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Re: **Michigan Quality Community Care Council and SEIU Healthcare Michigan And Patricia Hayes and Steven Glossop**
MERC Case Nos. C12 I-182 & C12 I-184, CU12 I-042 & CU12 I-043

Gentlemen:

Enclosed is a copy of Respondent SEIU Healthcare Michigan's Reply to Charging Party's Answers to Order to Show Cause, which was filed with MERC today.

Sincerely,

McKNIGHT, McCLOW, CANZANO
SMITH & RADTKE, P.C.

John R. Canzano

JRC/sjc
Enclosure

P:\SEIU\Healthcare MI\MQCCC\Letters\donahue and wright ltr.wpd

STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

Michigan Quality Community Care Council,
Public Employer-Respondent in Case Nos. C12 I-183 & C12 I-184,

-and-

SEIU Healthcare Michigan,
Labor Organization-Respondent in Case Nos. CU12 I-042 & CU12 I-043,

-and-

PATRICIA HAYNES,
Individual-Charging Party in Case Nos. C12 I-183 & CU12 I-042,

-and-

STEVEN GLOSSOP,
Individual-Charging Party in Case Nos. C12 I-184 & CU12 I-042.

RESPONDENT SEIU HEALTHCARE MICHIGAN'S REPLY TO CHARGING PARTIES' ANSWERS TO ORDER TO SHOW CAUSE

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RESPONDENT SEIU HEALTHCARE MICHIGAN'S REPLY TO CHARGING PARTIES' ANSWERS TO ORDER TO SHOW CAUSE

INTRODUCTION

As this Commission recognized in its Order To Show Cause, the claims asserted by the Charging Parties in this proceeding raise the same issues that are currently pending in federal court litigation between respondent SEIU Healthcare Michigan ("SEIU HCMI") and Michigan state officials, including Governor Richard Snyder.

On June 21, 2012, the United States District Court for the Eastern District of Michigan granted a preliminary injunction requiring Governor Snyder and the other defendant state officials to continue honoring SEIU HCMI's rights as the certified collective bargaining representative of providers in Michigan's Home Help Program, including SEIU HCMI's rights under an existing collective bargaining agreement with the Michigan Quality Community Care Council ("MQC3"). *See* Opinion and Order, *in Snyder v. SEIU Healthcare Michigan*, No. 2:12-cv-12332-NGE-DRG, _ F.Supp.2d _, 2012 WL 2367134, at *13 (E.D. Mich. June 21, 2012) (hereinafter "*Snyder* Opinion"); *see also* Order for Preliminary Injunction, D.E. #28, at 1, *in Snyder v. SEIU Healthcare Michigan*, No. 2:12-cv-12332-NGE-DRG (E.D. Mich. June 22, 2012) (hereinafter "*Snyder* Order"). In granting that injunction, the District Court rejected assertions that the employees represented by SEIU HCMI were not public employees, for purposes of the Public Employment Relations Act ("PERA"), when this Commission certified SEIU HCMI as their representative in 2005. *See Snyder* Opinion, 2012 WL 2367134, at *6, *8. The District Court likewise rejected attacks on the validity of the April 9, 2012 extension of SEIU HCMI's CBA. *Id.* at *14. The appeal of the preliminary injunction, which seeks review of many of these same issues, is pending before the Sixth Circuit and has been fully briefed.

The Charging Parties now ask this Commission to ignore the District Court's decision and order, revisit the very contentions made by the defendants and counsel for the Charging Parties in those proceedings but rejected by the District Court, "declare the original certification void ab initio, order the return of the last six months of . . . 'union dues' and 'agency fees,' and declare improper any future collection of . . . 'union dues' and 'agency fees.'" Brief in Support of Patricia Haynes's and Steven Glossop's Charge of Unfair Labor Practice and Declaratory Ruling Request ("Charging Parties' Brief in Support of ULP Charge") at 50. This Commission should reject the Charging Parties' request and, instead, should hold this matter in abeyance until the federal litigation is resolved.

As explained below, the Commission is bound by the preliminary injunction entered in *Snyder* because it is part of the Michigan state executive branch, which is headed by defendant Snyder, and would risk contempt if it sought to undermine the preliminary injunction. *See* Fed. R. Civ. P. 65(d)(2) (preliminary injunction binds parties, "parties' officers, agents, servants, employees, and attorneys," and "other persons who are in active concert or participation" with them).

Even if the Commission were not bound by the preliminary injunction, the strong policy favoring comity to federal court proceedings separately requires the Commission to defer to the federal litigation. *Consumers' Power Co. v. Mich. Pub. Util. Comm'n*, 270 Mich. 213, 217-18 (1935) (where same issue is before federal court and Michigan administrative agency, administrative proceedings should be held in abeyance as matter of comity). Indeed, it would be particularly inappropriate for this Commission (or any other state administrative agency) to revisit the district court's conclusions that Home Help Program providers were public employees and that the April 9, 2012 extension of SEIU HCMI's collective bargaining agreement was valid

because, for the purposes of SEIU HCMI's federal constitutional rights, those holdings involve matters of federal law, not state law. *See, e.g.*, *Gen. Motors Corp. v. Romein*, 503 U.S. 181, 187 (1992).[1]

The most prudent course for the Commission is therefore to postpone any action on the Charging Parties' charge until the Sixth Circuit has resolved the pending preliminary injunction appeal, and, thereafter, to request briefing from the parties on whether this matter should continue to be held in abeyance until the entire *Snyder* litigation is resolved. *Cf. Consumers' Power Co.*, 270 Mich. at 217-18.

Should the Commission choose to process the Charging Parties' charges before the Sixth Circuit rules, however, the Commission should dismiss the charges for lack of jurisdiction rather than referring them to an administrative law judge. *See* 2002 AACS R 423.165(1) (permitting such dismissals). As the Charging Parties concede, PERA only "addresses the bargaining rights and privileges of public employees" and "the Commission has subject-matter jurisdiction only over public employees." Response to Order To Show Cause ("Charging Parties' Response") at 1. The Charging Parties' claims, however, are premised on their contention that they are *not* (and have never been) PERA public employees. *See, e.g.*, *id.* at 16-17. The charges on their face fail to state a facially valid unfair practice charge under PERA because, accepting the allegations of the charges as true, they would not be within PERA's jurisdiction.

---

[1] In evaluating the claim that a State has sought to abrogate a plaintiff's contract in violation of federal constitutional rights, federal courts treat any contention that the plaintiff's contract was invalid under state law as a question of federal law. *Gen. Motors Corp.*, 503 U.S. at 187. This prevents after-the-fact reinterpretations of the State's legal rules from being used to infringe upon contractual rights otherwise protected by the federal Constitution. Thus, the many claims now made by the Charging Parties were not only decided against the Charging Parties' positions in the District Court, but that decision was reached as a matter of federal law and should not be relitigated before this state administrative body.

There also is no basis for the Charging Parties' alternative request for a declaratory ruling. If this Commission has no jurisdiction over the Charging Parties' claims, it cannot issue any ruling, declaratory or otherwise. Moreover, this Commission has never promulgated rules providing for declaratory rulings or issued a declaratory ruling. In addition, the Charging Parties' claims require the resolution of complicated factual disputes that cannot properly be addressed through the declaratory ruling procedure.

