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JURISDICTIONAL STATEMENT

This case concerns the propriety of the executive branch of state government converting home-based day care business owners and home-based independent day care contractors into government employees who can then be unionized. The central question in deciding jurisdiction is whether these home-based day care providers are public employees. *Lansing v Carl Schlegel, Inc*, 257 Mich App 627 (2003); *Prisoners' Labor Union v Dep't of Corrections*, 61 Mich App 328, 330 (1975) (“It is undisputed that [Michigan Employment Relations Commission (MERC)] has jurisdiction over the inmates’ claims if, and only if, those inmates are ‘public employees’ within in [sic] the meaning given that term in [the Public Employment Relations Act (PERA)].”). This question is also the fundamental dispute in this case. If Plaintiffs are correct in their legal claim, MERC did not have subject-matter jurisdiction over this matter, and the commission’s orders regarding home-based day care providers are void.

Determining whether Plaintiffs are public employees involves uncontested matters of public record. Because there are no disputed facts, and because “[c]onclusions drawn from undisputed facts are questions of law,” *Regents of Univ of Michigan v Employment Relations Comm*, 389 Mich 96, 103 n 3 (1973), no discovery is necessary. Hence, under MCL 600.4401(1), this suit was filed as a mandamus action directly at the Court of Appeals against the state officers named herein.

The Court of Appeals dismissed this action through a short order. On October 27, 2010, it also denied a timely motion for reconsideration. This application for leave is filed within 42 days of the denial for reconsideration and is timely pursuant to MCR 7.302(C)(2).

STATEMENT OF QUESTIONS INVOLVED

I. Does the Court of Appeals' latest dismissal order provide sufficient grounds for denying a writ of mandamus?

Plaintiffs: No.
Defendants: Yes.
Court of Appeals: Yes.

II. Are Plaintiffs public employees under the Michigan Public Employment Relations Act and related case law?

Plaintiffs: No.
Defendants: Have not taken a position on this question.
Court of Appeals: Did not address this question.

III. Are Plaintiffs public employees subject to public-sector collective bargaining pursuant to the interlocal agreement that formed the Michigan Home Based Child Care Council?

Plaintiffs: No.
Defendants: Surprisingly, no.
Court of Appeals: Did not address this question.

IV. Is MERC's order certifying Child Care Providers Together Michigan as the collective bargaining agent for home-based day care providers void, given that MERC lacked subject-matter jurisdiction at the time of the certification?

Plaintiffs: Yes.
Defendants: No.
Court of Appeals: Did not address this question.

V. Does the Court of Appeals have original jurisdiction in a mandamus action even if a non-state officer is found to be a necessary party in the case?

Plaintiffs: Yes.
Defendants: No.
Court of Appeals: No.

VI. Is a writ of mandamus action the proper remedy in this action?

Plaintiffs: Yes.
Defendants: No.

Court of Appeals: No.

INTRODUCTION

Plaintiffs Sherry Loar, Michelle Berry, and Paulette Silverson¹ are home-based day care providers tending children whose parents qualify for state day care subsidies. In September 2009, Plaintiffs filed an action for mandamus at the Court of Appeals, seeking to stop Defendant Department of Human Services (DHS) and its director, Defendant Ishmael Ahmed, from diverting “dues” to a union, Child Care Providers Together Michigan (CCPTM).² Plaintiffs claim Defendant DHS cannot treat home-based day care providers, who are business owners and independent contractors, as government employees. Further, Plaintiffs contend Defendants cannot rely on the Michigan Employment Relations Commission’s (MERC) certification of the CCPTM to justify diversion of these “dues,” since MERC’s certification order is void due to the commission’s lack of subject-matter jurisdiction.

As will be discussed below, organized labor faces a significant legal impediment to unionizing home-based day care providers in Michigan and other states. To circumvent this problem, labor leaders are promoting the flawed theory that providers’ direct or indirect receipt of state money makes them “public employees” and subject to public-sector collective bargaining under state law.

In Michigan, the “employer of record” became the Michigan Home Based Child Care Council (MHBCCC), a two-staff-member entity with a tiny budget.³ The MHBCCC was created out of an attempted interlocal agreement between Defendant DHS and Mott Community College

¹ For a short period, Loar was the only plaintiff, and there is a document or two in the Court of Appeals record that reflects this. But at most times, there have been multiple plaintiffs, and for ease of reference, “Plaintiffs” will be used in the plural.

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

³ From December 1, 2008 to September 30, 2010, MHBCCC has in aggregate been budgeted approximately \$306,000. http://www.michigan.gov/documents/dhs/291-292_MHBCCC_337548_7.pdf (last accessed December 7, 2010).

(Mott). The agreement purported to give the MHBCCC the power to engage in collective bargaining with a union of home-based day care providers. Not long after the agreement between the DHS and Mott was signed, the CCPTM submitted cards with signatures from some home-based day care providers and sought to organize. After a vote by mail, the union was “certified” by MERC, and the CCPTM eventually entered into a “collective bargaining agreement” with the MHBCCC. The DHS subsequently began withholding so-called “union dues” from the biweekly Child Development and Care (CDC) Program checks the department pays out to home-based day care providers on behalf of low-income parents qualifying for state day care assistance.⁴ The “dues” equal 1.15% of the value of the checks.

The DHS began withholding “dues” in January 2009. From January 1, 2009, to September 30, 2010, approximately \$4.1 million in “dues” was taken from home-based day care providers’ CDC checks. http://www.michigan.gov/documents/dhs/291-292_MHBCCC_337548_7.pdf.

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

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

From the start, this case has generated “significant public interest.” The lawsuit has been discussed in The Wall Street Journal, The Weekly Standard, The Washington Times, The Detroit News, the Detroit Free Press, The Oakland Press, the Lansing State Journal, the Flint Journal, the Livingston Daily Press & Argus, Petoskey News-Review, and other papers around the state. It

⁴ When this case was first filed, Plaintiffs believed that Defendant DHS paid the “dues” directly to the union. Freedom of Information Act requests subsequently filed with the MHBCCC show that the “dues” are first given to the MHBCCC, which then forwards the money to the union. That the entity to which the “dues” are first diverted is the MHBCCC, rather than the CCPTM, does not affect the question of whether it is proper for Defendant DHS to divert the “dues” at all.

was the subject of a four-minute segment on Fox News' national news show on February 11, 2010, which led to its being discussed on the nationally syndicated Rush Limbaugh radio show the next day, and it has been covered on other syndicated radio shows as well. The undersigned has been interviewed by TV Channels 2, 7 and 56 in Detroit; Channels 6 and 10 in Lansing; Channels 12 and 25 in Flint; Channel 5 in Saginaw; and a variety of radio stations, including NPR's Michigan Radio and Detroit's News/Talk 760 WJR Radio (several times).

The state's newspaper editorials have uniformly expressed concern over the government's actions in this case and the process involved. The Grand Rapids Press stated: "The formation of the union for Michigan child care providers four years ago was downright sneaky and unfair."⁵ The Lansing State Journal called the process "ridiculous," "a political scheme," and "a ploy to advance a particular group's interests without the messy involvement of the Legislature or the people of this state."⁶ The Livingston Daily described it as "an under-the-radar method of padding the union's pockets."⁷ The Macomb Daily called it "skewed and wrong."⁸ The Detroit News labeled it "murky dealings."⁹ Plaintiffs are unaware of any newspaper editorial supporting the process.

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

⁵ http://www.mlive.com/opinion/grand-rapids/index.ssf/2010/09/editorial_questionable_unioniz.html (last accessed on December 7, 2010).

⁶ <http://www.mackinac.org/archives/2010/033110LSJ-abandon.pdf> (last accessed on December 7, 2010).

⁷ <http://www.mackinac.org/archives/2010/Ed100917LivingstonDaily.pdf> (last accessed December 7, 2010).

⁸ <http://www.macombdaily.com/articles/2010/04/26/opinion/srv0000008113657.txt> (last accessed on December 7, 2010).

⁹ <http://www.mackinac.org/archives/2010/032210DN-lawmakers.pdf> (last accessed on December 7, 2010).

This case has a somewhat odd procedural history, which will be discussed below. As a result, Plaintiffs have requested the wide range of remedies set out at the end of this brief.

STATEMENT OF FACTS

A. General definitions and facts

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

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

Defendant DHS classifies "childcare providers into five different service types: day-care centers, group day-care homes, family day-care homes, day-care aides, and relative care providers." Auditor General Performance Audit, Child Development and Care Program Payments at 41 (July 29, 2008).¹⁰ Day care centers are defined as "a facility, other than a private residence, receiving 1 or more preschool or school-age children for care for periods of less than 24 hours a day, where the parents or guardians are not immediately available to the child." MCL 722.111(1)(g). A "group" home is "a private home in which more than 6 but not more than 12 minor children are given care and supervision for periods of less than 24 hours a day unattended by a parent or legal guardian, except children related to an adult member of the

¹⁰ This document is available at <http://audgen.michigan.gov/comprpt/docs/r431030005.pdf> (last accessed December 7, 2010). It will be referred to as "Program Payments Audit."

family by blood, marriage, or adoption.” MCL 722.111(1)(i)(iv). A “family” home is the same except that it has at least “1 but fewer than 7 minor children.” MCL 722.111(1)(i)(iii). The terms “day-care aide” and “relative care provider” are not explicitly defined in Michigan statutes or regulations. The Auditor General defined “day care aide” as “[a]n individual (including a relative) who provides CDC Program childcare in the home of the CDC Program child. A day-care aide may live with the parent or substitute parent and the CDC Program child.” Program Payments Audit at 80. The Auditor General defined “relative care provider” as:

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

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

Michigan receives a federal Temporary-Assistance-for-Needy-Families block grant. See generally 42 USC §§ 601-19. In the fiscal 2009 appropriation, 2008 PA 248, the DHS was allocated \$382,629,800 for “Day care services” by the Michigan Legislature. *Id.* at 6. For fiscal 2010, the appropriation was \$238,755,100.¹¹ 2009 PA 129 section 112. For fiscal 2011, the appropriation was \$182,113,300.¹² 2010 PA 190 section 112.

