STATE OF MICHIGAN
IN THE COURT OF APPEALS

SHERRY LOAR, MICHELLE BERRY,
and PAULETTE SILVERSON

Plaintiffs, Court of Appeals No. 294087

v

MICHIGAN DEPARTMENT OF HUMAN SERVICES,
and ISHMAEL AHMED, in his official capacity as
Director of Michigan Department of Human Services

Defendants.
_____/

PLAINTIFFS' MOTION FOR RECONSIDERATION

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Plaintiffs Sherry Loar, Michelle Berry, and Paulette Silverson[1] are three home-based day care providers who tend children of parents who qualify for state day care subsidies. Plaintiffs filed a complaint for mandamus 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), since the DHS does not have the constitutional authority to treat home-based day care providers, who are business owners and independent contractors, as public employees.

The mandamus action was filed with this Court on September 16, 2009. On October 7, 2009, Defendants moved to dismiss on technical and jurisdictional grounds.

On December 30, 2009, this Court entered a summary dismissal order that stated: "The complaint for mandamus is DENIED. The motion to dismiss is DENIED as moot." On January 20, 2010, Plaintiffs filed a motion for reconsideration that focused on the difficulty that the parties and the Michigan Supreme Court would have analyzing a summary dismissal order from a court of the first instance. On February 10, 2010, this Court denied the reconsideration motion.

On September 15, 2010, the Michigan Supreme Court unanimously remanded "this case to the Court of Appeals for an explanation of the reason(s) for the denial of the plaintiffs' complaint for mandamus." In response, on September 22, 2010, this Court entered an order that stripped of its boilerplate stated:

> 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.

[1] This suit was originally filed by Loar and Dawn Ives. Ives has since been dismissed without prejudice. Berry and Silverson were added as plaintiffs as part of an amended complaint.

> 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.

1. <u>Clear legal duty and the "election"</u>

This Court contends that "Defendants did not have the clear legal duty to ignore the results of the union certification election." As discussed below, this Court is wrong, because Plaintiffs are clearly not public employees, which thereby deprives the Michigan Employment Relations Commission (MERC) of subject-matter jurisdiction and renders MERC's certification of the union representation election void. 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.

To rule otherwise, this Court must hold either that Plaintiffs are public employees (at least with respect to the Public Employment Relations Act (PERA)), or that MERC's lack of subject-matter jurisdiction does not void the certification election. In making its ruling, this Court did not clarify which of these two determinations it made. Particularly in light of the Michigan Supreme Court's unanimous remand order requesting an explanation of this Court's reasoning, this Court's view of the Plaintiffs' designation under PERA calls for more analysis than was provided under the order of September 22, 2010. If this Court provides a detailed analysis, Plaintiffs believe this Court will be led to rule in their favor and issue the requested writ of mandamus.[2]

It is undisputed that a purported union election occurred in 2006. In its petition for representation proceedings, the CCPTM formally sought to unionize against the Michigan Home

[2] The Michigan Supreme Court has ruled it is proper to issue a writ of mandamus to prevent an "unconstitutional diversion of monies." *Kosa v State Treasurer*, 408 Mich 356, 383 (1980).

Based Child Care Council, a body created by an interlocal agreement between a community college and Defendant DHS. The CCPTM 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. 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 were opposed. Complaint, Exhibit 13.

The effect of the election is entirely dependent on the central legal issue in this case: whether Plaintiffs, who are home-based day care providers, are public employees. If Plaintiffs are not public employees, this case is simple to resolve. In *Lansing v Carl Schlegel, Inc*, 257 Mich App 627 (2003), this Court upheld a MERC ruling that MERC's "subject-matter jurisdiction" is limited to public employees. *Id*. at 629. This Court stated that PERA "addresses the bargaining rights and privileges of 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.").

Thus, Plaintiffs may attack the subject-matter jurisdiction of the MERC certification, but cannot challenge the mechanics of the certification. 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.

In this case, it is clear that PERA's definition of "public employee" does not include home-based day care providers. MCL 423.201(1)(e) 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.