Finally, the Charging Parties have expressly disclaimed any desire to rely upon the decertification process, *see id.* at 21, and have not even attempted to comply with the rules governing that process. Accordingly, there is no need for this Commission to decide whether the Charging Parties could invoke the decertification process, even though they contend that they are not public employees subject to this Commission's jurisdiction, or to consider how that process might interact with the pending federal litigation.

BACKGROUND

In 2005, this Commission certified SEIU HCMI as the collective bargaining representative for individuals paid by the State to provide in-home care services for elderly and disabled individuals through Michigan's Home Help Program. *Snyder* Opinion, 2012 WL 2367134, at *2. More than 20,000 homecare providers had signed authorization cards requesting representation by SEIU, and the certification followed a secret ballot representation election, supervised by the Commission, in which the voters overwhelmingly favored union representation. *Id.* SEIU HCMI and MQC3 thereafter negotiated two collective bargaining agreements governing the providers' terms and conditions of employment. *Id.* Those collective bargaining agreements provided significant improvements in working conditions for homecare providers who are paid by the State to assist elderly and disabled individuals with activities of

daily living. The collective bargaining agreements also provided for cooperation between MQC3 and SEIU HCMI in creating a registry to refer providers to consumers and otherwise improving the Home Help Program. From 2006 through April 2012, MQC3 and all other relevant Michigan officials honored SEIU HCMI's collective bargaining agreement with MQC3, including the provisions requiring that the providers' union dues and agency fees be paid via payroll withholding. *See id.* at *3. More than 97 percent of the providers chose to be union members rather than agency fee payers. *Id.*

The current collective bargaining agreement was originally set to expire on September 20, 2012. *Id.* at *2. However, on October 14, 2009, MQC3 and SEIU HCMI extended the agreement to November 15, 2012. *Id.* at *3. On April 9, 2012, the agreement was again extended, this time to February 28, 2013. *Id.*

On April 10, 2012, a new Michigan law, 2012 Mich. Pub. Act 76 ("P.A. 76"), took effect. *Id.* P.A. 76 purports to declare that the home care providers represented by SEIU HCMI are not public employees for purposes of PERA, states that any bargaining unit that includes such providers is "invalid and void," and prohibits public employers from recognizing any bargaining unit that includes those providers. Rather than permitting the existing collective bargaining agreement with MQC3 that SEIU HCMI had negotiated for that bargaining unit to expire by its own terms (which was scheduled to occur less than a year after P.A. 76's passage), the new law went out of its way to abrogate that existing contractual agreement. *Id.* at *4. On May 25, 2012, the Michigan Department of Community Health ("DCH") informed SEIU HCMI that, in accordance with P.A. 76, DCH intended to disregard the payroll withholding provisions of the

collective bargaining agreement and cease deducting dues and fees from providers' paychecks. *Id.*[2]

Four days later, SEIU HCMI filed a lawsuit in the United States District Court for the Eastern District of Michigan, asserting that defendants' immediate enforcement of P.A. 76 in a manner contrary to its existing contractual rights would violate the Contract Clause of the United States Constitution, U.S. Const. art. I, §10, cl. 1. SEIU HCMI sought temporary, preliminary, and permanent injunctive relief.

Counsel for the Charging Parties, the Mackinac Center Legal Foundation ("Mackinac Center"), appeared at the May 30, 2012 hearing on SEIU HCMI's request for a temporary restraining order, where the Mackinac Center requested and was granted leave to file an amicus brief opposing SEIU HCMI's request for a preliminary injunction. Mackinac Center filed that amicus brief on June 13, 2012, arguing, like the Charging Parties here, that the Commission's 2005 certification of the Home Help provider bargaining unit was improper. *See* Amicus Brief of Mackinac Center for Public Policy ("Mackinac Amicus Br.), D.E. #21, at 12-15, *in Snyder v. SEIU Healthcare Michigan*, No. 2:12-cv-12332-NGE-DRG (E.D. Mich. June 13, 2012). The amicus brief also challenged the April 9, 2012 extension of SEIU HCMI's collective bargaining agreement, asserting that MQC3 had violated Michigan's Open Meetings Act and that MQC3

[2] Less than three weeks before passing P.A. 76, the Michigan Legislature passed a separate amendment to PERA, 2012 Mich. Pub. Act 45, which excluded from PERA's coverage individuals "whose position does not have sufficient indicia of an employer-employee relationship using the 20-factor test" used by the IRS to determine whether individuals are employees or independent contractors. *See* MCL 423.201(1)(e)(iii). The Legislature's specific and explicit purpose in adopting 2012 Mich. Pub. Act 45 was to exclude graduate student research assistants from PERA's coverage, and the bill had nothing to do with home care providers. *See, e.g.*, 2012 *Michigan Journal of the Senate* 236-37 (Feb. 22, 2012), *available at* http://legislature.mi.gov/doc.aspx?2012-SJ-02-22-017 (amendment "clarifie[d] that graduate student research assistants are not employees under [PERA]" and "s[ought] to uphold the faculty-student relationship indicating that these students are students").

was no longer a public employer because the Michigan Legislature was no longer funding its operations. *Id.* at 16-17.

The District Court heard arguments on SEIU HCMI's motion for a preliminary injunction on June 20, 2012. The following day the District Court granted a preliminary injunction prohibiting defendants from enforcing P.A. 76 in a manner contrary to SEIU HCMI's contractual rights under its existing collective bargaining agreement with MQC3. *Snyder* Opinion, 2012 WL 2367134, at *15. The District Court expressly rejected the attack by the defendants, and by Mackinac Center, on the propriety of the Commission's 2005 certification of the Home Help provider bargaining unit, concluding that, "[b]ecause the home help providers were public employees and not subject to the NLRA, MERC had full jurisdiction to allow them to unionize under PERA with Plaintiff as their representative." *See Snyder* Opinion, 2012 WL 2367134, at *6; *see also id.* ("PERA's broad definition of a public employee, before [P.A. 76], clearly encompasses the home help providers."). The District Court similarly rejected the challenge to the validity of the April 9, 2012 extension of the collective bargaining agreement, explaining that SEIU HCMI and MQC3 "were well within their rights to enter into an extension of the CBA and to exercise the powers they rightfully possessed in the manner they deemed best for establishing and maintaining a large enough and stable workforce of qualified home help providers." *Id.* at *14. The District Court's order granting the preliminary injunction provided:

> 1. Defendants are prohibited from implementing [P.A. 76] in a manner contrary to the existing contractual rights of Plaintiff and its members, including their rights under the collective bargaining agreement with the Michigan Quality Community Care Council.
>
> 2. Defendants are required to withhold union dues and fees from provider paychecks when processing the monthly provider payroll and to transmit those dues and fees to Plaintiff, pursuant to the CBA, Transfer Agreement, and Interlocal Agreement (as defined in this Court's June 21, 2012 Opinion and Order Granting a Preliminary Injunction).

Snyder Order, at 1.

Defendants appealed the Court's decision and order to the United States Court of Appeals for the Sixth Circuit. Briefing on that appeal was completed on December 20, 2012, and the parties are waiting for the Sixth Circuit to schedule oral argument.