The Auditor General reviewed 30 months of CDC program payments from October 5, 2003, through March 4, 2006. Program Payments Audit at 59. During that time, the DHS paid out \$1,115,110,789 in child care subsidies, with enrolled relative care providers receiving 39.6% of the total; enrolled day care aides, 25.2%; licensed day care centers, 16.5%; licensed group day

¹¹ The 2009 “Day care services” line item was split into two categories: “Regulated day care services” and “Unregulated day care services.” The figure provided is the sum of the two.

¹² This figure is the sum of the “Licensed and registered child development and care” line and the “Enrolled child development and care” line.

care homes, 10.4%; registered family day care homes, 8.2%; and unlicensed day care centers and homes,¹³ 0.1%. *Id.*

The CCPTM contends it represents a “bargaining unit” composed of group day care providers, family day care providers, relative care providers, and day care aides. This unit would account for 83.4% of the payments from the audit period.¹⁴

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

The instant case occurs as part of a major national initiative by organized labor to increase its membership by redefining traditional notions of employer-employee relations when state or local governments help compensate a service rendered. As of 2004, according to the National Women’s Law Center, only 3% of day care center workers — as opposed to home-based day care providers — were either in a union or covered by a union contract, despite organizing efforts dating back to the 1960s. Deborah Chalfie, et al, *Getting Organized: Unionizing Home-based Child Care Providers* 6 (2007).¹⁵ Starting in 2005, organized labor actively began seeking to unionize home-based day care providers.

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

Child care centers may be difficult to organize, but at least there is a traditional employer-employee relationship between the owners and staff. In contrast, home-based providers do not easily fit into a legal status that permits them to unionize. The federal labor laws that cover the private sector expressly exclude both independent contractors and persons providing domestic services in another person’s home from the legal definition of “employee.” . . . [P]roviders are either independent contractors — self-employed business owners — or, in the case of a small number of . . . providers who are providing care in a child’s home,

¹³ Basically, these are facilities on federal land. See Auditor General Performance Audit, Child Development and Care Program Payments at 84 (July 29, 2008).

¹⁴ The 16.5% of the payments that went to licensed day care centers would be excluded, as would the 0.1% that went to unlicensed day care centers and homes.

¹⁵ This document is available at <http://www.mackinac.org/archives/2010/NatlWomensLawCtr2007-GettingOrganized.pdf> (last accessed on December 7, 2010). At least until March 23, 2010, the article was available at <http://www.nwlc.org/pdf/gettingorganized2007.pdf>, but it appears to have been removed.

[are] otherwise not in an employer-employee relationship under the federal labor relations laws.

. . .

Even if providers were considered employees under federal labor laws, however, the entities with which they would negotiate over key elements of their work — state and local governments — are not considered employers. They are expressly excluded from the definition of “employer” under the federal labor laws, and thus state and local public-sector employees . . . require specific legal authority in order to obtain collective bargaining rights with their government employer. . . .

In other words, without additional, specific legal authority, home-based child care providers have no right to organize for the purpose of collective bargaining, and the state has no right to recognize or negotiate with the providers’ representative.

Id. at 6-7 (emphasis added).

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

With federal options foreclosed, the Service Employees International Union (SEIU) sought to organize the home care workers in Los Angeles County against the county government. When the county refused to meet and confer with the SEIU as the bargaining agent, the SEIU brought suit. In 1991, the courts held that the home care workers were not employees of the county. *Service Employees International Union, Local 434 v Los Angeles Co*, 275 Cal Rptr 508 (Cal Ct App 1991). Subsequently, the California Legislature enacted a law allowing counties to establish “by ordinance, a public authority to provide for the delivery of in-home supportive services.” Cal Welf

& Inst Code § 12301.6(a)(2).¹⁶ This public authority would be deemed “the employer of in-home supportive services personnel [who were] referred to recipients,” although the “recipients” would “retain the right to hire, fire, and supervise the work of any in-home supportive services personnel providing services to them.” Cal Welf & Inst Code § 12301.6(c)(1).

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

Oregon was the next state to allow the organization of home care workers, doing so in 2000 through a ballot initiative that amended the state constitution. See *Ore Const*, art XV, § 11(f). In 2002, Washington through an initiative passed a similar law, which is codified in pertinent part at *Wash Rev Code* § 74.39A.270. In 2006, the state of Massachusetts created an entity to act as the “employer” of publicly financed home care workers. *Mass Gen Laws ch 118G* § 31.

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

In 2004, Michigan used a purported interlocal agreement between the Department of Community Health and the Tri-County Consortium on Aging to create the Michigan Quality

¹⁶ State law eventually mandated that all county governments create an entity to be an employer of in-home supportive services. *Cal Welf & Inst Code* § 12302.25.

¹⁷ In 2005, the Illinois Legislature codified the arrangement. 5 *Ill Comp Stat* 315/3(f), (n), (o); 5 *Ill Comp Stat* 315/7(4).

Community Care Council, which was given the power to collectively bargain with a union of home care providers.

This model of union organization was subsequently applied to home-based day care providers. In 2005, Illinois' governor allowed unionization of these workers via an executive order. Ill Exec Order 2005-1 (February 18, 2005). In 2005, Washington's governor issued an executive directive. Chalfie, et al, *Getting Organized* at 26 n 28 (2007). Unionization in Oregon was effected by two gubernatorial executive orders. Ore Exec Order 05-10 (September 23, 2005); Ore Exec Order 06-04 (February 13, 2006). In each of these three states, the orders were later replaced by legislation. 5 Ill Comp Stat 315/3(f), (n), (o); 5 Ill Comp Stat 315/7(4); Wash Rev Code § 41.56.028; Ore Rev Stat § 657A.430(3). Between 2005 and 2007, governors in Iowa, New Jersey, Wisconsin, New York, Pennsylvania, Kansas, and Maryland issued executive orders.¹⁸ In 2009, the state of New Mexico enacted legislation. NM Stat § 50-14-17.¹⁹

Some attempts to implement this model of union organization failed. Governors in New York, Massachusetts, and California vetoed legislation to permit unionization of home-based day care providers. NY Veto No 215 (June 7, 2006); Mass Veto HB 5257 (August 10, 2006); Cal Veto of Assembly Bill 1164 (October 14, 2007).²⁰ The voters of Massachusetts rejected a ballot initiative to allow unionization of home-based day care providers. <http://www.sec.state.ma.us/ele/elepdf/rov06.pdf> at 57-58 (last accessed December 8, 2010).

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

¹⁹ A union PowerPoint® presentation indicates that in 2006, after initially clashing in organization drives, AFSCME and the SEIU split up 19 states between them. Michigan was assigned to AFSCME (and the UAW). <http://www.mackinac.org/archives/2010/NWLC2007-BuildingaUnion.pdf> at 17-19 (last accessed December 7, 2010). Until at least March 22, 2010, the article was available at <http://www.nwlc.org/pdf/Oct4WebinarPresentation.pdf>, but it appears to have been removed.

²⁰ A subsequent New York governor issued the executive order mentioned above to allow unionization of home-based day care providers.

C. Michigan-specific facts

In 1973, Michigan enacted the Child Care Licensing Act, codified at MCL 722.111-128. All group child care homes must be “licensed,” while all family child care homes must be “registered.” MCL 722.115(1). The legislation states that the “department of human services . . . is responsible for the development of rules for the care and protection of children in organizations covered by this act.” MCL 722.112(1). The scope of the rules is set out in MCL 722.112(4) and covers a range of activities and subjects.

The DHS’ licensing rules for family and group day care homes are set forth in R 400.1901-52. Topics include, but are not limited to, the number of vacations days a caregiver²¹ can take (no more than 20), R 400.1903(1)(a); training requirements for caregivers, R 400.1905; daily activities, R 400.1914; permissible bedding for the children, R. 400.1916; food preparation requirements, R 400.1931; and various safety issues, R 400.1941-44. Caregivers can hire “assistant caregivers,” who must be at least 14, “of responsible character,” and trained (within 90 days of being hired) in CPR, first aid, and the handling of blood-borne pathogens. R 400.1904.

There are no statutes or regulations that govern the conduct of relative care providers or day care aides.²²

Until at least March 20, 2010, the DHS website contained an online “Relative Care Application,” a form that had been modified in March 2010.²³ Applicants had to agree to a list of conditions, including one that stated, “I understand I am considered to be self employed and not an employee of DHS.” <http://www.mackinac.org/archives/2010/DHSChildCareProviderApp.pdf> at 3, 4

²¹ The “caregiver” is the licensee/registrant in whose home the children are being cared for.

²² Administrative rules R 400.5001-15 concern relative care providers and day care aides, but primarily discuss eligibility and reimbursement.

²³ The page was originally located on the DHS website at http://www.michigan.gov/documents/dhs/DHS-0220-R_194100_7.pdf (last accessed March 20, 2010), but it has since been removed.

(last accessed on December 7, 2010). And until at least March 20, 2010, the DHS website contained an online “Child Development and Care Aide Provider Application,” a form that had been modified in March 2010.²⁴ Applicants had to agree to a list of conditions, including one that stated:

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

<http://www.mackinac.org/archives/2010/DHSDayCareAideApp.pdf> at 3, 4.

