STATE OF MICHIGAN
IN THE COURT OF APPEALS

SHERRY LOAR,

Plaintiff,

Court of Appeals No: 294087

v

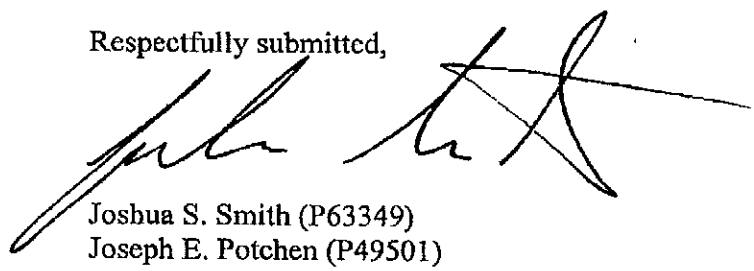
MICHIGAN DEPT. OF HUMAN SERVICES and ISMAEL AHMED, in his official capacity as Director of the Michigan Dept. of Human Services,

Defendants.

DEFENDANTS' REPLY TO PLAINTIFF'S BRIEF IN SUPPORT OF ANSWER TO DEFENDANTS' MOTION TO DISMISS PURSUANT TO MCR 2.116(C)(8) AND (C)(4)

ORAL ARGUMENT REQUESTED

Respectfully submitted,



Joshua S. Smith (P63349)
Joseph E. Potchen (P49501)
Assistant Attorneys General
Attorneys for Defendants
Health, Education & Family Services Division
525 W Ottawa St Fl 3
PO Box 30758
Lansing, MI 48909
517-373-7700

Dated: November 6, 2009

A. Plaintiff mischaracterizes the role of Department of Human Services ("DHS") in the present case and fails to properly recognize the role of the Michigan Employment Relations Commission.

Based on the allegations in the complaint and statements in her response brief, it is readily apparent that Plaintiff misunderstands DHS's role in this case, the collective bargaining process and the role played by the Michigan Employment Relations Commission (MERC). DHS was not involved in most of the actions that Plaintiff claims as support for her mandamus action. In fact, most of the "clear legal rights" or "clear legal duties" that Plaintiff cites as the basis for her mandamus claim do not involve DHS.

For example, Plaintiff claims that DHS gave the Michigan Home Based Child Care Council (MHBCCC) the "power to collectively bargain" (Plf's Brief, pp 4-5). DHS did not—indeed *could not*—grant MHBCCC the power to collectively bargain. Rather, DHS entered into an interlocal agreement with Mott Community College (Mott), which resulted in the creation of the MHBCCC. In 2006, in an election certified by MERC, the home child care workers voted to form a union, Child Care Providers Together Michigan (Union). The Union then negotiated and entered into a collective bargaining agreement with the MHCCC.

Plaintiff challenges the Union's existence, but DHS did not set up the Union. Plaintiff challenges the fact that an election was held, but DHS did not take part in that election. Plaintiff challenges the certification of the election, but DHS did not certify the election. Plaintiff challenges the propriety of the collective bargaining agreement, but DHS did not enter into that agreement. In fact, the only thing DHS has done is to deduct dues for which Plaintiff and other providers are already legally obligated to pay. Even if this Court prevented DHS from deducting the dues, Plaintiff would still be required to pay her union dues pursuant to the MERC decision and the collective bargaining agreement.

While Plaintiff objects to the Union's certification and the terms of the collective bargaining agreement that requires her union dues to be deducted, she clearly had notice of the election.[1] Indeed, Plaintiff states she is "not contending that the election was run improperly" (Plf's Brief, p 13). While she concedes this point, she is now trying to indirectly challenge the formation of the Union and the collective bargaining agreement by stating the election should not have taken place (Plf's Brief, pp 13-14).

While Plaintiff seemingly argues that MERC could not have had actual jurisdiction over the present case (Plf's Brief, p 14), that argument ignores the reality that *MERC actually exercised jurisdiction over the certification election* and issued a decision. Plaintiff no doubt knew this, as shown by her discussion of MERC's role in their Brief in Support of Original Action for Mandamus (Plaintiff's Brief in Support of Original Action for Mandamus, at pp 13-14). Plaintiff thus contrived the present suit, which serves as a retroactive attack on the MERC proceedings—without the presence of the Union, MHBCCC or MERC—as a way around their failure to challenge the MERC decision. The proper forum for a challenge to MERC's jurisdiction would seemingly be before MERC or, after the fact, at least *against* MERC. Plaintiff's arguments that the election should not have occurred "without legislation" should have been raised *when the case was before MERC or within the appeal period.* Plaintiff, however, not only failed to timely challenge MERC's jurisdiction, she failed to even add MERC to the present case.[2]

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[1] *See* Representation Election—Mailings to Petoskey, attached as Exhibit A.