REPLY TO CHARGING PARTIES' ANSWERS TO ORDER TO SHOW CAUSE

Rather than answering the specific questions posed by the Commission's Order To Show Cause in a straightforward manner, the Charging Parties rearranged the order of the questions and dodged some of them entirely. SEIU HCMI will do its best to reply to the Charging Parties' answers in a coherent way that respects the Commission's ordering of the questions to the extent possible. Before turning to the Charging Party's answers, however, it is important to reiterate SEIU HCMI's position as to how the Commission should handle the charges: 1) The Commission should hold this entire matter in abeyance until the Sixth Circuit rules on the preliminary injunction appeal, and then request further briefing from the parties about whether, in light of the Sixth Circuit's decision, the stay should continue until the federal litigation is over. 2) If the Commission considers the charges now, it should dismiss them on the grounds that a) the Charging Parties' charges fail to state a valid unfair labor practice charge, because PERA regulates the conduct of public employers toward public employees and the charges are premised on the Charging Parties' contention that the providers are *not* public employees, and b) a declaratory ruling is improper because the Commission has no jurisdiction to issue such a ruling, the Commission has never promulgated rules for issuing such rulings, and the charges involve factual disputes that are not appropriate for resolution through such a ruling.

Question 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.

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

The charge does not state a claim upon which relief can be granted under PERA, or a violation of §10 of PERA.

As the Charging Parties' concede, PERA only "addresses the bargaining rights and privileges of public employees" and "the Commission has subject-matter jurisdiction only over public employees." Charging Parties' Response at 1. The Charging Parties' claims, however, are premised on their contention that they are *not* (and have never been) public employees. *See, e.g.*, *id.* at 16-17. If the Charging Parties are not public employees, as they assert, they cannot assert any rights under PERA, and this Commission does not have any jurisdiction to consider their claims. As the Commission stated in *University of Michigan*, 25 MPER P 48, 2011 MI ERC Lexis 324, at *9, "If the [individuals in question] are not public employees, we have no jurisdiction over their relationship with the [purported employer] and the matter is at an end." Conversely, if the Charging Parties *are* public employees, their claims have no legal or factual basis. For that reason, the charge on its face fails to state any claim for which this Commission can grant relief.[3]

The Charging Parties attempt to address this fundamental flaw in their charge by asserting that "the Commission's rules indicate that either a party or the tribunal sua sponte may

[3] In an obvious effort to evade the District Court's preliminary injunction decision and order, the Charging Parties' response ignores P.A. 76 almost entirely. Accordingly, they make no effort to explain how this Commission retains jurisdiction over their claims if, as they contend, P.A. 76 explicitly amended PERA to establish that Home Help Program providers are *not* public employees subject to this Commission's jurisdiction. *See* Charging Parties' Brief in Support of ULP Charge at 11.

raise the issue of lack of jurisdiction over a party." Charging Parties' Reponse at 22. However, the rule cited by the Charging Parties provides no support for their position. Rule 423.165 simply allows the Commission to grant summary disposition if "the commission lacks jurisdiction over a party," but that rule does not in any sense create a claim for relief or a cause of action, let alone a claim or cause of action within the Commission's jurisdiction. The rule simply permits the dismissal of charges where the Commission lacks jurisdiction over one or more parties. Here, the Charging Parties allege that the Commission lacks jurisdiction over them, so there is nothing more for the Commission to do besides dismissing their charges.[4]

The Charging Parties also assert "the doctrine of primary jurisdiction is what is believed to give the Commission the first opportunity to consider this matter . . . ." Charging Parties' Response at 22. However, the "doctrine of primary jurisdiction" is "a concept of judicial deference and discretion" that is implicated "whenever there is *concurrent original subject matter jurisdiction* regarding a disputed issue in both a court and an administrative agency." Le Duc, *Michigan Administrative Law* §10:43, at 802 (citing *Rinaldo's Construction Corp. v Mich. Bell Tel. Co.*, 454 Mich 65, 70, 559 NW2d 647, 652 (1997)) (emphasis added). That doctrine does not *create* jurisdiction or a cause of action where no such jurisdiction or cause of action exists; it simply provides guidance regarding the proper exercise of *concurrent* jurisdiction over claims that may be pursued both in court and in an administrative agency. There are no such claims here. As stated, the premise of Charging Parties' allegations is that they are not (and have

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[4] The situation is similar to one in which the allegations of a plaintiff's complaint, if accepted as true, show that a court lacks jurisdiction. There is no need for the court to adjudicate whether the allegations are correct, since the plaintiff is bound by the allegations of its own complaint. *See, e.g.*, *Empire Coal & Transp. Co. v. Empire Coal & Min. Co*, 150 U.S. 159 (1893) (where plaintiff's pleading demonstrated absence of complete diversity necessary for federal jurisdiction, federal court properly granted demurrer for lack of jurisdiction).

never been) PERA public employees, so – accepting the Charging Party's allegations as true – their claims do not fall within the Commission's jurisdiction.

Indeed, if the Charging Parties are correct in their contention that these providers are not now (and never were) public employees under PERA, the conclusion that would necessarily follow is that no violation of PERA has or could have occurred with respect to these employees. Section 10 does not make it an unfair labor practice for a government entity to recognize a bargaining unit that consists solely of individuals who are not PERA public employees but, rather, says nothing about how government entities act toward such individuals.

As for the Charging Parties' conflict of interest claim, which they state "is the most traditional charge being presented to the Commission," Charging Parties' Response at 23, the charge fails on its face to allege an unfair practice, even if one ignores the Charging Parties' premise that the providers are not PERA public employees.

Under the relatively narrow and exceptional union conflict-of-interest doctrine developed under the National Labor Relations Act, a party that asserts such a conflict bears a "heavy" burden, and must demonstrate a "clear and present" danger that the conflict will prevent the union from loyally representing its members at the bargaining table. *See, e.g., Beverly Enterprises*, 293 NLRB 122, 122 (1989) (citation omitted). Assuming that PERA incorporates a conflict of interest doctrine comparable to that applied under the NLRA,[5] the doctrine applies only where a union takes on a financial or fiduciary interest, unrelated to normal collective

[5] SEIU HCMI does not concede that PERA incorporates a conflict of interest doctrine comparable to the NLRA's doctrine. The Charging Parties cite no authority in which this Commission has recognized and found merit to such a conflict of interest claim under PERA. Rather, in the sole authority they cite, the Court of Appeals, in agreement with this Commission, *rejected* a purported conflict of interest claim. *Northern Michigan Ed. Ass'n v. Vanderbilt Area Schools*, 87 Mich. App. 604, 609-10 (1979).

bargaining, in the enterprise of an employer (or one of its competitors) that may compromise the union's zeal in championing the interests of the workers through collective bargaining. *See, e.g.*, *NLRB v. Pinkerton's, Inc.*, 621 F.2d 1322, 1326-27 (6th Cir. 1980) ("Where the union does not compete with the employer and has neither financial stake in the employer's continued well-being nor objectives inconsistent with the employees' interests, the Board has not found a disqualifying conflict of interest.").