Until at least March 23, 2010, the DHS’ online “Child Development and Care (CDC) Handbook” that was revised in December 2009 appeared on the DHS website and stated:

When a parent chooses a provider, both the parent and provider are forming a business relationship with each other. This is an agreement between the parent and provider that may be in writing. Any agreement should at least cover:

- How payment will be made.
- Hours of care.
- Charge for care.
- When payment is expected.
- And any notice of when care is no longer needed.

The parent is responsible for any child care charges not paid by DHS. He/she also has to pay for the cost of any care provided while the parent is not involved in DHS Approved Activities, and for child care services provided before being authorized for child care by DHS.

All child care providers, except for Aides, are self-employed. This means that the provider runs their [sic] own business. If the provider is an Aide, he/she works for the parent of the child and is a household employee of the parent under federal law. Under the Fair Labor Standards Act the parent has to pay the employer’s share of any employer’s taxes that need to be paid, such as Social Security, Federal Insurance Contribution Act (FICA) and Federal Unemployment Tax Act (FUTA) taxes. Parents also have to give a W-2 form at the end of the year to the aide so they [sic] can do their [sic] taxes.

Please note: Provider is not employed by the State of Michigan or the Child Development and Care Program. Providers are not eligible for unemployment insurance.

²⁴ The page was originally located on the DHS website at http://www.michigan.gov/documents/dhs/DHS-0220-A_194099_7.pdf (last accessed March 20, 2010), but it has since been removed.

<http://www.mackinac.org/archives/2010/CDCHandbookDec2009.pdf> (last accessed on December 8, 2010, and emphasis in original).²⁵

In April 2006, the CCPTM attempted to organize against the DHS. Complaint, Exhibit 7. The proposed bargaining unit was “all providers receiving reimbursements from the CDC Program under the following job classifications: (1) group day care providers; (2) family day care providers; (3) relative care providers; and (4) day care aides.” *Id.*

On July 27, 2006, pursuant to Const 1963, art 7, § 28, and the Urban Cooperation Act, MCL 124.501-512, the DHS and Mott Community College entered into a purported interlocal agreement, creating the MHBCCC. Complaint, Exhibit 8. The DHS claimed that “entering into this Agreement is necessary or appropriate to assist the Department in carrying out its duties and functions, including licensing, regulating, assisting, providing training for, and administering the subsidy payments to eligible home based child care providers.” *Id.* at § 1.06.²⁶ That agreement defined a “provider” as one who supplies home-based child care services and is “licensed or registered” by the DHS or “who receives payments for providing home-based child care services through the Department.” *Id.* at § 1.15. The parties clarified that “[i]t is not the purpose of this Agreement to limit the selection process of child care providers by families; families will continue to select and retain the provider who best suits their needs.” *Id.* at § 2.01.

The agreement also professed to give the MHBCCC the “right to bargain collectively and enter into agreements with labor organizations. [The MHBCCC] shall fulfill its responsibilities

²⁵ The DHS website has a new version of the Child Development and Care (CDC) Handbook posted at http://www.michigan.gov/documents/dhs/DHS-PUB-0230_222206_7.pdf (last accessed December 7, 2010). This new version was last revised in October 2010. It eliminates much of the language in the quoted passage related to federal statutes, taxes and day care aides.

²⁶ The day care subsidy program concerns tens of thousands of providers and hundreds of millions of dollars in annual appropriations, yet MHBCCC has only two employees and a tiny budget. It is difficult to square the stated purpose of the interlocal agreement with these facts.

as a public employer subject to 1947 PA 336, MCL 423.201 to 423.217 [the Public Employment Relations Act (PERA)].” *Id.* at § 6.10.

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

Despite this resolution, the CCPTM soon filed a petition for representation elections with MERC.²⁷ Complaint, Exhibit 10. In its September 2006 petition for representation proceedings, the CCPTM formally sought to unionize against the MHBCCC and claimed that the bargaining unit included:

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

Complaint, Exhibit 11.²⁸ The claimed unit size was 40,532 individuals. Complaint, Exhibit 10.

MERC ran a certification election by mail in October and November of 2006. Of the 6,396 individuals who voted, 5,921 voted in favor of unionization, and 475 opposed unionization.²⁹ Complaint, Exhibit 13. On November 27, 2006, MERC certified the results. *Id.*

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

²⁷ MERC Case R 06I-106.

²⁸ This petition was actually amended from its original form. The original petition to MERC based membership in the proposed union on the receipt of state CDC subsidies. The amended petition removed the reference to the subsidies. Complaint, Exhibit 11.

²⁹ Implicitly, representation elections only require a majority of those voting, not a majority of those eligible to vote. R. 423.149b(5)).

This agreement formalizes the unique relationship between the MHBCCC and the CCPTM. . . .

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

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

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

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

Although the parties understand that economic increases are largely contingent upon necessary legislative funding, MHBCCC agree to work jointly with CCPTM to find creative solutions to fund economic increases when new funds are insufficient.

The MHBCCC, in agreement with the Union, will recommend to the Governor to make the necessary budget recommendations to the Legislature for Home Based Child Care Providers as outlined in Appendix B — Rates. And in addition, will provide the necessary political support to make effective the economic increases in this agreement.

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

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

Deductions of Union dues shall begin no later than thirty (30) days from the first date for which a provider received subsidized payment.

. . .

Union dues and initiation fees shall be deducted from the Provider's payments and remitted to the Union. . . . The warrant stub will state "Union Dues" and the amount of the deduction. . . .

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

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

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

Complaint, Exhibit 15. The "State of Michigan Remittance Advice" at the top of Plaintiffs' CDC checks showed that the checks were "DHS-funded payments." Complaint, Exhibits 16. Plaintiffs also received 1099 forms listing DHS as the payer. Complaint, Exhibits 18; Amended Complaint, Exhibits 26, 27. With each check, Plaintiffs received a document titled "Department of Human Services Child Development and Care Statement of Payments" indicating that "dues" were being deducted from each payment and specifying the amount of dues being removed from the check. Complaint, Exhibit 16.

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

which they mischaracterized Plaintiffs' claim as "the Union was improperly formed." Defendants' Motion to Dismiss Pursuant to MCR 2.116(C)(8) and (C)(4) at 1.

In response on October 28, 2009, Plaintiffs explained that they were not challenging the formation of the union — unions can exist without being granted mandatory collective bargaining power. *Smith v Arkansas State Highway Employees, Local 1315*, 441 US 463 (1979). Rather, Plaintiffs reiterated that "Defendants did not have the authority to give the Michigan Home Based Child Care Council the power to collectively bargain as the 'employer' of home-based day care providers under the interlocal agreement." [Plaintiffs'] Brief in Support of Answer to Defendants' Motion to Dismiss at 4-5.

On November 6, 2009, Defendants sought leave to file a reply brief. In the attached brief, Defendants admitted that "DHS did not — indeed *could not* — grant MHBCCC the power to collectively bargain." Defendants' Reply to [Plaintiffs'] Brief in Support of Answer to Defendants' Motion to Dismiss Pursuant to MCR 2.116(C)(8) and (C)(4) at 1 (emphasis in original).³⁰

On December 30, 2009, despite Defendants' concession of a central point in the litigation, the Court of Appeals entered a terse summary order dismissing the action. On January 20, 2010, Plaintiffs filed a motion for reconsideration that focused on the difficulty that the parties and this Court could have in analyzing such a summary dismissal order. On February 10, 2010, the Court of Appeals denied the reconsideration motion.

After that dismissal, two matters indirectly related to this case sparked further public interest. The first involved the Legislature's bipartisan attempt to end the MHBCCC's financing

³⁰ This quote is the source of Plaintiffs' assertion in Question III of the Statement of Questions Involved that Defendants agree that the state constitution prevents DHS from conferring on the MHBCCC through an interlocal agreement the power to declare Plaintiffs public employees. To be clear, Defendants' admission does not explicitly indicate that the DHS is prevented from conferring this power by the state constitution; defendants may have some other basis for their concession. Their rationale is necessarily unclear, given that this one-sentence admission represents Defendants' only discussion of the issue's merits to date.

in the fiscal 2010 budget. Despite the Legislature's actions, the MHBCCC continues to operate in fiscal 2010, a fact that generated media coverage.³¹ The second matter was a federal class action lawsuit challenging the unionization of Michigan's home-based day care providers (the suit was filed on February 17, 2010, in the Western District of Michigan). *Schlaud v Granholm*, Case No. 1:10-cv-147. The plaintiffs in that case contend that mandating that day care providers pay union dues (or any "fair share" fee) violates the First Amendment. In that federal case, Defendant Ahmed, sued in his official capacity as director of the DHS, 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), Defendant Granholm and Ahmed's Brief in Support of Their Motion to Dismiss at 2-3.

On March 24, 2010, Plaintiffs filed an application for leave with this Court.³² That application principally sought a remand to the Court of Appeals to explain that court's earlier dismissal. On September 17, 2010, this Court unanimously remanded this action to the Court of Appeals for "an explanation of the reason(s) for the denial of the plaintiffs' complaint for mandamus."

³¹ <http://www.woodtv.com/dpp/news/politics/Lawmakers-say-No-DHS-spends-anyway> (last accessed December 7, 2010). The Senate and House may have improperly effectuated the stated intent to defund the agency by failing to make that ban explicit in the legislation. The funding issue was explored in legislative hearings.

The DHS budget bill from the Senate for fiscal 2010, S-1 of HB 5882, <http://www.legislature.mi.gov/documents/2009-2010/billengrossed/House/pdf/2010-HEBS-5882.pdf> (last accessed December 7, 2010), contained an explicit ban on funding the MHBCCC and on DHS' collection of union dues. *Id.* at §§ 291-92. Neither provision was included in the final appropriation bill. 2010 PA 190.

