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January 10, 2013

Ms. Ruthanne Okun, Director
Licensing and Regulatory Affairs
Michigan Administrative Hearing System
Employment Relations Commission
3026 West Grand Boulevard, Suite 2-750
P.O. Box 02988
Detroit, MI 48202-2988

BY UPS NEXT DAY AIR

Re: *Michigan Quality Community Care Council and SEIU Healthcare MI -and- Patricia Haynes and Steven Glossop*
Case Nos. C12 I-183 / CU12 I-042
C12 I-184 / CU12 I-043

Dear Ms. Okun:

Enclosed please find the original and four copies of Respondent, Michigan Quality Community Care Council's Reply to Charging Parties' Answer to Order to Show Cause. Also enclosed is the Certificate of Service indicating a copy of the same has been sent to counsel of record.

Thank you for your assistance in this matter. Should you have any questions, please do not hesitate to contact me.

Sincerely,

WHITE, SCHNEIDER, YOUNG
& CHIODINI, P.C.

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kag
Enclosures
cc w/enc Patrick J. Wright, Esq.
John R. Canzano
Susan Steinke

MICHIGAN DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

MICHIGAN QUALITY COMMUNITY CARE COUNCIL and SEIU HEALTHCARE MICHIGAN,

Respondents,

-and-

PATRICIA HAYNES,

Charging Party.

Case Nos. C12 I-183
CU12 I-042

Agency MERC

Case Type MERC ULP

MICHIGAN QUALITY COMMUNITY CARE COUNCIL and SEIU HEALTHCARE MICHIGAN,

Respondents,

-and-

STEVEN GLOSSUP,

Charging Party.

Case Nos. C12 I-184
CU12 I-043

Agency MERC

Case Type MERC ULP

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CERTIFICATE OF SERVICE

I, Kimberly A. Gibbs, hereby certify that on January 10, 2013, a copy of Respondent, Michigan Quality Community Care Council's Reply to Charging Parties' Answer to Order to Show Cause was served on Patrick J. Wright, Mackinac Center Legal Foundation, Attorneys for Charging Parties, 140 West Main Street, Midland, MI 48640 and John R. Canzano, McKnight, McClow, Canzano Smith & Radtke, P.C., Attorneys for Respondent SEIU Healthcare Michigan, 400 Galleria Officentre, Suite 117, Southfield, MI 48034, by first class mail, depositing same in the United States mails at Lansing, Michigan.

Kimberly A. Gibbs

MICHIGAN DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

MICHIGAN QUALITY COMMUNITY CARE COUNCIL and SEIU HEALTHCARE MICHIGAN,

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RESPONDENT, MICHIGAN QUALITY COMMUNITY CARE COUNCIL'S REPLY TO CHARGING PARTIES' ANSWER TO ORDER TO SHOW CAUSE

NOW COMES Respondent, Michigan Quality Community Care Council, by and through its attorneys, White, Schneider, Young & Chiodini, P.C., and, for its reply to Charging Parties' Response to the November 15, 2012 Order to Show Cause states as follows:

INTRODUCTION

In general, Respondent Michigan Quality Community Care Council (MQC3) asserts there is no basis for Charging Parties' action filed with the Michigan Employment Relations Commission (MERC), so MERC should dismiss the action without the need to refer the matter to an administrative law judge for a hearing. Respondent MQC3 has reviewed Respondent SEUI Healthcare Michigan's reply and concurs with its answers. Respondent MQC3 answers the Commission's questions as follows.

1. **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.**

No, Charging Parties' Charge does not state a claim upon which relief can be granted under PERA. In their Response to Order to Show Cause, Charging Parties claim MERC lacks jurisdiction over Respondents MQC3 and SEIU Healthcare Michigan (SEIU) because it is alleged that the employees and members are not public employees. If Charging Parties are correct, then they have no claim and MERC should dismiss their Charge.

Regarding the allegation of a conflict of interest between Respondents, Charging Parties have failed to point to any section of PERA which would support such

a claim. Without a legal basis on which to bring their claim, Charging Parties have not raised an issue upon which relief can be granted.

2. Does the charge allege a violation of §10 of PERA? Explain the reason(s) for your answer.

The Charges do not allege an actual violation of §10 of PERA. In their Response, Charging Parties first claim Respondent MCQ3 violated Section 10(1)(b) in 2005. Regardless of any merit that this claim may or may not have, this allegation is well outside of the six (6) month statute of limitations for allegations of unfair labor practices as set forth in MCL 423.216(a).

Charging Parties next argue that this same violation re-occurred when Respondents' collective bargaining agreement was extended in 2012. In order to manipulate the argument to fall under §10 of PERA, Charging Parties claim Respondent MQC3 improperly "created/extended" the bargaining unit. Although creation of a bargaining unit is arguably within §10, the statute of limitations has long since expired on that claim, as discussed above. As for the "extension" argument, this does not appear to be a violation as stated in PERA, and Charging Parties have offered no authority supporting their position that this is a legitimate claim under PERA.