In the context of union financial assistance to distressed employers, the NLRA cases recognize that the giving of assistance by itself does not create a conflict – as the Charging Parties seem to contend here – but rather, such assistance creates a potential conflict of interest only if the contractual payback arrangements associated with the financial assistance are structured to create a sufficiently substantial union property interest in the employer's ongoing business (unrelated to the normal collective bargaining interests of the union) that could compromise the union's future conduct in representing the employer's employees. *See, e.g.*, *NLRB v. David Buttrick Co.*, 399 F.2d 505, 507-08 (1st Cir. 1968) ($4.7 million loan to employer's competitor by Teamsters pension fund did not create financial conflict-of-interest precluding representation of employer's employees by Teamsters local, because loan did not give Teamsters "an equity-like interest" in competitor); *see also Anchorage Community Hospital, Inc.*, 225 NLRB 575 (1976) (no conflict where union was minority representative on employer's governing board and executive committee, where union's loan to hospital was fully secured, and where employer received only a small percentage of its revenue from union fund).[6]

[6] Indeed, while federal law makes certain payments *from employers to unions* unlawful, *see* 29 U.S.C. §186(b); *see also Local 1814 v. NLRB*, 735 F.2d 1384 (D.C. Cir. 1984), no federal or Michigan law prohibits unions from paying money to an employer. To the contrary, such conduct is often *protected* under federal labor law, such as when a union makes "job targeting"
(continued)

Here, the sole basis for the Charging Parties' conflict of interest claim is a purported contribution of $12,000 by SEIU HCMI to MQC3 in January 2012. (As the Charging Parties acknowledge, MQC3 at the same time received contributions totaling approximately $10,000 from other sources. *See* Charging Parties' Brief in Support of ULP Charge, at 11.) No repayment of the union's contribution has ever been expected or promised. No property-like interests in the operations of the employer were even arguably created. Nor have the Charging Parties ever articulated any interest that they contend the union acquired through its contribution that might create an analogous conflict that will plague the union in the future. All the Charging Parties allege, and all that they could allege given the facts, is that SEIU HCMI made an entirely lawful, one-time, no-strings-attached contribution to MQC3 – the kind of contribution that MQC3 was specifically authorized to accept under the Urban Cooperation Act. For the reason explained above, this bare allegation that a union made a financial contribution to the employer does not establish an impermissible conflict of interest.

Moreover, even if the conflict of interest claim were not facially invalid, it fails to state a claim for which relief can be granted because it is time-barred. The financial contribution that purportedly created that conflict of interest occurred in January 2012 – more than six months before the Charging Parties filed their charge on September 20, 2012. Although the Charging Parties suggest that their claim is timely because it concerns the April 9, 2012 extension of the

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(continued)

payments to a union employer so that the union employer can bid against non-union employers for construction contracts. *See, e.g.*, *J.A. Croson Co.*, 359 NLRB 1, 4 (2012) ("The Union's utilization of its job targeting program on State-funded public works projects was clearly protected by Section 7 of the [NLRA].").

collective bargaining agreement, Charging Parties' Response at 24, 27, the actual basis for the charge is the January 2012 payment, which occurred outside the six-month limitations period.[7]

Question 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.

The Commission only has jurisdiction to consider and remedy the unfair labor practices enumerated in §10, and the Commission has no subject matter jurisdiction over a charge that does not allege a violation of PERA §10.

In contending otherwise, the Charging Parties' sole argument is that duty of fair representation claims do not involve violations of §10, but nonetheless fall within this Commission's jurisdiction. This is simply incorrect. Under well-established precedent, duty of fair representation claims arise under §10(3) of PERA. *See, e.g., Leider v. Fitzgerald Educ. Ass'n*, 167 Mich. App. 210, 215-16 (1988) ("A bargaining representative's breach of the duty of fair representation, such as a wrongful failure to pursue a member's grievance, is an unfair labor practice under § 10(3).") The Commission's jurisdiction to consider duty of fair representation claims thus provides no support for the exercise of jurisdiction over claims that on their face do *not* involve purported violations of §10.

The Charging Parties, recognizing the weakness of their argument, separately contend that "the Commission should consider creation of an unfair labor practice charge" that would allow "non-public employees" to challenge their placement in a bargaining unit. Charging

[7] The Charging Parties' assertion that the April 2012 extension of the collective bargaining agreement was in some fashion a result of a union conflict of interest is wholly speculative, unsupported, and unexplained. Moreover, the underlying reasoning of this assertion is even harder to discern, given that the substantive terms of that extended agreement were negotiated *in 2009*.

Parties' Response at 26. As the Charging Parties' concede, however, "the Commission has subject-matter jurisdiction only over public employees." Charging Parties' Response at 1. The Commission cannot expand its subject-matter jurisdiction by creating a new unfair labor practice available to (alleged) non-public employees.

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.

For the reasons explained above, the allegations in the charge do not state a violation of §10. Accordingly, this Commission need not consider Question 4. Nonetheless, the Charging Parties' claims would be time-barred if they stated violations of §10. The certification of the SEIU HCMI bargaining unit challenged by the Charging Parties occurred more than seven years ago, and the parties' continued bargaining in reliance on that certification cannot be challenged as an unfair labor practice at this late date. *Cf. Local Lodge No. 1424 v. NLRB*, 362 U.S. 411 (1960) (rejecting as time-barred unfair labor practice charge based on employer's bargaining with union that lacked majority support at time of its recognition by employer); *see also Southgate Community School District*, 14 MPER P 32; 2001 MI ERC Lexis 91 (following *Local Lodge No. 1424*, *supra*, and rejecting as time-barred charge alleging unlawful negotiation and maintenance of CBA memorandum of understanding filed more than six months after memorandum executed). Likewise, 2012 Mich. Pub. Act 45, which the Charging Parties contend excluded them from PERA's coverage, was enacted on March 12, 2012 – more than six months before the Charging Parties filed their charge on September 20, 2012 – so any claims premised on the enactment of that law are likewise time-barred. And finally, for the reasons explained

above, the Charging Parties' "conflict of interest" claim is time-barred because it challenges an event that took place in January 2012.[8]

Question 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.

The Charging Parties assert in their answers that they are not and have never been public employees. Charging Parties' Response at 16-17. The Charging Parties are bound by that position. As explained above in SEIU HCMI's answer to Questions 1 and 2, this Commission does not have jurisdiction over individuals who are not public employees, and the "doctrine of primary jurisdiction" does not create such jurisdiction in the Commission.

Question 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.

Question 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.

Questions 6 and 7 must be answered by reference to the specific context in which the issue is raised. In this case, the issue has been raised through an unfair labor practice charge under PERA §10, rather than through a decertification petition. Because such unfair labor

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[8] Because the Charging Parties disclaim any desire to initiate a representation case by filing a decertification petition or otherwise, the Commission need not consider whether such a representation case would also be time-barred.

practice charges are subject to a six-month statute of limitations, MCL 423.216(b), the Commission's 2005 findings and the 2005 representation election must be accorded finality and validity in this unfair labor practice proceeding, and this Commission does not have authority to set aside its 2005 findings or overturn the 2005 representation election.