³² Supreme Court # 140810.

In response, on September 22, 2010, the Court of Appeals entered an order³³ that stated in pertinent part:

This Court denied plaintiffs' complaint for mandamus because plaintiffs failed to meet their burden of identifying a clear legal right to the performance of a specific, ministerial duty by defendants. Defendants did not have the clear legal duty to ignore the results of the union certification election.

Plaintiffs are actually seeking declaratory and injunctive relief, which are available in other actions. Where other persons who are not state officers are necessary to the determination of this action, jurisdiction lies with the circuit court and not this Court. Plaintiffs have other remedies available, and mandamus is inappropriate.

On October 13, 2010, Plaintiffs filed a motion for reconsideration. Defendants opposed that motion and again did not address the merits of Plaintiffs' claims. On October 27, 2010, the Court of Appeals denied the reconsideration motion.³⁴

DISCUSSION

I. The Court of Appeals' dismissal order

A. Standard of Review

To obtain a writ of mandamus, a plaintiff must show: "(1) the plaintiff has a clear legal right to the performance of the duty sought to be compelled, (2) the defendant has a clear legal duty to perform, (3) the act is ministerial in nature, and (4) the plaintiff has no other adequate legal or equitable remedy." *Citizens for Protection of Marriage v State Bd of Canvassers*, 263 Mich App 487, 492 (2004). The Court of Appeals has stated that the first two elements are matters of law and are reviewed de novo. *Id.* at 491-92. The latter two elements seem amenable to de novo review, since both are purely legal questions. A number of older cases from the Court of Appeals indicate that a trial court's denial of a writ of mandamus is reviewable for an abuse of discretion. But a de novo standard makes more sense: All of the elements of mandamus concern

³³ Per MCR 7.302(A)(1)(g), a copy of that order is attached.

³⁴ A copy of that order is also attached to this application for leave.

straightforward legal questions. There is no room for discretion in the analysis of the mandamus elements; either they are met, or they are not.

B. Argument: the three assertions made by the Court of Appeals

The Court of Appeals' order contains three distinct assertions: (1) "Defendants did not have the clear legal duty to ignore the results of the union certification election"; (2); the Court of Appeals lacked jurisdiction because "other persons who are not state officers are necessary to the determination of this action"; and (3) Plaintiffs are "actually seeking declaratory and injunctive relief", so "mandamus is inappropriate," because "Plaintiffs have other remedies available."

Begin with the Court of Appeals' first assertion: "Defendants did not have the clear legal duty to ignore the results of the union certification election." If this means that DHS officials will not typically be able to recognize the legal flaws in the actions of another branch of government (in this case, MERC), the assertion is probably correct, but entirely irrelevant. The question of a clear legal duty is not subjective; it is objective. The Court of Appeals has previously explained that "[w]ithin the meaning of the rule of mandamus, a 'clear, legal right' is one 'clearly founded in, or granted by, law; a right which is inferable as a matter of law from uncontroverted facts regardless of the difficulty of the legal question to be decided.'" *University Medical Affiliates, PC v Wayne Co Executive*, 142 Mich App 135, 143 (1985). Whether DHS officials can be expected to recognize their clear legal duty is irrelevant. What matters is whether the courts can discern an objective, clear legal duty under the law.

In order to hold that the MERC certification should not be "ignore[d]," the Court of Appeals would need to make one of two assumptions: either that Plaintiffs are "public employees" under PERA, thereby providing MERC with subject-matter jurisdiction over them; or assuming (correctly) that Plaintiffs are not public employees under PERA, there is some exception to the decades-old rule that a lack of subject-matter jurisdiction voids orders from the issuing tribunal.

The flaws in these assumptions will be analyzed in the arguments that follow. The question of Plaintiffs' status under PERA will be addressed in Part II of the Discussion, which will look at the statutory language and the case law, and in Part III of the Discussion, which will look at whether there are nonlegislative means to expand the universe of public employees subject to PERA. Part IV of the Discussion will address the impact of orders from tribunals that lack subject-matter jurisdiction.

The Court of Appeals' second assertion that it lacks jurisdiction in this case will be addressed in Part V of the Discussion, which will show that there are no other necessary parties and that the Court of Appeals has original jurisdiction of this matter. The court's third assertion will be discussed in Part VI of the Discussion, which will address whether mandamus is the proper type of relief.

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

A. Standard of review

The standard of review is the same as it is in Part I of the Discussion.

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

The following argument and Part III of the Discussion both relate to the first two mandamus elements — whether Plaintiffs have a right to performance of a clear legal duty and whether Defendants have that duty to perform. Plaintiffs contend that they are not public employees and that Defendants should not be taking public-employee union dues from the CDC checks Plaintiffs receive for providing day care to low-income families.

At this point, it seems almost certain that Defendants agree that Plaintiffs are not public employees under PERA. There have been numerous opportunities for Defendants to argue to the contrary. This case has been before the Court of Appeals twice and before this Court previously,

yet never once did Defendants contend that Plaintiffs are public employees under PERA. In fact, in Defendants' 12-page opposition to the last application to this Court, Defendants managed to cite neither the PERA definition of a "public employee" nor a single case regarding who can be designated as a public employee. Further, in the federal case challenging the unionization of Michigan's home-based day care providers on First Amendment grounds, Defendant Ahmed, there sued "in his official capacity as the Director of Michigan Department of Human Services," explicitly refused to "conced[e] that Plaintiffs are public employees." If Defendants had a strong argument that Plaintiffs are public employees under PERA, they would have made it by now.

Despite Defendants' de facto admission that Plaintiffs are not public employees under PERA, Plaintiffs will affirmatively demonstrate the point. This question is too important to be decided by default.

Michigan began allowing public-sector bargaining in 1965 with the enactment of PERA.³⁵ Soon thereafter, the courts created a four-factored test to distinguish government contractors from government employees. That test has been applied even as the Legislature has altered PERA's definition of an "employee."

Under this test, Plaintiffs are not government employees. In addition, the latest amendment to PERA's definition of "employee" shows that the Legislature meant to prevent novel organizing theories from enlarging the pool of government employees. Further, rulings outside of PERA-specific case law reinforce the fact that home-based day care providers are independent contractors, not government employees.

³⁵ Michigan's public-sector bargaining history prior to PERA will be discussed below in Part III of the Discussion.

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

MCL 423.201(1)(e) currently states:

“Public employee” means a person holding a position by appointment or employment in the government of this state, in the government of 1 or more of the political subdivisions of this state, in the public school service, in a public or special district, in the service of an authority, commission, or board, or in any other branch of the public service, subject to the following exceptions:

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

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

As originally implemented in 1947 PA 336, state public employment law discussed the meaning of “employee” only in the provision prohibiting strikes:³⁶

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

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

The enactment of PERA, which significantly altered state public employment law, did not change the definition of “employee” found in MCL 423.202. Nor was the definition altered by the six amendments to PERA between its creation and 1994.³⁷

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

³⁶ This original state law was known as the Hutchinson Act. It will be discussed below.

³⁷ 1965 PA 397; 1973 PA 25; 1976 PA 18; 1976 PA 99; 1977 PA 266; 1978 PA 441.

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

See *Grandville*, 453 Mich at 433; *id.* n. 9. The current version of MCL 423.201(1)(e)(i) was originally enacted as part of 1996 PA 543.³⁸

The meaning of “public employee” under PERA is further illustrated by Michigan case law.³⁹ In *Wayne County Civil Service Commission v Board of Supervisors*, 22 Mich App 287 (1970), the Court of Appeals dealt with potential conflicts between PERA and a state law that allowed Wayne County to create its own civil service. In that case, three county entities disagreed over which of them acted as the employer of the county’s road workers.

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

³⁸ There has been one further amendment to MCL 423.201(1)(e) since that time — 1999 PA 204 — but it essentially just added MCL 423.201(1)(e)(ii), which is not relevant here.

³⁹ Much of the case law surrounding MCL 423.202 is not relevant to the instant case. For instance, many of the “public employee” cases involved supervisory or executive workers. Typically, the disputes in these cases concerned which bargaining unit the workers belonged to, not whether they were in fact public employees under PERA. *Dearborn School Dist v Labor Mediation Bd*, 22 Mich App 222 (1970); *Hillsdale Community Schools v Labor Mediation Bd*, 24 Mich App 36 (1970); *UAW v Sterling Heights*, 176 Mich App 123 (1989); *Muskegon Co Professional Command Ass’n v Co of Muskegon (Sheriff’s Dep’t)*, 186 Mich App 365 (1991). Another case dealt with whether teachers without a valid contract were still public employees under PERA. *Holland School Dist v Holland Ed Ass’n*, 380 Mich 314 (1968). Yet another concerned the extent to which constitutionally created state universities were public employers subject to the requirements of PERA. *Board of Control of Eastern Michigan Univ v Labor Mediation Bd*, 384 Mich 561 (1971).

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

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

Specifically, this Court examined whether this group constituted employees. It noted that the university provided them with W-2 forms and withheld a portion of their compensation for “the purposes of federal income tax, state income tax, and social security coverage.” *Id.* at 110-11. The university provided them with fringe benefits, including medical coverage. The group performed many tasks for which their employer, the university, was compensated, and the group members were entrusted with important decisions, such as writing prescriptions, admitting and discharging patients, and performing surgeries. *Id.* at 112.

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

The Court of Appeals then examined the Correctional Industries Act. While the court recognized that the act set up the “trappings of conventional employment,” it held the act’s

primary purpose was corrections, not employment. *Id.* at 332-33. Thus, without applying the four-factored test, the court held that the prisoners were not public employees under PERA.