Additionally, Charging Parties argue Respondent SEIU violated Section 10(3)(a)(i) by "failing to let the public employees 'negotiate or bargain collectively with their public employers through representative[s] of their own free will.'" (Charging Parties Response to Order to Show Cause, at 24.) Charging Parties list two SEIU representatives who bargained with MQC3 on behalf of Respondent SEIU, but fail to point to any evidence that these people were not the "representatives of their own free will." Merely stating that a statute has been violated, without offering any support to

even raise an inference of a violation, is not sufficient to allege an actual violation. For all of these reasons, Charging Parties' Charges do not state a violation of §10 of PERA.

a. If the charge does state a violation of §10 of PERA, indicate:

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

As stated above, Charging Parties have pointed to several provisions of PERA under which they claim to have stated violations. However, since each of their allegations is either outside the statute of limitations, does not actually fall under the protection of the statute, or does not make any allegation of an actual violation, Charging Parties have failed to indicate actual violations.

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 occurrence of each particular act. Identify 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 all of the reasons stated above, Charging Parties have failed to do this.

3. 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.

As stated above, if there are no allegations of an actual violation of §10 of PERA, MERC can have no subject matter jurisdiction over these Charges. Charging Parties try to draw an analogy by showing MERC has jurisdiction over duty of

fair representation claims which are not found within the actual text of §10. (Charging Parties' Response, at 25-26.) However, it is clear that duty of fair representation claims are a violation of PERA and the duty arises directly from PERA. *See Goolsby v City of Detroit*, 419 Mich 651, 660, n5 (1984). Thus, if Charging Parties cannot state a violation of PERA, they cannot contend that MERC has jurisdiction over a charge not rooted in PERA.

Charging Parties state MERC should create an unfair labor practice charge for non-public employees who have been improperly placed in a bargaining unit. (Charging Parties' Response, at 26.) MERC has no authority to create an unfair labor practice charge that is not specifically stated or firmly grounded in PERA.

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.

As stated above, none of Charging Parties' allegations state a violation of §10. Clearly, any allegation regarding findings from 2005 are outside of the statute of limitations. Charging Parties' argument that the extension of the contract, as stated above, is not a violation of §10. Even if this allegation somehow was a claim, the underlying basis for the claim is the alleged conflict of interest which occurred in January 2012. Charging Parties' September 20, 2012 Charges are outside of the statute of limitations concerning this issue.

5. **Are Charging Parties currently public employees within the meaning of PERA?**

   a. **If Charging Parties are not currently public employees, exactly when did that change and what was the circumstance that caused the change.**

   b. **If Charging Parties are 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.**

Charging Parties state in their Response that they are not currently public employees within the meaning of PERA. If they are not public employees, then MERC does not have jurisdiction over their claims.

6. **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.**

In their Response to Order to Show Cause, Charging Parties failed to address this question. Instead of directly discussing whether the Commission has authority to retroactively set aside findings made in 2005, which Respondent MCQ3 asserts it does not, Charging Parties merely attempt to distract from the question by arguing that the Commission lacked jurisdiction to have held the election in 2005, and the election is thus void.

By wholly dodging the question asked by the Commission, Charging Parties have failed to provide any supporting authority, or in fact even make the argument, that the Commission has the authority to retroactively set aside findings made in 2005. Respondent MCQ3 submits MERC does not have such authority.

7. **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 answers and provide supporting legal authority.**

Like Question 6 above, Charging Parties did not address the issue raised by the Commission, and instead argued that there was a lack of jurisdiction in 2005. For the same reasons as above, Charging Parties have failed to provide any supporting authority, or in fact even make the argument, that the Commission has the authority to overturn an election that occurred in 2005. Again, Respondent MCQ3 submits that it does not.

8. **Does the Commission have the authority to rescind collective bargaining agreements? Explain the basis for your answer and provide supporting legal authority.**

Charging Parties have conceded there are no Michigan cases allowing for MERC to rescind an existing collective bargaining agreement. Charging Parties cite to a DC Circuit case upholding an NLRB order, however, it is easy to see the facts in that case are nowhere even remotely close to being applied to the instant situation. Therefore, Respondent MQC3 would assert MERC does not have the authority to rescind a collective bargaining agreement.

9. **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.**

Respondent MQC3 asserts that based on its prior decision in *Lakeshore Public Schools*, 1988 MERC Lap Op 817, 1 MPER ¶19147, MERC has declined to issue declaratory rulings. Therefore, even though Section 63 of the Administrative Procedures Act, MCL 24.263, would allow an agency to issue a

declaratory ruling, the fact MERC has promulgated no rules for such, and has never issued a declaratory ruling in the past, demonstrates that this Commission should not begin doing so here.