SEIU HCMI was certified by this Commission as the collective bargaining representative of Home Help Program providers in 2005, following a Commission-supervised secret-ballot election in which the vast majority of voters favored representation by the union. Now, more than seven years later, the Charging Parties charge SEIU HCMI and MQC3 with having committed an unfair labor practice by engaging in the very collective bargaining permitted and required by this Commission's 2005 certification order. Even if the Respondents could be charged with an unfair labor practice for proceeding in compliance with a facially valid order by this Commission (which is highly doubtful, to say the least), the six-month statute of limitations that governs unfair labor practice charges precludes this Commission from reconsidering its 2005 certification decision, or the propriety of the 2005 representation election, in this unfair labor practice proceeding. Because no party challenged the propriety of SEIU HCMI's 2005 certification as an unfair labor practice within six months, SEIU HCMI and MQC3 had the right to rely upon that certification's finality and validity going forward without worrying about potential unfair labor practice charges in the future.

The United States Supreme Court reached a similar conclusion in *Local Lodge No. 1424 v. NLRB*, 362 U.S. 411 (1960). In that case, the employer impermissibly granted recognition to a union lacking majority support among the employer's employees, then entered into a collective bargaining agreement with the union that included a union security clause. *Id.* at 412-14. Those actions indisputably constituted unfair labor practices under the NLRA. *Id.* at 414. However, no

party challenged the agreement within six months of its execution. Instead, the NLRB received unfair labor practice complaints challenging the continued enforcement of the union security clause ten and twelve months after the execution of the agreement. The NLRB concluded that the charges were timely and found them to be meritorious, but the Supreme Court reversed, concluding that the unfair labor charges were time-barred notwithstanding the continued enforcement of the union security clause. *Id.* at 414-15. Because the challenge to the union security clause was premised upon the illegality of an event occurring outside the limitations period – in *Local Lodge No. 1424*, as here, certain circumstances surrounding the formation of the parties' collective bargaining relationship – the charges effectively sought to "reviv[e] a legally defunct unfair labor practice." *Id.* at 417. The Court recognized that permitting such charges to proceed "would mean that the statute of limitations would never run in a case of this kind." *Id.* at 416.

The situation here is no different. As in *Local Lodge No. 1424*, the Charging Parties' assertion that the post-certification collective bargaining constitutes an unfair labor practice because the 2005 certification was erroneous is time-barred.

The Charging Parties seek to revive their time-barred claims by characterizing them as a challenge to this Commission's jurisdiction. That argument, however, fails for multiple reasons.

First, the Charging Parties ignore the distinction, drawn in the very cases they cite, between "want of jurisdiction in which case the court has no power to adjudicate at all, and a mistake in the exercise of undoubted jurisdiction. . . ." *Jackson City Bank & Trust Co. v. Fredrick*, 271 Mich. 538, 544 (1935). The Charging Parties' fundamental claim is that, given the factual circumstances of the Home Help Program providers' employment, they were not "public employees" for purposes of PERA when this Commission certified SEIU HCMI as their

collective bargaining representative in 2005. Such a factual error by the Commission (if there was one) involves, at most, "an erroneous exercise of jurisdiction." *Id.* at 545. As the Michigan Supreme Court has explained, such an error "might be taken advantage of by direct appeal, or by direct attack" but it "may *not* be called in question collaterally." *Id.* (emphasis added).

In *Bowie v. Arder*, 441 Mich. 23 (1992), for example, the Michigan Supreme Court considered the jurisdictional consequences of a circuit court's erroneous consideration of a child custody petition filed by a third party that was neither a parent to the child nor the child's legal guardian, and who therefore had no rights under Michigan's Child Custody Act. *Id.* at 49. The Court rejected the argument that the third party's lack of standing deprived the court of subject matter jurisdiction, explaining that this approach "confuses the question whether the court has jurisdiction over a class of cases, namely, child custody disputes, with the question whether a particular plaintiff has a cause of action." *Id.* at 39. The Court explained instead that, "when a circuit court entertains an original action for custody by a party who does not have standing, the court errs in the exercise of jurisdiction, rather than taking action for which it is without jurisdiction." *Id.* at 49.

Bowie demonstrates the fundamental flaw in the Charging Parties' arguments. Even if this Commission were mistaken about the providers' status under PERA in 2005 when it certified SEIU HCMI as their collective bargaining representative (and it was not), that purported mistake would have been no different from the mistake in *Bowie* – the Commission would have erroneously concluded that the providers had substantive rights under PERA, when in fact they did not. As in *Bowie*, the Commission had jurisdiction over the 2005 representation petition and certification's "class of cases" – namely, representation proceedings involving interlocal agencies like the MQC3 and their purported employees. *See* MCL 124.507(1) (interlocal agency

is "a public body, corporate or politic"); MCL 124.505(8) (employees of interlocal agency "are eligible as of the day the joint exercise of power becomes effective through its contract to choose their representative under [PERA]"). Because the 2005 representation petition and certification involved a dispute within the Commission's subject matter jurisdiction, any purported mistake by the Commission in processing that petition was a mere error in the exercise of its jurisdiction that cannot be collaterally attacked at this late date. *Jackson City Bank & Trust Co.*, 271 Mich. at 545.[9]

Second, the Charging Parties provide no support for their assertion that the lawfulness of the collective bargaining between SEIU HCMI and MQC3 (as occurred in the years following the 2005 election) depended upon the validity of the 2005 certification order. Notably, Michigan's Attorney General recognized the validity of such bargaining *before* PERA's enactment, demonstrating that, even absent any statutory authorization, collective bargaining by a public entity with a majority representative is *not* illegal. *See, e.g.*, Mich. Op. Att'y Gen. 4306, at 331 (1964), *available at* http://www.ag.state.mi.us/opinion/datafiles/1960s/op03087.pdf (concluding, before PERA's enactment, that school board had authority to recognize and negotiate with labor organization that received majority of votes in representation election). Nothing in PERA prohibited such previously lawful arrangements to the extent that they were, as the Charging Parties here contend, outside PERA's coverage. And of course, given the Charging Parties' premise that they fall outside PERA's coverage, there can be no serious contention that

[9] Conversely, in *this* proceeding, the Charging Parties ask the Commission to adjudicate PERA claims brought by individuals who expressly assert that they are *not* public employees. On their face, such claims fall categorically *outside* the "class of cases" over which this Commission has subject-matter jurisdiction. This Commission can no more address claims by non-PERA-covered employees than it can resolve child custody or probate disputes.

such bargaining arrangements in the absence of a valid MERC certification constitute PERA unfair labor practices.[10]

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

The Charging Parties acknowledge that the rescission remedy would apply, if at all, only to their conflict of interest claim, and that, as to that claim, it is unsupported by any authority. Charging Parties' Response at 36 (stating, in answering Question 8, that "Charging Parties were unable to locate any Michigan cases discussing the remedies *for conflicts of interest* during bargaining) (emphasis added). Indeed, they identify no Michigan caselaw whatsoever suggesting that this Commission has the authority to rescind collective bargaining agreements. *Id.* Whether or not there are unusual circumstances in which the Commission might be able to order the rescission of a collective bargaining agreement as a proper remedy for an unfair labor practice presented to this Commission,[11] it is clear that no such remedy could be warranted here.

