director of the "agency," where "agency is defined in (1)(a) as the "commission…within the department," where the "department" is defined as CIS or its successors. The charging parties properly submitted the request to the Director of the Commission.

Section (1)(c) describes the required portions of the submissions, and their labels.

(c) The request shall contain all of the following information:

> (i) Under a section labeled "Statement of Facts," a complete, accurate, and concise statement of the facts or

> situation upon which the request is based, which shall include all facts known to the applicant that are or may be relevant to a determination of the applicability of a statute, rule, final order, or decision.
>
> (ii) Under a section labeled "Certification," a certification by the applicant as to the existence of the actual state of facts set forth and the submission of all relevant facts known to the applicant.
>
> (iii) Under a section labeled "Laws/Rules/Orders," specific reference to all statutes, rules, final decisions, or orders that are to be considered.
>
> (iv) Under a section labeled "Issues," a concise statement of the issues presented.
>
> (v) Under a section labeled "Analysis and Conclusions," an analysis, legal brief, or memorandum of the issues presented, including reference to any legal authority relied upon, and the applicant's conclusions.
>
> (vi) The applicant's full name, degree or title, if applicable, professional or occupational license number, if applicable, daytime telephone number, mailing address and identification of any legal counsel.

Charging Parties' filing contained a "Statement of Facts" that was labeled as such per subrule (c)(i). Subrule (c)(ii) requires a section labeled "certification."

The Charging Parties did not include such a specifically-labeled certification; however, the filings were signed by the parties' attorney and, generally, the signature of an attorney on a pleading "constitutes a certification." See MCR 2.115(D).

Section (c)(iii) requires a section labeled "Laws/Rules/Orders." Charging parties did not so label a section; however, they did label a section "Table of Authorities" which included the relevant statues, cases and other authorities. Additionally, the section labeled "Discussion" made specific reference to the relevant order at issue in this matter.

A concise statement of issues was provided, as required by section (c)(iv), and labeled "Statement of Questions Involved."

Although not combined and labeled "Analysis and Conclusions" as required by subrule (c)(v) the filing contains extensive analysis labeled "Discussion" and conclusions labeled "Conclusion." The Discussion section contains the requisite analysis and legal briefing.

The filings contained the names of the Charging Parties, as well as the contact information and "P" numbers of the filing attorneys as required by subrule (c)(vi).

R 338.81(d) requires applicants to submit 2 copies of all relevant documents as attachments. Four copies were submitted. Subrule (e) states that "failure to follow the procedure in subdivisions (a) to (d) of this subrule may result in the return of the request for compliance or in denial as specified in subrule (8) of this rule." That subrule gives the Commission discretion to deny a request for failure to

follow the above-reference procedure or more importantly "if the ruling would not be in the public interest or in furtherance of statutory objectives."

As noted previously, this question of challenging jurisdiction where the Commission has failed to do so sua sponte has arisen three times in the last seven years. It has directly impacted over 80,000 citizen (40,000 in this matter alone) and tens of millions of potentially improper "dues/fees" (over $30,000,000 in this matter alone). Clearly, these are matters of public interest.

<u>Question 11</u> – In *SEIU Healthcare v Snyder*, No. 12-12332, (E.D. Mich. June 21, 2012) (opinion and order granting preliminary injunction) the Court enjoined the defendants, the Governor of Michigan, the Director of the Michigan Department of Community Health, and the Michigan Treasurer from failing to comply with certain terms of the contract between Respondent SEIU Healthcare and Respondent MQCCC until February 28, 2013. Inasmuch as Governor Snyder is the head of the executive branch of government of the State of Michigan, and the Commission is part of that branch of State government, isn't the Commission bound by the federal court ruling ordering the Governor to take or refrain from taking specific action contrary to the collective bargaining agreement between Respondents? Explain the basis for your answer and provide supporting legal authority.

<u>Question 12</u> – Does comity obligate the Commission to honor the Court's ruling in SEIU Healthcare v Snyder, No. 12-12332, (E.D. Mich. June 21, 2012) (opinion and order granting preliminary injunction)? Explain the basis for your answer and provide supporting legal authority.

The premise of Question 11 misstates the holding from Judge Edmunds opinion. It was not that defendants were preliminarily enjoined "from failing to comply with certain terms of the contact between Respondent SEIU Healthcare and Respondent MQCCC"; rather, it was that those three entities were

preliminarily enjoined from enforcing 2012 PA 76, which clarified that home help workers are not public employees. Thus, those three parties could not cease sending dues to MQCCC because it would interfere with SEIU Healthcare's ability to politic during the 2013 budget cycle and the 2012 November elections. Charging Parties are not seeking to have the Governor cease the transfer of dues/fees from DCH to MQCCC; therefore, the question regarding whether an injunction against the Governor binds the Commission is not relevant.

There are two preclusion doctrines. 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).

Quite simply, home help providers who contend they were not public employees were not parties to the federal suit. Therefore, there is not a mutuality of parties, and both claim preclusion and issue preclusion do not apply.

Further, Charging Parties make three claims here: (1) the 2005 certification is void because home help employees were not public employees at that time; (2) even if the home help workers were public employees from 2005 to March 12, 2012, the passage of 2012 PA 45 changed that; and (3) the April 9, 2012 "collective bargaining agreement" extension was improper due to a conflict of interest. The federal court did not address either the second or the third issue.

