STATE OF MICHIGAN
IN THE COURT OF APPEALS

SHERRY LOAR and DAWN IVES

Plaintiffs, Court of Appeals No. _____

v

MICHIGAN DEPARTMENT OF HUMAN SERVICES,

and ISHMAEL AHMED, in his official capacity as
Director of Michigan Department of Human Services
_____/

Patrick J. Wright (P54052)
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_____/

COMPLAINT FOR WRIT OF MANDAMUS
Oral argument requested

1. This is an original action for a writ of mandamus directing the Director of the Michigan Department of Human Services to stop removing "union dues" from plaintiffs' checks for providing day care to low-income parents who are participating in the Child Development and Care Program.

JURISDICTION

2. This Court has jurisdiction over this action pursuant to MCL 600.4401 (mandamus against state officials) and MCR 3.305(A)(1).

PARTIES

3. Plaintiff Sherry Loar has operated a home-based child care located at 801 West Sheridan Street Petosky, Michigan 49770 since 1994. Since 1999, plaintiff has been licensed at the "group" level (up to twelve kids). Her license was last renewed in October 2008. Exhibit 1.

4. Plaintiff Dawn Ives has operated a home-based child care located at 812 Regent Drive Petoskey Michigan since 2004. Her certification was last renewed in June 2007. Exhibit 1.

5. Defendant Department of Human Services is the state department that licenses group day care homes, certifies family day care homes, and registers relative care providers and day care aides. It is the entity that takes "union dues" from subsidy checks that the above types of providers receive when they provide care to families participating in the Child Development and Care Program and forwards it to Child Care Providers Together Michigan.

6. Defendant Ishmael Ahmed is the Director of the Michigan Department of Human Services, and he is sued in his official capacity.

FACTS

7. Defendant Department of Human Services defines one of its missions as "to insure protection to vulnerable . . . children who are receiving care from licensed agencies, facilities and homes as required by [the Child Care Licensing Act, 1973 PA 116, MCL 733.111 to MCL 733.126] as amended . . . and other applicable laws." Exhibit 2.

8. According to the Auditor General's 2008 performance audit titled "Child Care Development and Care Program Payments," Michigan's Department of Human Services (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." Exhibit 3 at 41.

9. A day care center is defined as "a facility, other than a private residence, receiving 1 or more preschool or school-age children for care for periods less than 24 hours a day, where the parents or guardians are not immediately available to the child." MCL 722.111(1)(g).

10. 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 family by blood marriage or adoption." MCL 722.111(1)(i)(iv).

11. A "family" home is "a private home in which 1 but fewer than 7 minor children are received for 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 family by blood, marriage, or adoption." MCL 722.111(i)(iii).

12. A "day care aide" is not defined in either a statute or a regulation. The term was defined in the Auditor General's 2008 performance audit titled "Child Care Development and Care Program Payments" as: "An individual (including a relative) who provides [Child Development and Care (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." Exhibit 3 at 80.

13. A "relative care provider" is not defined in either a statute or a regulation. The term was defined in the Auditor General's audit as: "A child provider that is related to the [Child Development and Care] 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." Exhibit 3 at 83-84.

14. According to Defendant Department of Human Services' Web site page titled "Child Care": "Child Development and Care Program may provide payment for child care services for qualifying families when the parent, legal guardian or substitute parent is unavailable to provide the child care because of employment, education and/or because of a health/social condition for which treatment is being received." Exhibit 4.

15. According to the Defendant Department of Human Services' Web site page titled "Income Eligibility Chart": "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." Exhibit 5.

16. The booklet accompanying the assistance application, form DHS 1171, indicated that an applicant "is responsible for any child care costs not paid by DHS." Exhibit 6.

17. On or about April 13, 2006, an entity titled Child Care Providers Together Michigan filed a petition to represent "the child care providers receiving reimbursement payments from the Michigan Child Development & Care Program (CDC) administered by the Department of Human Services." Exhibit 7.

18. On July 27, 2006, Defendant Department of Human Services and Mott Community College entered into an interlocal agreement, creating the Michigan Home Based Child Care Council (MHBCCC or Council). The agreement indicated that it was entered pursuant to Const 1963, art 7, § 28 and the Urban Cooperation Act, MCL 124.501-124.512. Exhibit 8.

19. At some point after MHBCCC was created, it entered a document titled "Resolution 2006-1" that purported to recognize Child Care Providers Together Michigan as the bargaining agent of "child care providers receiving reimbursement payments." Exhibit 9.

20. Upon information and belief, the organization attempt referred to in ¶¶ 17 and 19 was eventually abandoned.

21. Section 6.10 of the interlocal agreement states: "The Council shall have the right to bargain collectively and enter into agreements with labor organizations. The Council shall fulfill its responsibilities as a public employer subject to [the Public Employment Relations Act (PERA)] 1947 PA 336, MCL 423.201 to 423.217." Exhibit 8.