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[10] Because the Charging Parties have expressly disclaimed any desire to use the decertification process and have not complied with the Commission's requirements for filing a decertification petition, *see* 2002 AACS R 423.141, this Commission need not consider whether the same considerations would preclude the Commission from reconsidering its prior findings or overturning a representation election in the context of a decertification petition. In such cases, there may be no need for the Commission to consider that issue, because the relevant facts regarding the employees' work and the relevant law would be evaluated at the time of the decertification petition; the prior legal status of the employees under PERA would be largely irrelevant. Indeed, in this case, there have been relevant changes since 2005. For example, there have been several amendments to PERA since the Commission's 2005 certification of the bargaining unit – including P.A. 76 – and there may have been changes in the relationship between the providers and MQC3 after seven years of collective bargaining. Given those changes, this Commission would have no reason to address – in a hypothetical decertification petition or elsewhere – the purely academic question of whether the Commission's 2005 certification of the SEIU HCMI bargaining unit under the then-effective but since-amended version of PERA was proper at the time it issued.

[11] *Cf., e.g., Local 1814 v. NLRB*, 735 F.3d 1384 (D.C. Cir. 1984) (upholding NLRB order requiring rescission of collective bargaining agreement where union officials had been convicted (continued)

As explained above, the Charging Parties' charge does not state a claim upon which relief can be granted or an unfair practice under PERA §10, much less any other basis on which the Commission might be authorized and justified in granting such novel relief. Put simply, this Commission does not have jurisdiction to consider the Charging Parties' claims.

Question 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.

The Commission does not have the authority, absent specific rules, to issue a declaratory ruling. In *Lakeshore Public Schools*, 1988 MERC Lab. Op. 817, 1 MPER P 19147, 1988 WL 1587991, the Commission dismissed a charge filed against the Lakeshore Public Schools by the charging party Lakeshore Federation of Teachers seeking a declaratory ruling on the question whether a proposed contract clause constituted a mandatory subject of bargaining. The Commission explained that "neither PERA nor the promulgated rules of the Commission contain any reference to declaratory rulings." The Commission acknowledged Section 63 of the Administrative Procedures Act, MCL 24.263, which appears to direct agencies to adopt rules regarding declaratory rulings, and concluded:

> [W]e have not promulgated rules setting forth procedures for the submission, consideration, or disposition of a declaratory ruling request under PERA. Since we have not promulgated the required rules, we decline to grant Charging Party's request that we issue a declaratory ruling in place of an unfair labor practice finding in this case.

1988 WL 1587991, at *2.

(continued)

of receiving unlawful kickbacks from employer over several years, union's recognition by employer was part of kickback agreement, "the agreement between the Company, the Union, and the Union's principal officers was completely tainted by fraud and corruption from the very beginning," and the illegal kickbacks tainted and undermined the entirety of the parties' bargaining relationship).

There is no reported case in which the Commission has ever issued a declaratory ruling, and it appears that the Commission has in fact never done so. Despite the seemingly mandatory language in Section 63, Charging Parties have not sought to compel the Commission to promulgate declaratory ruling rules. In the absence of such rules specific to the Commission, there is no basis for a declaratory ruling, as this Commission recognized in *Lakeshore*.

Moreover, this case would not be appropriate for a declaratory ruling even if there were rules in place.

First, for the reasons described above, the Commission has no jurisdiction over the claims at issue here, which depend upon the Charging Parties' contention that the providers are *not* public employees. Because the Commission lacks jurisdiction, it can neither issue a declaratory ruling nor consider the Charging Parties' unfair labor practice charges.

Second, Section 63 provides that "an agency *may* issue a declaratory ruling as to the applicability to *an actual state of facts* of a statute administered by the agency," MCL 24.263 – establishing not only that it is within an agency's discretion whether or not to issue a declaratory ruling, but also that this relief is appropriate only where the key facts are undisputed: "[D]eclaratory rulings are appropriate when there are no facts in dispute and the question is the application of a statute or a rule to that unquestioned set of facts." Le Duc, *Michigan Administrative Law* §6:13, at 408. If the facts *are* disputed, the appropriate procedure is an evidentiary hearing in a contested case, as defined in APA §3(3), MCL 24.203(3). In *Mutual Signal Corp.*, Michigan Public Service Commission Case No. U-8461, 1986 Mich PSC Lexis 748, for example, the Public Service Commission declined a request for a declaratory ruling that the petitioner was not subject to the Commission's regulation because that coverage issue was

sufficiently complex and "deserving of an open forum to provide the fullest opportunity for interested parties to express their views."

Contested case hearings at this Commission are narrowly limited to proceedings in which the Commission determines whether an unfair labor practice under PERA §10 has been committed and what remedy, if any, should be required. *See* MCL 423.216. For the reasons explained above, the Charging Parties do not and cannot allege a violation of §10, and they fail to state a claim for which relief may be granted. Thus, neither a contested case hearing nor a declaratory ruling is appropriate in this case.

Question 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.

As stated above, the Commission has never issued a declaratory ruling under any rule or authority, including 2001 AACS R 338.81. *Lakeshore Public Schools* suggests that the Commission should decline to issue a declaratory ruling in the absence of promulgated rules governing such rulings, and there are no cases or guidelines from the Commission or elsewhere regarding the issuance of a declaratory ruling by the Commission under 2001 AACS R 338.81.

Assuming *arguendo* that the rule is applicable to the Commission, the Charging Parties have not complied with its requirements, as they admit. *See* Charging Parties' Response at 29-31. Most critically, the Charging Parties have failed to comply with the rule's "certification" requirement. The rule requires "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." 2001 AACS R 338.81(1)(c)(ii). As explained above, declaratory rulings are only appropriate where the facts are essentially uncontested, and the certification requirement is consistent with this purpose. Figure 1, which is part of the rule and which is the recommended form to request a

declaratory ruling under the rule, requires the applicant to state, "I hereby certify the existence of the actual state of facts set forth and the submission of all relevant facts know to me." 2001 AACS R 338.81(2). The rule requires the certification of the *applicant*, not the applicant's attorney. And unlike an attorney certification under MCR 2.114(D), 2001 AACS R 338.81, the rule does not allow the certification as to "the existence of the actual state of facts and the submission of all relevant facts known to the applicant" to be made on information and belief.

The factual issues involved here are by no means simple or uncontroverted. Historically, the Commission has in a number of factually complex cases addressed issues involving joint employer status, although in the similar but distinct context of joint employment by a public entity and a private institutional employer. *See, e.g.*, *Louisiana Homes, Inc.*, 1989 MERC Lab. Op. 51, aff'd, 192 Mich. App. 187 (1991), remanded, 441 Mich. 883 (1992), reaff'd 203 Mich. App. 213, lv. denied, 445 Mich. 938 (1994); *Saginaw Bay Human Services,* 1992 MERC Lab. Op. 522; *Passages Community Services*, 1991 MERC Lab. Op. 653. To say the least, litigation of such joint employer issues can become quite fact-intensive and complex. Timeliness and jurisdictional considerations aside, these potentially complex factual issues are not appropriate for a declaratory ruling procedure under MCL 24.263, which contemplates a relatively straightforward and undisputed factual scenario.

Question 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 MQCCC 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.