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

This Court held that the coemployer concept can be helpful where day-to-day control and budgetary control of public employees are split. *Id.* at 233. It was noted that, by statute, the St. Clair prosecutor had the ability to "appoint supervise, and terminate" assistant prosecutors, while St. Clair County, through its board of supervisors, had the power "to control the number and remuneration" of the assistant prosecutors. *Id.* at 226. This Court therefore held that the county prosecutor and the county board were coemployers that both had a right to sit at the collective bargaining table. *Id.* at 227.⁴⁰

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

⁴⁰ In *Genesee County Social Services Workers Union v Genesee County*, 199 Mich App 717 (1993), the Court of Appeals held that a county prosecutor was not a coemployer (along with the county commissioners) of the "victim-witness assistants" who acted as liaisons between the assistant prosecutors and the crime victim. *Id.* at 719. The court accepted a MERC gloss on *St. Clair Prosecutor* that limited coemployer status to those who could hire and fire a worker and noted that the prosecutor did not have this power over the disputed workers.

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

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

The Court of Appeals set forth the following facts:

The administrator of the consortium reports to a council composed of the superintendents of the participating school districts. The consortium is responsible for its own budget and financial affairs. The consortium also has contracts with community education employees and leases or rents facilities for its programs.

The collective bargaining agreements between the school districts and [each] union do not include the wages, hours, and working conditions of the consortium employees. The consortium employees do not have union dues deducted from their wages. The consortium never entered into a collective bargaining agreement with the unions, which stated their preference of negotiating only with the individual school districts on behalf of the consortium adult education teachers.

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

Two court cases led directly to the 1996 amendment of MCL 423.201(1)(e): *AFSCME v Louisiana Homes, Inc*, 203 Mich App 213 (1994), and *AFSCME v Department of Mental Health*,

215 Mich App 1 (1996). Both cases involved “joint employers,” a multiple-employer doctrine that “treats two separate employers [of the same employees] as a single unit for collective bargaining purposes.” *St Clair Prosecutor*, 425 Mich at 225 n. 2.

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

In the first decision, the Court of Appeals considered whether the Michigan Department of Mental Health (DMH) was a joint employer of residential care workers at a private facility operating under an agreement with contractors to the state of Michigan. The court began by noting, “The State of Michigan is responsible for providing mental health care services.” *Id.* at 188. The DMH contracted with Detroit-Wayne County Community Mental Health (CMH) to provide “residential facilities for mentally ill and mentally retarded persons” in Wayne County. *Id.* CMH, in turn, subcontracted these same services to Michigan Residential Care Alternatives (MRCA), which itself subcontracted to Louisiana Homes. The court explained: “MRCA is a private, nonprofit organization whose membership includes residential care providers. MRCA does not operate residential facilities, but instead is primarily a lobbying organization.” *Id.*

AFSCME petitioned MERC to be named the collective bargaining agent for employees at three locations operated by Louisiana Homes.⁴¹ MERC found Louisiana Homes and the DMH were joint employers.

The Court of Appeals affirmed. It noted that the DMH set “mandatory guidelines for operating a residential care facility” and that any subcontractor would be bound by those. *Id.* at 190. The CMH operated “in effect, under budget guidelines, personnel decisions and

⁴¹ As will be discussed below, the union initially sought to organize under the NLRA, but that request was denied because of the close ties between Louisiana Homes and the DMH. See *Michigan Community Services Inc v NLRB*, 309 F3d 348 (2002).

requirements, training requirements, minimum staff qualifications, and contract provisions set by DMH.” *Id.* Further, any residential care facility is state-funded. *Id.* The DMH gives an allotment for personnel costs, and the facility cannot provide extra money for that expense. *Id.* at 191. Louisiana Homes hired its own workers, but those decisions were subject to approval by the Michigan Department of Social Services (DSS) as the licensing agency and the CMH as the contract agency. *Id.* at 190-91. Likewise, Louisiana Homes had the power to dismiss its employees, but the Court of Appeals noted that the DMH could place a contract “in jeopardy” if an employee it wanted fired was not. *Id.* at 192. Further, the DMH mandated 120 hours of training for the workers annually, and it even had control over some day-to-day activities of Louisiana Homes’ employees through mandates concerning their daily schedule. *Id.*

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

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

Id. at 192-93 (emphasis added).

The second *Louisiana Homes* case concerned the interplay between the NLRA and PERA. AFSCME had sought collective bargaining under PERA because the National Labor Relations Board had prevented the union from organizing under the NLRA, specifically because “an employer health-care institution like Louisiana Homes” was too closely affiliated with an arm of the state — i.e., Michigan’s DMH. *Louisiana Homes*, 203 Mich App at 216. After the Court of Appeals’ first

decision, this Court remanded to determine if federal pre-emption prevented entities like Louisiana Homes from being unionized under PERA. *Louisiana Homes*, 203 Mich App at 216. The Court of Appeals held that pre-emption was not a concern given that the NLRB had repeatedly hesitated to assert federal control in cases where an arm-of-state employer is involved. *Id.* at 221.

After the second *Louisiana Homes* decision, the NLRB reversed itself on the arm-of-the-state doctrine and held that entities like Louisiana Homes could be organized under the NLRA. The implications of this decision were discussed in *AFSCME v Department of Mental Health*, 215 Mich App 1 (1996), the second case that led to the amendment of MCL 423.201(1)(e). The Court of Appeals noted that the NLRB's action meant that there was an "insufficient showing" that "the NLRB would decline to assert its jurisdiction" and thus held that the disputed employees could not be organized under PERA. *Id.* at 15.

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

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

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

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

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

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

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

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

Id. at 516.

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

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

A review of the four-factored test likewise shows that no public employment relationship is involved here. As mentioned above, the four factors for determining whether a government entity is a public employer are “(1) that they select and engage the employee; (2) that they pay the employee; (3) that they have the power of dismissal; and (4) that they have the power and control over the employee’s conduct.” *Wayne Co Civil Service Comm*, 22 Mich App 294.

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

Indeed, it is telling that Defendant DHS repeatedly agreed with Plaintiffs’ view that they are self-employed. For example, the DHS stated in the Child Development and Care (CDC) Handbook cited earlier: “All child care providers, except for Aides, are self-employed. This means that the provider runs their [sic] own business. If the provider is an Aide, he/she works for the parent of the child and is a household employee of the parent under federal law.” There is no mention of the MHBCCC, even though that version of the handbook was modified in December 2009. In addition, in the online CDC application forms cited earlier (since removed from the

DHS website), the DHS required a relative care provider to affirm that he or she was “considered to be self employed” and a day care aide to affirm that “the parent/substitute parent is my employer.” In both cases, no mention was made of the MHBCCC, even though both applications indicated they were last modified in March 2010, long after the creation of the MHBCCC.⁴²

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

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

2. Non-PERA Michigan cases

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

In *Terrien v Zwit*, 467 Mich 56 (2002), this Court determined whether family day care homes violated a restrictive covenant prohibiting “commercial, industrial, or business uses.” This Court held that the day care activity was clearly “commercial,” since it was run for a profit, and therefore violated the covenant. *Terrien* thus shows that being a day care provider is not a governmental service, but rather a commercial activity.

⁴² The recent modification of the CDC Handbook and the removal of the application forms in question does not negate the fact that DHS made these telling admissions months after this case had been filed.

Morin v Department of Social Services, 134 Mich App 834 (1984),⁴³ involved the question of whether a day care aide was a DSS employee for the purposes of workers' compensation. The plaintiff was a certified day care aide hired by a parent whose child care costs were paid by the state while the parent participated in a work-training program. *Id.* at 836-37.

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

Applying the "economic realities" test,⁴⁴ the Workers' Compensation Appellate Board held that the aide was an independent contractor, not a department employee. *Id.* at 837-38. The Court of Appeals agreed:

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

Id. at 841-42.

This Court adopted the *Morin* ruling as a baseline in *Walker v Department of Social Services*, 428 Mich 389 (1987), holding that unlike the day care aide in *Morin*, the home-care worker in *Walker* was an employee of the DSS for purposes of a workers' compensation claim.

⁴³ A rehearing was granted in *Morin* related to issues that are not relevant here. *Morin v Dep't of Social Services*, 138 Mich App 482 (1985).

⁴⁴ In *Clark v United Technologies Automotive Inc*, 459 Mich 681 (1999), this Court indicated that the "economic realities" test applied in the field of workers' compensation. That test is a four-factored test: "(1)[the] control of worker's duties, (2) the payment of wages, (3) the right to hire and fire and the right to discipline, (4) the performance of the duties as an integral part of the employer's business towards the accomplishment of a common goal." *Id.* at 688. No single factor controls. *Id.* at 689. This Court further noted that "whether a business entity is a particular worker's 'employer,' as that term is used in the [Worker's Disability Compensation Act], is a question of law for the courts to decide if the evidence on the matter is reasonably susceptible of but a single reference." *Id.* at 693.

Key differences between *Walker* and *Morin* were noted: In *Walker*, the provider was hired directly by the agency; the agency set forth the duties of the job; and the agency visited the home on a monthly basis to check on the provider. *Id.* at 393-94.

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

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

3. Other states' cases

In *Rhode Island v State Labor Relations Board*, 2005 WL 3059297, No CA 04-1899 (November 14, 2005), the Rhode Island Superior Court rejected an attempt to unionize 1300 certified home-based day care workers. Unlike many states at the time, Rhode Island had no law or executive order creating an employer. The union still sought to organize against the state, and the state denied it was the employer.