It is true that the opinion did contain a short section discussing MCL 423.201(1)(e), the PERA definition of "public employee," as it existed in 2005. But this analysis was cursory. No mention was made of the Michigan Court's 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.

Also, the federal ruling was on a <u>preliminary</u> injunction. SEIU Healthcare sought to allow dues money to continue to flow during the budget cycle and the November election. Both of those events have now occurred. The fiscal year 2013 Department of Community Health budget was passed on June 26, 2012. 2012 PA 200, Art. IV. The November election occurs on November 6, 2012. Whatever

immediacy the federal court identified that was necessary to prevent harm to SEIU Healthcare has passed.

Question 10 mentions comity, but the more pertinent question is abstention. In *Colorado Conversation District v United States*, 424 US 800 (1976), the Supreme Court indicated that abstention is appropriate "in cases presenting a federal constitutional issue which might be mooted or presented in a different posture by a state court determination of pertinent state law" and "is also appropriate where there have been presented difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar." *Id*. at 814. Both of those seem to apply here. The Contract Clause claim presented in SEIU Healthcare becomes moot if any of the following determinations are made: (1) the 2005 certification was improper; (2) 2012 PA 45 prevented the April 9, 2012 extension; or (3) a conflict of interest prevented the April 9, 2012 extension. Further, the state law issues presented transcend the issue presented in *SEIU Healthcare*. This Commission is charged with being an expert on state law labor matters involving public employees (and/or those who some claim to be public employees) and it therefore needs to apply that expertise.

<u>Question 8</u> – Does the Commission have the authority to rescind collective bargaining agreements? Explain the basis for your answer and provide supporting legal authority.

Charging Parties were unable to locate any Michigan cases discussing the remedies for conflicts of interest during bargaining. Therefore, they looked to NLRA cases for guidance.

In *Local 1814, International Longshoreman's Association, AFL-CIO*, an employer gave kickbacks to union officials. As remedies for the conflict of interest, the NLRB ordered that the union be decertified, the last collective bargaining agreement be abrogated, and that dues/fees be refunded. *Id*. at 1400-05. In discussing the rescission of the collective bargaining agreement, the Court of Appeal for the DC Circuit stated: "In unlawful assistance cases where the violation has had some impact on the contract in question, the abrogation remedy is virtually routine." *Local 1814, International Longshoreman's Association, AFL-CIO*, 735 F2d at 1403.

To the extent the Commission considers the above to be persuasive it would allow for a decertification of SEIU Healthcare, a rescission of the April 9, 2012 collective bargaining agreement extension, and repayment of any dues/fees collected from that date.

<u>Question 13</u> – Charging parties seek the return of union dues and agency fees paid by them and similarly situated home help providers to SEIU Healthcare Michigan.

a. In an action that was not brought by a labor organization, does the Commission have jurisdiction to grant relief to persons who were not named parties in the action, essentially treating the matter as a class

action? Explain the basis for your answer and provide supporting legal authority.

b. Do Charging Parties have the authority to represent similarly situated home help providers in this matter? If so, provide the basis for that authority[.]

The National Labor Relations Board, whose purpose and jurisdiction is comparable to the Commission's, has on many occasions exercised its jurisdiction to fashion a remedy encompassing parties who are not named as charging parties to the action. For example, the NLRB has ordered the union to pay refunds to employees who were not the charging party but were similarly situated, as a remedy for an unfair labor practice. In *United Mine Workers of America and Steve G. Meso, et al*, 305 NLRB No. 56, 1991 WL 237287 (Oct. 31, 1991), an individual worker sued to recover his strike assistance fund money and the NLRB commissioners ordered a refund to all similarly-situated employees based on its finding of unfair labor practices.

> In addition, we shall order the Respondent [Union] to refund to employees who resigned their membership and returned to work for their employer all moneys which they may have paid to the Respondent pursuant to the reimbursement provision of rule 7 of the Selective Strike Assistance Program…

Likewise, in *Transport Workers of America, et al, and Eggleston, Sr.*, 329 NLRB No. 56, 1999 WL 812240 (Sept. 30, 1999), where one worker's "Beck rights" were violated, the NLRB and the administrative judge ordered, as a remedy, that all employees be informed that the union had committed an unfair labor practice.

While Charging Parties were unable to locate a Michigan case were employees were returned improperly dues and fees, there is a case where a union was allowed to collect back dues where Wayne County failed to recognize it as the collective bargaining unit. *Wayne Co*, 1988 MERC Lab Op 232, 1988 WL 1587874 (March 23, 1988).

Note also that the Commission's regulations require the addition of any parties necessary to afford complete relief. R 423.157:

> Rule 157. Persons having such an interest in the subject of the action that their presence in the action is essential to permit the commission to render complete relief shall be made parties and aligned as charging parties or respondents in accordance with their respective interests. If the persons have not been made parties, then the commission or administrative law judge shall, on motion of either party, order them to appear in the action, and may prescribe the time and order of pleading.

If the Commission finds that home help workers other than the charging parties are similarly-situated and relief cannot be granted to them based on the petition of the charging parties here, as such similar relief has been granted by the NLRB, then the charging parties may, by motion, seek to include the other workers as parties who are essential "to render complete relief" at any time before or after hearing pursuant to R 423.161.

CONCLUSION

For the above reasons, the Commission should declare the original certification void ab initio, order either return of all "union dues" and "agency

fees," since April 9, 2012 (or six months worth of dues and 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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