Yes. This Commission is bound by the preliminary injunction entered by the district court in *Snyder*. Rule 65 of the Federal Rules of Civil Procedure provides that a preliminary injunction binds not only the parties to the federal litigation, but also "the parties' officers, agents, servants, employees, and attorneys," and "other persons who are in active concert or participation" with the parties or their agents. Fed. R. Civ. P. 65(d)(2). As part of Michigan's Executive Branch, this Commission is bound by the preliminary injunction entered against Governor Snyder by the *Snyder* court. *See, e.g., ACLU v. Johnson*, 194 F.3d 1149, 1163 (10th Cir. 1999) (injunction entered in lawsuit against governor and attorney general of New Mexico properly bound all district attorneys within New Mexico). The Commission, no less than the Governor, must therefore respect "the existing contractual rights of Plaintiff and its members, including their rights under the collective bargaining agreement with the Michigan Quality Community Care Council," and cannot interfere with the withholding of union dues and fees from provider paychecks or with their delivery to Plaintiff. *Snyder* Order, at 1.

The Commission cannot evade the requirements of the district court's preliminary injunction by relying on the alternative legal theories suggested by the Charging Parties. *See* Charging Parties' Response at 34 (arguing that the 2005 certification was void, that 2012 Mich. Pub. Act 45 changed the providers' status as public employees, and that the April 9, 2012

extension was invalid due to a conflict of interest). The district court specifically held that the 2005 certification of the SEIU HCMI bargaining unit by this Commission was valid; that PERA's definition of "public employee" encompassed Home Help Program providers prior to the enactment of P.A. 76; and that the April 9, 2012 extension of the collective bargaining agreement was valid. *See Snyder* Opinion, 2012 WL 2367134, at *6, *14. This Commission cannot ignore those holdings, or the legal obligations flowing therefrom. Any contrary rule would deprive Rule 65(d) of all meaning, and invite gamesmanship and unending, piecemeal litigation.[12]

The Charging Parties ask this Commission to "declare the original certification void ab initio, order the return of the last six months of . . . 'union dues' and 'agency fees,' and declare improper any future collection of . . . 'union dues' and 'agency fees.'" Charging Parties' Brief in

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[12] The Charging Parties incorrectly assert that the district court merely prohibited Governor Snyder "from enforcing 2012 PA 76" and "ceas[ing] the transfer of dues/fees from DCH to [MQC3]." Charging Parties' Response at 33. This ignores the specific language of the injunction, which requires that Governor Snyder recognize SEIU HCMI's "existing contractual rights" and that he "transmit [union] dues and [agency] fees *to Plaintiff*, pursuant to the CBA." *Snyder* Order, at 1. Their cramped interpretation of the preliminary injunction also ignores the fundamental legal justification for the preliminary injunction – namely, that SEIU HCMI has a valid contractual right to receive union dues and agency fees via payroll withholding that the Contract Clause prohibits the State from impairing. *Snyder* Opinion, 2012 WL 2367134, at *8-*10.

Rather than addressing the Commission's obligations under Rule 65, the Charging Parties' response to Question 11 focuses on the doctrines of claim and issue preclusion. Those doctrines are irrelevant. The question is not whether the Charging Parties are *themselves* precluded from asserting claims that are inconsistent with the district court's decision, but whether *this Commission* is bound by the injunction. The Commission is bound by the injunction, for the reasons explained above, whether or not claim or issue preclusion separately bars the Charging Parties' claims. The Charging Parties' passing suggestion that the Commission can ignore the preliminary injunction because "whatever immediacy the federal court identified that was necessary to prevent harm to SEIU Healthcare has passed," Charging Parties' Response at 34-35, is also meritless. The preliminary injunction remains in effect and binding until it is dissolved by the district court or reversed by the Sixth Circuit, and this Commission cannot unilaterally disregard its terms.

Support of ULP Charge at 50. Such an order, however, would directly frustrate implementation of the district court's order that the State *not* interfere with the continued collection of union dues and agency fees by SEIU HCMI. Accordingly, if this Commission were to proceed to hear these charges now, it would risk contempt proceedings under Rule 65 and an injunction under the All Writs Act barring further proceedings. *See* 28 U.S.C. §1651(a) (permitting the issuance of "all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law"); *United States v. N.Y. Tel. Co.*, 434 U.S. 159, 174 (1977) ("The power conferred by the Act extends, under appropriate circumstances, to persons who, though not parties to the original action or engaged in wrongdoing, are in a position to frustrate the implementation of a court order or the proper administration of justice, and encompasses even those who have not taken any affirmative action to hinder justice.") (citations omitted).

Question 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.

Yes. Even if the Commission were *not* bound by the preliminary injunction (which it is), comity would nonetheless obligate the Commission to honor the injunction. In *Consumers' Power Co. v. Mich. Pub. Util. Comm'n*, 270 Mich. 213 (1935), the Michigan Supreme Court held that when a Michigan administrative agency faces issues that are already pending before a federal court, the administrative proceedings should be held in abeyance until the completion of federal court litigation. *Id.* at 217-18. As the Court explained, "litigants should obtain adjudication of their respective rights in the forum to which their controversy was first presented" – here, as in *Consumers' Power Co.*, the federal court – in order "[t]o avoid even the possibility of a useless and burdensome proceeding before the commission, as well as to preserve orderly administration of justice." *Id.*

Rather than addressing these comity concerns, the Charging Parties assert that "the more pertinent question is abstention." Charging Parties' Response at 35. However, no party to the *Snyder* litigation asked the District Court to abstain. Moreover, there was no valid basis for abstention, because the issues before the District Court were matters of federal law, *not* state law, for purposes of the Court's Contract Clause analysis. *Gen. Motors Corp.*, 503 U.S. at 187; *Irving Trust Co. v. Day*, 314 U.S. 556, 561 (1942) ("When this Court is asked to invalidate a state statute upon the ground that it impairs the obligation of a contract, the existence of the contract and the nature and extent of its obligation become federal questions for the purposes of determining whether they are within the scope and meaning of the Federal Constitution . . . ."). The District Court rejected arguments made by the Michigan Attorney General and counsel for the Charging Parties that are largely repeated by the Charging Parties here, and concluded *as a matter of federal law* that the Home Help Program providers were public employees until at least April 10, 2012 (when P.A. 76 took effect), and that the April 9, 2012 extension of the collective bargaining agreement was valid and enforceable. *See Snyder* Opinion, 2012 WL 2367134, at *6, *14. It would be particularly inappropriate for this Commission to revisit those federal law issues in this state administrative proceeding.

Because this Commission's power to act on the Charging Parties' claims is defined and significantly circumscribed by the District Court's preliminary injunction, the Commission should not take any action until the pending Sixth Circuit appeal of that injunction, which is fully briefed, has been resolved. Furthermore, under *Consumers' Power Co.*, this Commission should hold all proceedings on the Charging Parties' claims in abeyance until the *Snyder* lawsuit has been resolved. At that time, the Commission can consider how best to address the Charging Parties' claims.

Question 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?**

The Charging Parties admit that there is no Michigan caselaw or Commission decision granting the class-wide relief that they seek or permitting the Charging Parties to represent "similarly situated" home help providers. Instead, the Charging Parties rely upon the NLRB's authority "to fashion a remedy encompassing parties who are not named as charging parties to the action." Charging Parties' Response at 37. For purposes of standing and remedies, however, the NLRB is fundamentally different from the Commission.