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

A provider's work is done at the provider's home with the provider's furnishings. The provider furnishes its own instrumentalities and tools. All of the work is performed at the provider's private residence, and the State does not have the right to assign any children to the provider. The provider unilaterally controls the hours and days of operation and may unilaterally change them at any time. The provider unilaterally decides when to take vacation, how much vacation time to take, and how often to take vacation. The provider decides whom to hire and how

to pay assistants. . . . Finally, the State is not in business with home day care providers, and there is no tax involvement by the State other than its duty to report to the IRS any funding forwarded to a provider. . . .

Id. at * 7.

The court concluded that regulation does not equal control: “Although the Court recognizes that home day care is a highly regulated industry, substantial regulation does not necessarily equate to the control required to create an employer/employee relationship between the State and anyone who chooses to become a provider.” *Id.*

Rhode Island v State Labor Relations Board strongly supports a holding that Plaintiffs are not employees of any public employer. Hence, PERA, the case law interpreting it, Michigan law from other fields, and case law from other jurisdictions all show that home-based day care providers are not employees of a public employer.

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

A. Standard of Review

The standard of review is the same as it is in Part I of this discussion.

B. Argument: purported “interlocal agreement” and common law

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

Having shown that Plaintiffs are not public employees under PERA and its case law, there is only one other means by which Plaintiffs might be transformed into public employees: that the interlocal agreement that formed the MHBCCC somehow expanded the universe of public employees to include Plaintiffs. As noted above, this argument is also relevant to the first two mandamus elements — i.e., whether Plaintiffs have a right to performance of a clear legal duty, and whether Defendants have that duty to perform.

But it is clear that no extra-legislative action can transform Plaintiffs into public employees. Defendants have already ceded this point, stating “[Plaintiffs claim] that DHS gave the [MHBCCC] the ‘power to collectively bargain.’ . . . DHS did not — indeed *could not* — grant MHBCCC the power to collectively bargain.” Defendants’ Reply to [Plaintiffs’] Brief in Support of Answer to Defendants’ Motion to Dismiss Pursuant to MCR 2.116(C)(8) and (C)(4) at 1 (emphasis in original). Again, however, Plaintiffs will affirmatively demonstrate this point because of its importance to the issues presented here.

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

The legislature by general law shall authorize two or more counties, townships, cities, villages or districts, or any combination thereof among other things to: enter into contractual undertakings or agreements with one another or with the state or with any combination thereof for the joint administration of any of the functions or powers which each would have the power to perform separately; share the costs and responsibilities of functions and services with one another or with the state or with any combination thereof which each would have the power to perform separately; transfer functions or responsibilities to one another or any combination thereof upon the consent of each unit involved; cooperate with one another and with state government; lend their credit to one another or any combination thereof as provided by law in connection with any authorized publicly owned undertaking.

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

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

This is a new section designed to encourage the solution of metropolitan problems through existing units of government rather than creating a fourth layer of local government. Local governments are allowed to join in a variety of ways to work out together the solutions to their joint problems.

This is to be done by agreement of the units of government involved and no unit will be compelled to enter into any agreement. Possible abuses are prevented by providing overall control by general acts of the legislature. . . .

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

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

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

(g) The manner of employing, engaging, compensating, transferring, or discharging necessary personnel, subject both to the provisions of applicable civil service and merit systems, and the following restrictions:

(i) The employees who are necessary for the operation of an undertaking created by an interlocal agreement, shall be transferred to and appointed as employees subject to all rights and benefits. These employees shall be given seniority credits and sick leave, vacation, insurance, and pension credits in accordance with the records or labor agreements from the acquired system. . . . If the employees of an acquired system were not guaranteed sick leave, health and welfare, and pension or retirement pay based on seniority, the political subdivision shall not be required to provide these benefits retroactively.

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

Not surprisingly, the Urban Cooperation Act is silent about organizing for collective bargaining, since the subject is exhaustively covered by PERA. Hence, the Act does not provide a means to expand the universe of public employees.

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

On July 25, 1941, for instance, the Attorney General entered an opinion that would “apply with equal force to . . . all branches of the government while engaged in the performance of a governmental function.” OAG, 1941-1942, p 247 (July 25, 1941).⁴⁵ In the opinion, the Attorney General stated: “In the industrial field collective bargaining has been adopted as a method of solving private labor disputes. However, because of fundamental concepts and principles of government, it is obvious that collective bargaining cannot apply to public employment and public labor which involves the expenditures of public funds.” *Id.*

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

In 1943, in *Fraternal Order of Police v Harris*, 306 Mich 68 (1943), this Court upheld the firing of a police officer who joined the Fraternal Order of Police. In May 1947, this Court

⁴⁵ The Attorney General did not assign numbers to opinions at that time.

upheld the firing of a police officer on identical grounds in *State Lodge of Michigan, Fraternal Order of Police v Detroit*, 318 Mich 182 (1947).

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

On July 3, 1947, the Hutchinson Act was passed. It allowed “a majority of any given group of public employees evidenced by a petition signed by said majority and delivered to the labor mediation board” to have their grievances mediated by that board. 1947 PA 116 § 7. This act also stipulated that striking public employees could be dismissed from their jobs and stripped of their pension and retirement benefits. *Id.* at §§ 2, 4.

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

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

Thus, prior to the Michigan Constitutional Convention of 1961, the common law regarding public-employee collective bargaining was that public entities could not engage in collective bargaining, that at least some employees (police) could be fired for joining unions,⁴⁶ and that public employees did not have a right to strike. Nothing in the language of either Const

⁴⁶ Following the enactment of PERA, the Court of Appeals ruled that police officers were entitled to join the labor union of their choice, since they were public employees under MCL 423.202 as it stood at the time. *Escanaba v Labor Mediation Bd*, 19 Mich App 273 (1969).

1963, art 7, § 28 or the Urban Cooperation Act allows a contract between a state department and a local agency to change the common-law presumption against collective bargaining.

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

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

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

If the state of Michigan wishes to permit the creation of a public-employee union of all private-sector home-based day care providers who receive a state subsidy, the state constitution requires that state officials accomplish this dramatic shift from traditional employer-employee

relations through the passage of legislation.⁴⁷ Such a sweeping change in public-sector labor law cannot be accomplished by the executive department, either alone or in conjunction with local government. This undeniable fact renders improper and illegal the DHS’ garnishing of purported “union dues” from the CDC checks legally owed to home-based day care providers who look after children from qualified needy families.

In its last order, the Court of Appeals did not explicitly discuss whether Plaintiffs were public employees. Defendants’ tacit and explicit admissions and the arguments presented in the previous two sections of this brief show that Plaintiffs are not public employees.

IV. MERC’s lack of subject-matter jurisdiction renders its certification order void.

A. Standard of review

This Court reviews de novo whether a court has subject-matter jurisdiction. *In re Treasurer of Wayne Co for Foreclosure*, 478 Mich 1, 14 (2007).

B. Argument: An order from a tribunal without subject-matter jurisdiction is void

As noted above, the Court of Appeals stated, “Defendants did not have the clear legal duty to ignore the results of the union certification election.” It is undisputed that a purported union election occurred in 2006. The validity of the election, however, depends on the central legal issue in this case: whether Plaintiffs, who are home-based day care providers, are public employees.

In *Lansing v Carl Schlegel, Inc*, 257 Mich App 627 (2003), the Court of Appeals upheld a MERC ruling that MERC’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

⁴⁷ Note that in some states, legislative action is not required. For example, the Maryland Court of Appeals held that under Maryland’s constitution, an executive order could allow a union to bargain collectively with the governor’s designee on behalf of home-based day care providers. *Maryland v Maryland State Family Child Care Ass’n*, 966 A2d 939 (Md App 2009).

public employees, using the term ‘public employee’ to distinguish those individuals covered under PERA from private employees.” *Id.* at 631.

MERC’s lack of subject-matter jurisdiction would void its certification of CCPTM as the bargaining agent for home-based day care providers:

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

Jackson City Bank Trust Co v Fredrick, 271 Mich 538, 544-45 (1935); 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.”).⁴⁸

The conclusion that Plaintiffs are not public employees either under PERA or through some heretofore unknown transformative power of interlocal agreements means that the MERC certification was void for lack of subject-matter jurisdiction. As a result, no collective bargaining unit exists; Plaintiffs are not governed by a collective bargaining agreement; there is no authority requiring Plaintiffs pay “dues”; and so-called “dues payments” cannot be legally diverted from DHS payments owed to the Plaintiffs. All of this is clear under the law, and Defendants have a clear legal duty to act accordingly. In other words, contrary to the Court of Appeals’ ruling, Defendants *do* “have a clear legal duty to ignore the results of the union certification election.”

⁴⁸ In *Blackburne & Brown Mortgage Company v Ziomek*, 264 Mich App 615 (2004), the Court of Appeals discussed collateral attacks on judgments from other states: “[C]ollateral attack may be made in the courts of this [s]tate by showing that the judgment sought to be enforced was void for want of jurisdiction in the court which issued it.” *Id.* at 620-21 (citations omitted).

Ultimately, Plaintiffs may attack the subject-matter jurisdiction of the MERC certification, but cannot challenge the mechanics of the certification. By not appearing at MERC, Plaintiffs, just like a defendant who questions the jurisdiction of an out-of-state court and fails to appear there, waive only the opportunity to challenge the merits of the underlying claim. For example, if MERC had insufficient signatures to initiate an election, then Plaintiffs’ failure to appear before MERC during the certification process would prevent them from raising that point.

V. No other parties are necessary, and the Court of Appeals has original jurisdiction.

A. Standard of review

This Court reviews de novo whether a court has subject-matter jurisdiction. *In re Treasurer of Wayne Co for Foreclosure*, 478 Mich 1, 14 (2007).