[2] Defendants' statements should not be viewed to waive any valid defenses MERC may have should Plaintiff attempt to join it as a party.

Instead of squarely addressing these failures, Plaintiff cites to a pair of cases that she claims bar MERC's jurisdiction.[3] Both are inapposite. Plaintiff conveniently ignores the fact that both *City of Lansing* and *Prisoners' Labor Union* originated in MERC.[4] If anything, these cases stand for the proposition that the proper time for Plaintiffs' action to decertify the Union was before MERC, not three years after the fact in this Court. In addition, both cases involve far different legal issues than those presently at issue. *Prisoners Labor Union* held that the Department of Corrections rather than MERC had exclusive jurisdiction over correctional industries and the inmates who work for them.[5] And *City of Lansing* involved a challenge to a project labor agreement requiring a private company to unionize its employees in order for it to work on a city project.[6] Neither situation applies to the present case.

B. Plaintiff misapplies the elements of mandamus to wrongfully claim she has stated a valid cause of action.

Plaintiff seems to believe that she has a right so compelling that, rather than go through the cumbersome method of pleading the elements of a mandamus claim with supporting facts, merely adding the word "mandamus" to her complaint compels this Court to grant her chosen writ. Mandamus, however, is not a "writ of right."[7] Rather, it is an "extraordinary remedy" within the discretion of the court.[8] Because "[t]he burden of showing entitlement to the

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[3] *See City of Lansing v Carl Schlegel Inc*, 257 Mich App 627; 669 NW2d 315 (2003); *Prisoners' Labor Union v Dep't of Corrections*, 61 Mich App 328; 232 NW2d 699 (1975).
[4] *City of Lansing*, 257 Mich App at 629-630; *Prisoners' Labor Union*, 61 Mich App at 329.
[5] *Prisoners' Labor Union*, 61 Mich App at 336-337. The providers, including Plaintiff, are not in the Michigan prison system.
[6] *City of Lansing*, 257 Mich App at 629. Unlike *City of Lansing*, the present case involves employees who voted in favor of a union in a free and fair election.
[7] *McGregor v Carney*, 271 Mich 278, 281; 260 NW 163 (1935).
[8] *Lee v Macomb Co Bd of Comm'rs*, 235 Mich App 323, 331; 597 NW2d 545 (1999).

extraordinary remedy of a writ of mandamus is on the Plaintiff," merely stating "mandamus" in the complaint or even reciting the elements, bereft of support, do not satisfy that burden.[9]

Plaintiff similarly ignores the substantial case law that elucidates the requirements for mandamus relief. For instance, mandamus is not available to collect money seized by a defendant unless there is no factual or legal dispute that that the plaintiff is entitled to the funds—a situation that does not exist here.[10] In general, mandamus is not available where a party has failed to exhaust its remedies, including challenging the rules, processes and procedures before the appropriate agency.[11] Plaintiff, however, made no attempt to challenge the MERC decision or any of its rules, processes or procedures. Nor is mandamus available to decide difficult and unresolved issues of law.[12] Given that the present case involves difficult and unresolved issues of law, and that Plaintiff failed to pursue remedies at the agency level, it would be inappropriate to grant mandamus relief in the present case.

Plaintiff attempts to remedy her failure to plead mandamus by stringing together unconnected snapshots of events and slapping the elements of mandamus onto them. For instance, Plaintiff alleges that she has "a clear legal right" to a presumption against public-sector collective bargaining. But Plaintiff makes no effort to link her asserted "clear legal right" to any action undertaken by DHS or explain how a ruling consistent with their understanding of that right would lead to the relief requested.

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[9] *White-Bey v Dept of Corrections*, 239 Mich App 221, 223; 608 NW2d 833 (1999).
[10] *Lobaido v Detroit Police Comm'r*, 15 Mich App 138, 140; 166 NW2d 515 (1968).
[11] *Michigan Ass'n of Homes & Servs for the Aging v Shalala*, 127 F3d 496, 503 (6th Cir 1997) (discussing 28 USC 1351, which codifies common law action for mandamus against a state officer).
[12] *State Board of Education v Fox*, 620 F2d 578, 580 (6th Cir 1980).