Under the plain text, Plaintiffs are not public employees. None of them receive wages or employment benefits from the government, and the subsidy amounts are recorded under 1099s, which are the forms used for independent contractors, not under W-2s, which are the forms used for employees. Complaint Exhibit 18; Amended Complaint Exhibits 26 and 27. The case law, which has been set out in Plaintiffs' prior filings at this Court, provides further support for a holding that Plaintiffs are not public employees under PERA. Finally, to the extent there is any ambiguity in the statutory definition, the legislative history of subpart (i), which is the latest amendment to the definition, indicates that the Legislature was seeking to limit, not expand, the class of people who are considered public employees. See Senate Fiscal Agency Bill Analysis, SB 1015, January 30, 1997.

In light of these facts, Defendants' response has been illuminating. The most straightforward way for Defendants to prevail is for this Court to hold that Plaintiffs are in fact public employees under PERA. Nevertheless, Defendants repeatedly eschew that argument. Defendants have had three opportunities in this action to argue Plaintiffs are public employees, and Defendants have not done so once. In fact, at the application stage at the Michigan Supreme Court, Defendants had the opportunity to present fifty pages of argument and instead presented twelve. In those pages, Defendants did not mention the term "public employee" once, nor did they cite the statutory definition of public employee. Indeed, in a related federal court action, Defendants 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.

Similarly, Defendants explicitly reject an argument Plaintiffs duly considered in their brief: the possibility that the creation of an interlocal agreement provided an avenue for transforming home-based day care providers into public employees. Plaintiffs rejected this argument, citing, in part, the plain language of the Michigan Constitution,[3] and Defendants apparently agreed, asserting: "DHS did not — indeed *could not* — grant MHBCCC the power to collectively

[3] Most directly, Const 1963, art 4, § 48, states: "The legislature may enact laws providing for the resolution of disputes concerning public employees, except those in the classified civil service." Thus, the state constitution gives only the Legislature the power to determine the boundaries of public employment.

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).

When this Court contends that "Defendants did not have the clear legal duty to ignore the results of the union certification election," it cannot mean that DHS officials could not clearly recognize why the MERC election was void; the officials' state of mind is irrelevant. This Court has previously explained that "Within 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). Hence, in stating that Defendants had no clear legal duty, this Court must be holding either that Plaintiffs are public employees under PERA — an argument Defendants themselves are unwilling to make — or that there are exceptions to the decades-old rule voiding the action of a tribunal that lacks subject-matter jurisdiction. Either holding would be remarkable and would deserve more than the single sentence of explanation this Court provided.

2. <u>Other actions</u>

This Court stated this action was really one for injunctive or declaratory relief. In *Duncan v Michigan*, 284 Mich App 246 (2009), this Court defined mandamus as "mandatory injunctive relief." *Id*. at 273, 275. See also *Flint City Council v Michigan*, 253 Mich App 378, 386-87 (2002) (same definition); *Straus v Governor*, 459 Mich 526, 532 (1999) (same definition). In other words, mandamus is a specific type, or subset, of injunctive relief generally. As argued previously at this Court, Plaintiffs meet all of the elements necessary for this Court to issue a writ of mandamus against Defendants to prevent the further improper diversion of monies owed to Plaintiffs.

3. Other parties

This Court stated: "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." This Court used a plural noun and did not identify the "necessary" parties.

MCR 3.305(A), which concerns jurisdiction, states:

> (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.

Id. Thus, this Court apparently read MCR 3.305(A) to mean that if there was a defendant who was not a state officer, the mandamus action must be brought in the circuit court.

Assuming there are other necessary parties in the instant case, MCR 3.305 has a more plausible reading: Mandamus must be brought in the circuit court only when no state officers are defendants. This reading is consistent with this Court's ruling in *Citizens Protecting Michigan's Constitution v Secretary of State*, 280 Mich App 273 (2008), while this Court's rationale in the instant case is not. In *Citizens Protecting*, the mandamus suit was commenced in this Court, and a non-state officer was allowed to intervene as a party defendant. Under this Court's assertion in the instant case, *Citizens Protecting* should have been immediately dismissed for lack of jurisdiction. Yet no judge of this Court nor any Justice of the Michigan Supreme Court, which reviewed an application for leave from this Court's decision in *Citizens Protecting*, raised MCR 3.305(A) as a jurisdictional issue.