B. Argument: The Court of Appeals can hear an original mandamus action

The Court of Appeals stated “[w]here other persons who are not state officers are necessary to the determination of this action, jurisdiction lies with the circuit court and not this Court.” The court used a plural noun, but did not identify who the necessary parties were. This makes review and analysis difficult.

It appears that the Court of Appeals accepted two of Defendants’ claims: first, that MERC, the MHBCCC, the CCPTM and the members of CCPTM who voted in favor of unionization are all necessary parties to this case; and second, that the Court of Appeals does not have jurisdiction to hear an original action under MCR 7.203(C)(2) and MCR 3.305(A)(1) once “necessary parties” who are not state officers are added. Yet MCR 3.305(A) states:

(A) Jurisdiction.

(1) An action for mandamus against a state officer may be brought in the Court of Appeals or the circuit court.

(2) All other actions for mandamus must be brought in the circuit court unless a statute or rule requires or allows the action to be brought in another court.

Accepting for the moment that Defendants are right about which parties are “necessary,” Defendants are still incorrect to argue that the Court of Appeals is stripped of jurisdiction in an original action wherever a “necessary” defendant is not a “state officer.” Defendants fail to recognize that MCR 3.305(A) has a more plausible reading — that it is only where defendants involve *no* “state officers” that mandamus must be brought in circuit court.

Indeed, Defendants’ argument would contradict this Court’s ruling in *Citizens Protecting Michigan’s Constitution v Secretary of State*, 280 Mich App 273 (2008). In that case, the ballot

question committee “Reform Michigan Government Now” (RMGN) circulated a proposed constitutional amendment. *Citizens Protecting Michigan’s Constitution*, 280 Mich at 275. A second ballot question committee, “Citizens Protecting Michigan’s Constitution,” filed suit solely against the Secretary of State and Board of Canvassers, both “state officers,” to prevent the proposed amendment from being placed on the ballot. *Id.* at 275, 278. RMGN was not named in the complaint, and it sought to intervene. This Court allowed permissive intervention and aligned RMGN as a defendant. *Id.* at 279. The Attorney General was granted permission to file a brief as amicus curiae due to his “independent obligation as a state officer to protect and defend the constitution.” *Id.*

Under Defendants’ theory, the Court of Appeals should have dismissed that action for lack of jurisdiction as soon as RMGN was added as a defendant. 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 sponte. *Straus v Governor*, 459 Mich 526, 532 (1999). Yet at no point during the pendency of *Citizens Protecting Michigan’s Constitution* was the jurisdiction of the Court of Appeals questioned by either its own panel or any member of this Court. *Citizens Protecting Michigan’s Constitution v Secretary of State*, 482 Mich 960 (2008) (denying leave to appeal).

Secretary of State v Department of Treasury, 113 Mich App 153 (1982) vacated on other grounds 414 Mich 874 (1982), provides further support for the conclusion that the addition of nonstate officers does not destroy original jurisdiction in the Court of Appeals. In that case, the Secretary of State filed an original mandamus action at the Court of Appeals against the Department of Treasury, and a number of entities relating to county roads — none of them “state officers” — were allowed to intervene. Similarly, in *People ex rel Oakland County Prosecuting Attorney v State*

Bureau of Pardons and Paroles, 78 Mich App 111 (1973), when a county prosecutor filed an original mandamus action at the Court of Appeals seeking to nullify a grant of parole, the parolee was allowed to intervene as a defendant. It is difficult to think of a party more necessary to an action than an individual who might be returned to prison if the requested relief were granted, yet the parolee's inclusion in the case did not deprive the Court of Appeals of jurisdiction.

Assuming that Defendants are correct in their cursory argument that other parties must be added to this action, MCR 2.207 indicates that those parties may be added. The rule states in pertinent part:

Misjoinder of parties is not a ground for dismissal of an action. Parties may be added or dropped by order of the court on motion of a party or on the court's own initiative at any stage of the action and on terms that are just.

MCR 2.207. This Court could choose to order any entity it deemed necessary into the case.⁴⁹

But this Court should recognize that none of the parties mentioned by the Defendants is necessary to provide Plaintiffs' requested relief. As argued earlier, MERC's certification of the CCPTM is void due to MERC's lacking subject-matter jurisdiction over Plaintiffs, who are not public employees, and this fact necessarily means that Defendants have no right to divert so-called "dues" payments. Defendants may perform their clear legal duty to stop this illegal diversion at any time; they need not involve other parties, since any other parties' presumed rights are based on a void order and therefore do not exist in the eyes of the law. Plaintiffs are not seeking a return of past "dues" payments, but rather to have the illegal diversion stop.

⁴⁹ There should be no concern that the CCPTM would be prejudiced by not having been a participant in this case to date. First, the field is wide open for any merit defenses the CCPTM might make, since Defendants have pointedly refused to argue that Plaintiffs are (or are not) public employees. Further, the CCPTM is a defendant in the federal *Schlaud* case, which covers much of the same factual material. The parties and the federal judge in that case are intimately familiar with this case and the arguments being presented here.

The Court of Appeals' necessary-party assertion suggests the court may be operating on some sort of unstated equity principle, believing Plaintiffs should have included CCPTM in their suit. If so, three things should be noted.

First, the CCPTM and any providers who voted for unionization could seek to intervene in this action, just as the RMGN committee that sponsored the ballot initiative at issue in *Citizens Protecting Michigan's Constitution* sought to intervene in that case. If these parties do not seek to intervene, this Court could request that the CCPTM or other parties file an amicus brief.

Second, a ruling in Plaintiffs' favor would not disband the union, nor would it prohibit home-based day care providers from joining the CCPTM and providing it with financial support. Such a ruling would mean only that this support would be entirely voluntary, with individual providers choosing to join the union and affirmatively send dues. The CCPTM would continue to exist and could continue to lobby the Legislature, which is, practically speaking, all that it is currently able to do. It would not, however, be a mandatory collective bargaining agent.

Third, equity requires clean hands. Plaintiffs' placement in a government employee union was the result of — at best — a novel, complex, and dubious administrative process whose impact did not become clear to them until money was withheld from state subsidy payments. There is evidence that this entire process was set up at the behest of CCPTM's parent unions.

Consider a lengthy e-mail written by Nick Ciaramitaro, a member of the state bar, a former representative in the Michigan House, and a current lobbyist for the American Federation of State, County and Municipal Employees (one of the parent unions of the CCPTM). On September 13, 2009 — three days before the instant action was filed at the Court of Appeals — Mr. Ciaramitaro e-mailed a message that included the following text to MHBCCC Chairman of the Board Larry Simmons, MHBCCC Executive Director Dr. Elizabeth Jordon, and others:

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

...
The Interlocal Agreement came about at the recommendation of Michigan AFSCME and the UAW with the support of the Executive Office.

(Emphasis added).⁵⁰

Other parties are not necessary to afford Plaintiffs the relief they request. If any party has an interest based on MERC's improper union certification order, that party may seek to intervene or to participate as an amicus curiae.

VI. Mandamus is the proper cause of action.

A. Standard of review

The standard of review is the same as it is in Part I of the Discussion.

B. Argument: mandamus elements and Court of Appeals

The Court of Appeals stated Plaintiffs are "actually seeking declaratory and injunctive relief"; therefore "mandamus is inappropriate," because "Plaintiffs have other remedies available." This statement is too general to provide meaningful guidance or grounds for dismissal. Even a cursory review of the case law shows that mandamus is a subset of injunctive relief. In *Duncan v Michigan*, 284 Mich App 246 (2009), the Court of Appeals defined mandamus as "mandatory injunctive relief." *Id.* at 273, 275. See also *Flint City Council v*

⁵⁰ This e-mail was received as part of a FOIA request to MHBCCC, and a copy of the e-mail is attached to this application.

Michigan, 253 Mich App 378, 386-87 (2002) (same definition); *Straus v Governor*, 459 Mich 526, 532 (1999) (same definition). Thus, the Court of Appeals is really saying that mandamus (a subset of injunctive relief) cannot be sought whenever general injunctive relief (the superset) is available. Taken seriously, this view would essentially read mandamus out of the law and negate over 100 years of Michigan case law to the contrary.

Thus, the real question is whether Plaintiffs meet the mandamus requirements. The first two criteria for mandamus have been discussed above. The third mandamus requirement is also satisfied: The issuance of a check is plainly a ministerial act, and this Court has ruled it proper to issue a writ of mandamus related to an “unconstitutional diversion of monies.” *Kosa v State Treasurer*, 408 Mich 356, 383 (1980).

Finally, the fourth criterion is also met, since no other adequate remedy for the illegal diversion exists. Plaintiffs cannot go to MERC; the commission lacks subject-matter jurisdiction. The void certification order means that only two parties are involved in this action: (1) Plaintiffs, home-based daycare providers to whom DHS agreed to send CDC payments; and (2) Defendants, who have illegally diverted a portion of those payments. Mandamus is a proper remedy.

This Court requested that the Court of Appeals explain its original dismissal of this case. Unfortunately, the Court of Appeals’ September 22, 2010 Order was brief and largely unhelpful. Although rare, there have been instances where this Court has remanded a matter to the Court of Appeals twice if this Court was unsatisfied with that court’s first effort.

In *People v Drain*, 471 Mich 934 (2004), this Court remanded a sentencing case for application of the factors in *People v Babcock*, 469 Mich 247 (2003). In *Drain*, on first remand, the Court of Appeals merely quoted from its original opinion. This Court then “instructed the Court of Appeals to provide a more thorough analysis and conclusion.” *Drain*, 471 Mich at 934.