22. On or about September 15, 2006, CCPTM filed a petition with the Michigan Employment Relations Commission (MERC). This petition named the Council as the employer and the Union sought to represent a bargaining unit comprised of "All home-based child care providers receiving reimbursement payments from the Michigan Child Development & Care Program including group day care providers, family day care providers, relative care providers, and day care aides." Exhibit 10.

23. A later amendment sought to redefine the bargaining unit as "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 [Council]." Exhibit 11.

24. The petition claimed that the bargaining unit consisted of 40,532 employees. Exhibit 10.

25. MERC administered a mail election and eligible voters were "those who were employed during the payroll period ending June 30, 2006." Exhibit 12.

26. On or about November 27, 2006, MERC certified that the union received a majority of the 6,396 votes that were cast. Exhibit 13.

27. On January 1, 2008, the MHBCCC and the CCPTM entered into what they contend was a collective bargaining agreement, and this document became effective. Exhibit 14.

28. The collective bargaining agreement between the CCPTM and the MHBCCC noted that those entities have a "unique relationship" and that "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." *Id*. at 3.

29. The collective bargaining agreement states "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.

30. The collective bargaining agreement indicated that the "union dues" would be taken from subsidy checks. *Id*. at 9, 15.

31. On or about January 12, 2009, plaintiffs were made aware that the DHS was going to begin to withhold union dues, via a notification that stated: "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 daycare providers' CDC State payments." Exhibit 15.

32. From the date of the notification in ¶ 29, Plaintiff Loar has had "union dues" removed from subsidy checks she has received from Defendant DHS. Exhibit 16.

33. From the date of the notification in ¶ 29, Plaintiff Ives has had "union dues" removed from subsidy checks she has received from Defendant DHS. Exhibit 17.

34. Plaintiff Loar has at least one child in her care who receives a subsidy from the State of Michigan, Department of Human Services as part of the "Today's Child Development and Care Program." The check is issued from "State of Michigan" and is sent directly to Plaintiff Loar. The "State of Michigan Remittance Advice" sent at the top of the page from which the CDC subsidy checks are detachable at a perforation indicates that the checks are "DHS-funded payments." Exhibit 16.

35. Plaintiff Loar received 1099 forms listing the DHS as the payer and categorizing the subsidy payments as "nonemployee compensation." Exhibit 18.

36. Plaintiff Ives has at least one child in her care who receives a subsidy from the State of Michigan, Department of Human Services as part of the "Today's Child Development and Care Program." The check is issued from "State of Michigan" and is sent directly to Plaintiff Ives. The "State of Michigan Remittance Advice" sent at the top of the page from which the CDC subsidy checks are detachable at a perforation indicates that the checks are "DHS-funded payments." Exhibit 16.

37. Plaintiff Ives received 1099 forms listing the DHS as the payer and categorizing the subsidy payments as "nonemployee compensation." Exhibit 19.

38. Defendant DHS has a Web page titled "Relative Care Application" that was modified in February 2009. Relative care applicants must agree to a list of conditions, including one that states, "I understand that I am considered to be self employed and not an employee of DHS." Exhibit 20.

39. Defendant DHS has a Web page titled "Day Care Aide Provider Application" that was modified in February 2009. Day care aide applicants must agree to a list of conditions, including one that states, "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." Exhibit 21.

COUNT I – MANDAMUS

40. Plaintiffs reallege and incorporate Paragraphs 1-39, as if fully set forth in this Count.

41. MCL 423.201(1)(e) defines "public employee." Neither the express words of that definition nor the case law interpreting it allow for plaintiffs to be considered public employees.

42. Under Michigan common law prior to the enactment of the 1963 Constitution, public sector bargaining was not allowed.

43. Const 1963, art 3, § 7 requires that: "The 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."

44. Const 1963, art 4, § 1 states that the "legislative power of the State of Michigan is vested in a senate and a house of representatives."

45. Const 1963, art 4, § 48 states that the "legislature may enact laws providing for the resolution of disputes concerning public employees, except those in the state classified civil service." The Legislature used this power when it enacted the Public Employment Relations Act in 1965 to reverse the common-law prohibition against public-sector collective bargaining. 1965 PA 379.

46. Const 1963, art 7, § 28 states, in part, that:

> 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.

47. Nothing in Const 1963, art 7 § 28 allows the creation of an interlocal agreement to override the constitutional provisions requiring that the Legislature be the body that expands the pool of citizens who may be organized as public employees.

WHEREFORE, Plaintiffs respectfully request that this Honorable Court issue a writ of mandamus directing Defendant Department of Human Services to stop taking "union dues" from their checks.

Respectfully submitted,

MACKINAC CENTER
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By: _____

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Dated: September 16, 2009