Furthermore, the interpretation of MCR 3.305(A) is irrelevant. Due to MERC's lack of subject-matter jurisdiction, the only parties necessary to this case are Defendants, who are

improperly diverting payments from Plaintiffs, and Plaintiffs, who seek an order from this Court requiring Defendants to stop the diversion.

Perhaps this Court feels that it would be inequitable to grant the writ of mandamus without the participation of the union and the providers who voted for it. Three things should be noted, however.

First, the CCPTM and any providers who voted for unionization could seek to intervene in this action, just as the committee that gathered the signatures for the ballot initiative at issue in *Citizens Protecting* sought to intervene in that case. If these parties do not seek to intervene, this Court could request that the CCPTM 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 could continue to lobby the Legislature, which is, practically speaking, all that it is currently able to do.

Third, equity should be accorded to Plaintiffs as well. Their 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 until money was withheld from state subsidy payments.[4] As the Grand Rapids Press stated: "The formation of the union for Michigan child

[4] Indeed, given Defendants' own web page for home-based day care providers, it is hardly clear that Plaintiffs are considered public employees: Defendants seem intent on emphasizing that Plaintiffs do not work for the government. Defendant DHS' own website states:

> When a parent chooses a provider, both the parent and provider are forming a business relationship with each other. . . .
>
> All child care providers, except for Aides, are self-employed. This means that the provider runs their 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. . . .
>
> Please note: Provider is <u>not</u> employed by the State of Michigan or the Child Development and Care Program. Providers are <u>not</u> eligible for unemployment insurance.

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.

This heightened public interest is another reason for this Court to fully explain its rationale. In *Citizens Protecting Michigan's Constitution v Secretary of State*, 482 Mich 960 (2008), Justice Kelly — now Chief Justice Kelly — indicated that the courts have a duty to Michigan's citizens to provide guidance on important constitutional questions. A decision that offers no guidance on "essential questions" is in fact neglecting the courts' "duty to the citizens of Michigan to serve as the final arbiter of the law." *Id.* (Kelly, J., dissenting from denial of leave to appeal).

Conclusion

In the instant case, we have a controversial process that stretches the concept of employment past any point recognized by the Legislature. It is a matter that has gained considerable national and local attention. Resolution of the issue may well inform important opinions about Michigan and its suitability for future business investment, since this unionization creates a precedent in which private business owners may become government employee union

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http://www.michigan.gov/documents/dhs/DHS-PUB-0230_222206_7.pdf (last accessed on October 13, 2010; emphasis in original).

[5] http://www.mlive.com/opinion/grand-rapids/index.ssf/2010/09/editorial_questionable_unioniz.html (last accessed on October 13, 2010).

[6] http://www.mackinac.org/archives/2010/033110LSJ-abandon.pdf (last accessed on October 13, 2010).

[7] http://www.livingstondaily.com/article/20100917/OPINION01/9170303/1014/OPINION (last accessed on October 13, 2010).

[8] http://www.macombdaily.com/articles/2010/04/26/opinion/srv0000008113657.txt (last accessed on October 13, 2010).

[9] http://www.mackinac.org/archives/2010/032210DN-lawmakers.pdf (last accessed on October 13, 2010).

members because they accept food stamps or other forms of government subsidy on behalf of welfare recipients.[10]

This Court may feel that a unionization vote occurred and should not be overturned, but a more fundamental principle is at stake: separation of powers. The people of this State have given the Legislature the authority to set the parameters of public employee collective bargaining. Those boundaries cannot be unilaterally expanded by the executive and a community college to enrich the governor's political ally.

Relief Requested

Plaintiffs request that this Court cure its palpable errors by granting the writ of mandamus or by fully complying with the Michigan Supreme Court's remand order and providing a full explanation for its reasoning in denying it. Specifically, Plaintiffs request a ruling on whether Plaintiffs are public employees under PERA, and if not, what impact this conclusion has on the validity of the MERC election certification.

Respectfully Submitted,

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Dated: October 13, 2010

[10] The legal arm of the National Federation of Independent Business filed an amicus brief when leave to appeal was being sought at the Michigan Supreme Court.