In *Dan De Farms v Sterling Farm Supply, Inc*, 467 Mich 857 (2002), this Court remanded a case to the Court of Appeals for a second time because that court had held that a statute was ambiguous, but “nowhere in its opinion on remand [had] the Court of Appeals identified the specific language of the statute which is allegedly ambiguous or explained why that language is ambiguous.” *Id.* In that case, the original opinion was six pages, and the first remand was six pages. Here, the original order was one paragraph, and the order after remand had two paragraphs that might arguably be said to address the merits. But these two paragraphs, set out above, fail to discuss whether Plaintiffs are public employees under PERA, whether MERC had jurisdiction to issue a union certification order, what party is necessary to this action, or what specifically Plaintiffs could have filed instead of a mandamus action to challenge the illegal diversion of monies from their checks.⁵¹

Plaintiffs recognize the unique procedural situation here and this Court’s natural disinclination to act as a court of the first instance. Normally, Plaintiffs would seek first a second remand to the Court of Appeals. But here, the Defendants have essentially ceded the central point of the litigation: Plaintiffs are not public employees under PERA. At some point, Defendants’ numerous forgone opportunities to argue that Plaintiffs are public employees means Defendants’ admission is no longer tacit, but rather binding.

The inescapable conclusion regarding Plaintiffs’ employment status — both through Defendants’ admissions and Plaintiffs’ arguments in Discussion Parts II and III — requires that the MERC certification order be voided and Defendants be compelled to cease diverting “dues” from Plaintiffs’ checks.

⁵¹ The Court of Appeals’ repeated failure to fully address the issues in this case is all the more puzzling given that Judge Borrello, a panel member, has an extensive background in labor law and has written multiple articles and publications on the subject, including one titled “Public Sector Labor Law.” <http://www.svsu.edu/abs/cj/faculty/part-time-faculty.html> (last accessed December 7, 2010).

RELIEF REQUESTED

For the reasons set forth above, including the odd procedural history of this case and Defendants' unwillingness to argue that Plaintiffs are public employees, Plaintiffs offer various types of relief for this Court to consider: (1) immediate entry of a writ of mandamus prohibiting the further garnishing of "dues" from Plaintiffs' subsidy checks; (2) a grant of oral argument; (3) oral argument on the application; (4) a remand, with this Court retaining jurisdiction, to the Court of Appeals for that Court to specifically answer whether Plaintiffs are properly considered public employees, if the MERC certification is void for lack of jurisdiction, and what, if any, specific cause of action Plaintiffs should have filed to challenge the "dues" if mandamus was inappropriate; and (5) that same remand without the retention of jurisdiction. If this Court believes that participation of the CCPTM or other entities would be beneficial or perhaps equitable, those entities could be asked to file a motion to intervene or to participate as amici curiae.

Respectfully Submitted,

Patrick J. Wright (P54052)
Attorney for Plaintiffs
Mackinac Center for Public Policy

Dated: December 8, 2010

Court of Appeals, State of Michigan

ORDER

Sherry Loar v Department of Human Services

Docket No. 294087

LC No. 00-000000

Donald S. Owens
Presiding Judge

Patrick M. Meter

Stephen L. Borrello
Judges

Pursuant to the September 15, 2010 remand order of the Supreme Court, the Court states:

Mandamus is a writ issued by a court of superior jurisdiction to compel a public officer to perform a clear legal duty. *Jones v Department of Corrections*, 468 Mich 646, 658; 664 NW2d 717 (2003). To obtain a writ of mandamus, a plaintiff must have a clear legal right to the performance of the specific duty sought to be compelled, and the defendant must have a clear legal duty to perform the act. *Casco Twp v Secretary of State*, 472 Mich 566, 577; 701 NW2d 102 (2005). The act must be ministerial, and the plaintiff must be without other adequate legal or equitable remedy. *Citizens for the Protection of Marriage v Bd of State Canvassers*, 263 Mich App 487, 492; 688 NW2d 538 (2004). The burden is on plaintiff to prove entitlement to a writ of mandamus. *Id.*

This Court denied plaintiffs' complaint for mandamus because plaintiffs failed to meet their burden of identifying a clear legal right to the performance of a specific, ministerial duty by defendants. Defendants did not have the clear legal duty to ignore the results of the union certification election.

Plaintiffs are actually seeking declaratory and injunctive relief, which are available in other actions. Where other persons who are not state officers are necessary to the determination of this action, jurisdiction lies with the circuit court and not this Court. Plaintiffs have other remedies available, and mandamus is inappropriate.

We do not retain jurisdiction.



A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

SEP 22 2010

Date

Sandra Schultz Mengel
Chief Clerk

Court of Appeals, State of Michigan

ORDER

Sherry Loar v Department of Human Services

Docket No. 294087

LC No. 00-000000

Donald S. Owens
Presiding Judge

Patrick M. Meter

Stephen L. Borrello
Judges

The Court orders that the motion for reconsideration is DENIED.



A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

OCT 27 2010

Date

Sandra Schultz Mengel
Chief Clerk

Subject: Re: MHBCCC Discussion Meeting
From: llsr@aol.com
Date: Sun, Sep 13, 2009 11:20 pm
To: nick@miafscme.org
Cc: DillonA1@michigan.gov, brewer-walraveni@michigan.gov, dejordan@mhbc3.org, WheelerL@michigan.gov

Thank you Nick, this very helpful for me in scoping the meeting we are trying to establish. The council is certainly interested in participating in the public policy discussion and look forward to doing so in a collective manner.

I would say that when a request comes from "above" such as this one did as opposed to a contact from your office to ours, that is where my feeling of being called on the carpet originates. The council for one did not require the Lt. Gov. in order to welcome a meeting with AFSCME. I hope one of the outcomes of this meeting is that you will feel comfortable reaching out directly to us through our Exec Dir or me, as council chair. We are always available to work together to advance the issues of well being for our children and their home care providers.

We do seem to have a problem with the proposed meeting time on tuesday. Dr. Jordan cannot do 11am and I cannot do 3pm.

it seems we are looking at another day. I am available any other day that week or the following week, mon, wed (not the 23rd afternoon), thurs or friday morning or afternoon.

thanks Nick I appreciate you taking the time to clarify,
Larry

-----Original Message-----

From: Nick Ciaramitaro <nick@miafscme.org>
To: llsr@aol.com
Cc: DillonA1@michigan.gov; brewer-walraveni@michigan.gov; dejordan@mhbc3.org; WheelerL@michigan.gov
Sent: Sun, Sep 13, 2009 12:57 am
Subject: RE: MHBCCC Discussion Meeting

Larry,

I think you may have misinterpreted this discussion. There are two separate things going on involving child care (maybe three):

- On matter relating to the contractual relationship between CCPTM and MHBCCC, the process established makes sense and I hope is working. You are correct that Herb and Grant speak for the union with the Council on collective bargaining matters. I have no intention of involving myself on issues of contract negotiations, contract implementation, grievances, etc. I am sorry that you feel you are somehow being called "on the carpet." That certainly is not my intention. Nor is it my intention or desire to call anyone else "on the carpet."
- On matters involving legislation and public policy, at the direction of President Garrett and Secretary Treasurer Roehrig, in consultation with our Executive Board, I speak for Michigan AFSCME Council 25.

As you know, CCPTM20 and MHBCC are somewhat unusual entities. As our economy changes, representation of workers 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.

The relationship between the union and MHBCC is fairly clear and being worked out in the manner you indicate. The relationship between the Department and the Council is one governed by the Interlocal Agreement referenced in the above paragraph and a transfer agreement adopted by the Department. And much of the "wages, hours and terms and conditions of employment" addressed by the collective bargaining agreement are, by the terms of the contract itself, "subject to appropriation." Public action, obviously, is of interest to the Executive Office and to AFSCME.

The Interlocal Agreement came about at the recommendation of Michigan AFSCME and the UAW with the support of the Executive Office. The role of the Department, the role of the Council, state appropriations, state law, and department rules and regulations remain matters of "legislation and public policy" on which Michigan AFSCME weighs in through the legislative and political processes.

A number of issues have arisen that cannot be addressed through the collective bargaining process and that are subjects of legislation and public policy. Some of those issues are of concern to the two unions that organized child care providers. The Lt. Governor's office, as part of the current Administration have an interest in these issues as well. The Department is deeply involved in these issues and I would hope the Council is concerned as well. To deal with these legislative and public policy issues, I suggested that these interested parties meet and the Lt. Governor's office helped in getting it to happen expeditiously.

--Nick C.

From: llsr@aol.com [<mailto:llsr@aol.com>]
Sent: Friday, September 11, 2009 2:42 PM
To: brewer-walraven1@michigan.gov; dejordan@mhbc3.org; nick@miafscme.org; WheelerL@michigan.gov
Cc: DillonA1@michigan.gov
Subject: Re: MHBCCC Discussion Meeting

I am confused. I thought Herb and Grant spoke for the union, and that we working out roles and responsibilities is exactly what we have been doing in the meetings, emails, phone calls with Herb, Grant, Elizabeth and me.

What exactly is Nick's role and responsibility. Of course i will meet with whomever the Lt. Governor's office requests me to meet. I do want to be clear, we have a method for addressing issues, that does not involve the Lt. Governor, Governor, Dir or Deputy Dir except on matters that have failed to be resolved at the level of the council.

Perhaps i am wrong but this feels like an end around or a calling on the carpet. If it is we have a problem.

I have been instructed by the union in writing that the spokespersons for CCPTM are Herb and Grant. If that is changing then they need to communicate that to me in writing. If it hasn't then anything discussed in this meeting in their absence is merely dialogue, which while it may make us feel better, does nothing for working the through the myriad thicket of issues that confront our efforts