Under the NLRA, "any person, even a stranger to the collective bargaining agreement, can bring unfair labor practice charges." *Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc.*, 690 F.2d 489, 517 (5th Cir. 1982). Should the NLRB determine that issuance of a complaint on that charge is warranted, the NLRB ultimately prosecutes the matter in its own name. *See, e.g.*, 29 U.S.C. §160(a) ("*The Board* is empowered . . . to prevent any person from engaging in any unfair labor practice . . . .") (emphasis added); *General Engineering, Inc. v. NLRB*, 341 F.2d 367, 376 (9th Cir. 1965) (in unfair labor practice proceedings, "the Board occupies a position similar to that of a plaintiff in a civil action"). Under PERA, by contrast, a charging party must have standing to bring an unfair labor practice charge. *See, e.g.*, *Chesaning Union Schools*, 1 MPER P 19158 (1988) (dismissing individual charge for lack of standing where charging party did not appear at hearing and person who did appear provided no evidence

that she personally suffered wrongdoing and therefore "was not a proper Charging Party to pursue the alleged violations of PERA").[13] Because the NLRB acts as a public prosecutor charged with "prevent[ing] any person from engaging in any unfair labor practice," 29 U.S.C. §160(a), while PERA requires private parties with standing to pursue unfair labor practices charges in their own right, the Charging Parties' reliance on the NLRB's broad remedial authority is misplaced.[14]

Even if the Charging Parties had some right to represent "similarly situated" providers in this proceeding (notwithstanding that those other providers have not designated the Charging Parties as their representative and that PERA provides no class action-type procedure), that group of "similarly situated" providers could include, at most, only the very small percentage of the provider bargaining unit that consists of "agency fee" payers. "Of the over 41,000 providers" in the bargaining unit, "only approximately 2% have elected not to be full members." *Snyder* Opinion, 2012 WL 2367134, at *3. The remaining 40,000 providers have joined SEIU HCMI as full members, and voluntarily pay union dues to support SEIU HCMI's

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[13] *See also City of Detroit*, 7 MPER P 25122 (1994) (individual has no standing to assert refusal to bargain charge); *Kent County Education Ass'n*, 7 MPER P 25027 (1994) (county residents, parents and taxpayers lack standing to bring charge that teachers union violated PERA by illegally striking); *University of Michigan*, 25 MPER P 48; 2011 MI ERC Lexis 324 (proposed research assistants group lacked standing to intervene in representation case involving graduate research assistants, because group did not seek placement on ballot but sought to intervene for purpose of expressing opposition to MERC conducting election, "a purpose it lacks standing to pursue in a representation proceeding"); *Detroit Public Schools*, 2012 MI ERC Lexis 71 (individuals lack standing to pursue refusal to bargain charge, and proposed intervenors must have standing in order to intervene under 2002 AACS R 423.157) (citing *Wayne County (Community Mental Health Agency)*, 21 MPER 73, 2008 MI ERC Lexis 123 (2008)).

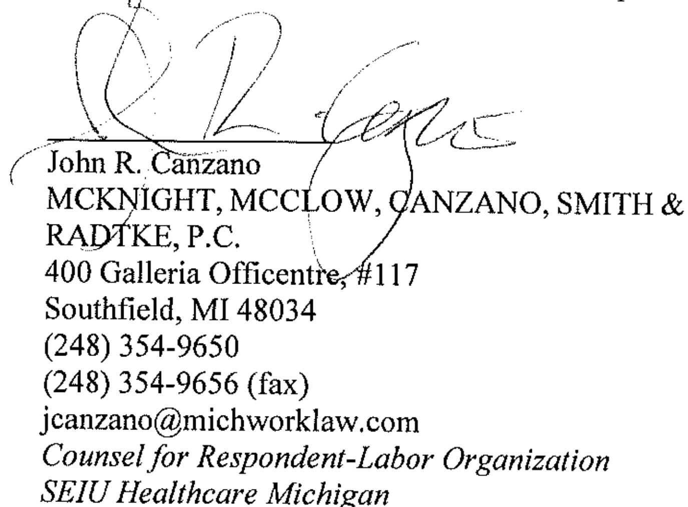
[14] 2002 AACS R 423.157 also does not suggest that this Commission should grant relief to anyone other than the specific Charging Parties. "[C]omplete relief," for purposes of that rule, can be granted to the Charging Parties without the addition of any of the thousands of other Home Help Program providers who have not filed charges with this Commission or otherwise challenged their representation by SEIU HCMI.

representational activities. *Id.* The Charging Parties, who challenge SEIU HCMI's right to represent them and seek a refund of their payments to SEIU HCMI, are not "similarly situated" to the full union members who voluntarily pay union dues. Indeed, the Charging Parties are not even "similarly situated" to the other agency fee payers in the Home Help provider bargaining unit, because that group includes employees with widely divergent views regarding the desirability of being represented by SEIU HCMI. *See Gilpin v. AFSCME*, 875 F.2d 1310, 1313 (7th Cir. 1989) (Posner, J.) (affirming denial of class certification where named plaintiffs sought to represent all agency fee payers, because that group includes both employees who are "happy to be represented by a union but won't pay any more for that representation than . . . forced to" and employees who are "hostile to unions on political or ideological grounds").

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

The Charging Parties have expressly disclaimed any desire to use the decertification process, Charging Parties' Response at 21, and have not complied with the Commission's requirements for filing a decertification petition. *See* 2002 AACS R 423.141. Accordingly, it is not necessary for this Commission to determine whether the Charging Parties could pursue any of their claims through a properly presented decertification petition, or how such a petition would be processed.

Dated: January 11, 2013



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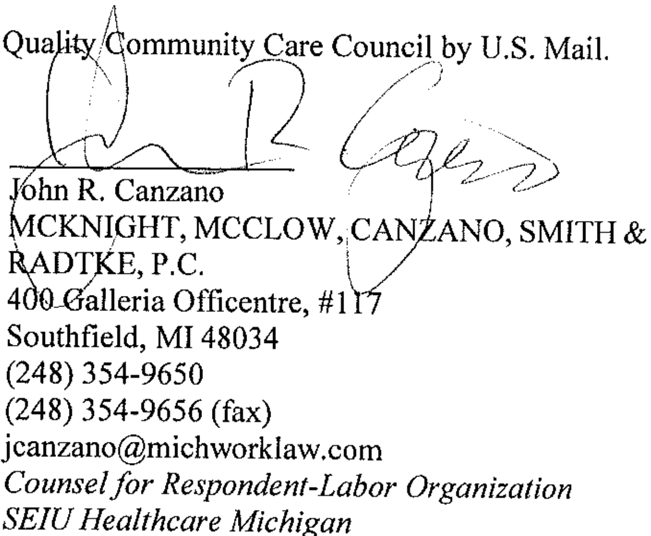
STATEMENT OF SERVICE

I hereby certify that on January 11, 2013, a copy of Respondent SEIU Healthcare Michigan's Reply to Charging Parties' Answers to Order To Show Cause was served on the Charging Parties and Respondent Michigan Quality Community Care Council by U.S. Mail.

Dated: January 11, 2013



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