10. Do Charging Parties' filings in this case comply with 2001 AACS R 338.81? Explain their compliance or lack of compliance and the effect thereof on the Commission's authority to issue a declaratory ruling in this matter.

Charging Parties' filing in this case did not comply with 2001 AACS R 338.81, which Charging Parties admitted in their Response to Order to Show Cause. As quoted by Charging Parties, the Rule requires separate sections for a "Statement of Facts," "Certification," "Laws/Rules/Orders," "Issues," and "Analysis and Conclusions." R. 338.81(1)(c).

Although Charging Parties' Motion for Declaratory Ruling does include a lengthy Statement of Facts, none of the remaining required sections were included. Charging Parties claimed that, although their Motion did not include a "Certification" section, the signature of the attorney filing the document "constitutes a certification" under the Michigan Court Rules. MCR 2.114(D) states that "[t]he signature of an attorney . . . constitutes a certification by the signer that . . . to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the document is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law . . . ." MCR 2.114(D)(2).

The rule requiring certification for a motion for declaratory ruling, on the other hand, requires "certification by the applicant as to the existence of the actual state of facts set forth . . . ." R. 338.81(1)(c)(ii). This is more akin to MCR 2.114(B), which sets forth the rules of verification: "If a document is required or permitted to be verified,

it may be verified by . . . oath or affirmation of the party or of someone having knowledge of the facts stated . . . ." MCR 2.114(B)(2)(a). For a verification, the signature of an attorney filing the document, unless he or she has personal knowledge of all of the facts involved, is not sufficient.

The signature of Charging Parties' attorney on the Motion merely means that the attorney has read the document, believes that it is accurate after a reasonable inquiry, and is filing it in good faith. It does not imply that the signor has any personal knowledge "as to the existence of the actual state of facts set forth," as required by a certification. The attorney's signature, therefore, does not constitute a certification as is required by R. 338.81.

Charging Parties also claim they complied with the "Laws/Rules/Orders, "Issues," and "Analysis and Conclusions" section requirements in their Brief, although none of those sections actually appear. Respondent MQC3 submits that based on the absence of a majority of the sections required by R. 338.81, Charging Parties have not complied with the Rule. Because of this substantial lack of compliance, in addition to the other reasons stated herein, Respondent MQC3 requests that this Commission deny Charging Parties' Motion pursuant to R. 338.81(8).

11. **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 MQC3 until February 28, 2013. Inasmuch as Governor Snyder is the head of the executive branch of the 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.**

Respondent MQC3 contends that MERC is bound by the federal court preliminary injunction. As part of the executive branch of government, Respondent MQC3 believes the Commission would be bound by the injunction entered against the Governor.

12. **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.**

Respondent MQC3 asserts the Commission is bound by the preliminary injunction as stated above. However, even if it was not, Respondent MQC3 would suggest that based on comity the Commission should stay its proceedings until the federal court action is resolved.

13. **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?

Respondent MQC3 asserts the Commission does not have jurisdiction to grant relief to persons not named in an action unless the matter was brought by a labor organization. In *Kent County Ed Ass'n*, 7 MPER ¶25027, MERC stated:

> We have repeatedly held that an individual may not assert a violation of the duty to bargain in good faith by an employer.
>
> * * *
>
> An individual employee cannot assert the rights of his or her union. Moreover, it is a fundamental principle that where the labor organization to which the bargaining obligation runs consents or acquiesces to employer conduct, the employer does not violate its bargaining obligation. Therefore, where the employee's labor organization does not contend that the employer has refused to bargain in good faith, no such refusal can be found. (Citations omitted.)

Therefore, if a labor organization has not brought an action, an individual cannot stand in for the labor organization or represent other members of that labor organization in an unfair labor practice charge.

14. Why isn't a petition for decertification the appropriate means to resolve Charging Parties' complaint? Explain the reason for your answer.

Charging Parties addressed this question simultaneously with Questions 6 and 7, *supra.* Like the questions above, Charging Parties did not address the issue raised by the Commission, and instead argued that there was a lack of jurisdiction in 2005. For the same reasons as above, Charging Parties have avoided the question, and instead argued that "[b]ecause the certification does not exist, there is no need to use the decertification process." (Charging Parties' Response, at 21.) By avoiding the question altogether, Charging Parties have failed to offer a reason why a petition for

decertification would not be the appropriate means to resolve their complaint. Respondent MCQ3 submits that it is.

CONCLUSION

For all the reasons stated above, Respondent MQC3 respectfully requests that the Commission dismiss Charging Parties' Unfair Labor Practice Charges and action in their entirety.

Respectfully submitted,

WHITE, SCHNEIDER, YOUNG
& CHIODINI, P.C.
Attorneys for Respondent MQC3

By _____
Jeffrey S. Donahue (P48588)

Dated: January 10, 2013