Similarly, Plaintiff argues that the well-established requirement that a complaint state the elements of a claim and explain, *via* allegations of fact, how those elements are satisfied somehow does not apply to her. In support of this, she cites to a case in which this Court reversed a trial court decision dismissing a case for the plaintiff's failure to provide an accurate label in the complaint for the action.[13] In the present case, however, Plaintiff's Complaint lacked any attempt to link the elements of mandamus to the Defendants' conduct. Citing to *Smith* does not remedy Plaintiff's defective pleadings, and neither does offering an out-of-context quote from *Duncan v Michigan*.[14]

Plaintiff engages in further sophistry in her attempted recitation of the mandamus case law. For example, Plaintiff relies on this Court's decision in *Citizens Protecting Michigan's Constitution v Secretary of State* for the proposition that this Court retains jurisdiction where a non-state party is added.[15] Jurisdiction, however, was never raised in *Citizens Protecting Michigan's Constitution* nor was it an issue in the case or central to this Court's holding. Thus, any statement concerning jurisdiction in that case is mere *dicta* and lacks precedential value.[16] It is thus slightly disingenuous to cite it as conferring jurisdiction over the present case. To be certain, courts have a duty to *sua sponte* question their own jurisdiction, but a court's failure to do so can in no way be twisted to support the conclusion that it has jurisdiction in all similar cases, particularly when that conclusion contradicts the language of the court rules. Moreover, Defendants specifically raise jurisdiction in this case.

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[13] *Smith v Stolberg*, 231 Mich App 256, 260-261; 586 NW2d 103 (1998).
[14] *Duncan v Michigan*, 284 Mich App 246, 273, 275; __ NW2d __ (2009).
[15] *Citizens Protecting Michigan's Constitution v Secretary of State*, 280 Mich App 273; 761 NW2d 210 (2008).
[16] *Dressel v Ameribank*, 468 Mich 557, 569; 664 NW2d 151 (2003).

The other cases cited by Plaintiff are even less relevant. In *Secretary of State v State Treasurer*, jurisdiction was neither raised nor addressed by this Court.[17] Moreover, not only was the opinion vacated by the Michigan Supreme Court,[18] it also features separate opinions by each judge on the panel. Finally, it was decided under the former General Court Rules, which were superseded in 1985 by the present Michigan Court Rules.[19]

Plaintiff also cites to *People ex rel Oakland Prosecuting Attorney v State Bureau of Pardons and Paroles*.[20] Once again, however, the issue of this Court's jurisdiction was neither raised nor addressed. Moreover, it also originated under the General Court Rules. Finally, *Oakland County Prosecuting Attorney* was originally composed of two original actions in this Court—a complaint filed by Edward A. Trudeau for superintending control and a complaint by the Oakland County Prosecuting Attorney for mandamus.[21] This Court then consolidated the cases for consideration. Needless to say, the procedural posture of *Oakland County Prosecuting Attorney* was far different than the present case and in no way stands for the proposition that the language of the court rules may be ignored.

Plaintiff fails to address the actual language of the rules governing jurisdiction in the present case. The rules governing the interpretation of statutes apply to court rules, including the cardinal rule that a court rule must be interpreted according to its plain language.[22] The basis for this Court's jurisdiction is MCR 7.203(C)(2) and MCR 3.305(A)(1). Under MCR 7.302(C)(2), this Court has jurisdiction over an original action for "mandamus against a state officer." At the

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[17] *Secretary of State v State Treasurer*, 113 Mich App 153; 317 NW2d 238 (Mich Ct App 1982).
[18] *Secretary of State v State Treasurer*, 414 Mich 874; 322 NW2d 710 (1982).
[19] *See* generally MCR 1.102.
[20] *People ex rel Oakland Prosecuting Attorney v State Bureau of Pardons and Paroles*, 78 Mich App 111; 259 NW2d 385 (1977).
[21] *Oakland County Prosecuting Attorney*, 78 Mich at 111.
[22] *People v Williams*, 483 Mich 226, 232; 769 NW2d 605 (2009).

same time, however, MCR 3.305(A)(2) makes it clear that where the action involves a party other than a state officer it, "must be brought in the circuit court." Accordingly, applying the plain language of the relevant rules, once the necessary parties are added, this Court is stripped of jurisdiction.[23]

Conclusion

The arguments presented in Plaintiff's Brief in Support of Answer to Defendants' Motion to Dismiss Pursuant to MCR 2.116(C)(8) and (C)(4) fail to accurately capture the facts of the present case or the relevant law. Accordingly, this Court should grant Defendants' the relief requested in their Motion to Dismiss Pursuant to MCR 2.116(C)(8) and (C)(4).

Respectfully submitted,

Joshua S. Smith (P63349)
Joseph E. Potchen (P49501)
Assistant Attorneys General
Attorneys for Defendants
Health, Education & Family Services Division
PO Box 30758
Lansing, MI 48909
517-373-7700

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[23] Contrary to Plaintiff's assertions, MCR 2.207 does not apply because it does not address the jurisdictional requirements set forth in MCR 7.203(C)(2) and MCR 3.305(A)(1) and (2).