STATE OF MICHIGAN
IN THE COURT OF APPEALS

PATRICIA HAYNES and STEVEN GLOSSOP,

Appellants,

and

Case No. 318557

SEIU HEALTHCARE MICHIGAN, and
MICHIGAN QUALITY COMMUNITY CARE COUNCIL,

MERC Nos. C12 I-183, C12 I-184, CU12 I-042, & CU12 I-043

Appellees.

_____/

Patrick J. Wright (P54052)
Derk A. Wilcox (P66177)
Attorneys for Appellants
MACKINAC CENTER LEGAL FOUNDATION
140 West Main Street
Midland, MI 48640
(989) 631-0900

John R. Canzano (P30417)
Attorneys for Appellees
McKNIGHT, McCLOW, CANZANO,
SMITH & RADTKE, P.C.
400 Galleria Officentre, Suite 117
Southfield, MI 48034
248-354-9650

_____/

APPELLANTS' BRIEF

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

RULES

CONSTITUTIONAL PROVISIONS

JURISDICTIONAL STATEMENT

The Michigan Employment Relations Commission decided this matter on April 11, 2013. The Commission's decision was a final appealable order pursuant to MCR 7.202(6)(a)(i). Leave to Appeal was granted by this court on March 28, 2014. Therefore, this court has jurisdiction pursuant to MCR 7.203(B)(3).

STATEMENT OF QUESTIONS INVOLVED

I. If home help workers were not public employees in 2005 then was MERC's certification order void *ab initio* due to lack of jurisdiction?

Appellants:	Yes.
Appellee SEIUHM:	Unclear.
Appellee MQCCC:	Unclear.
MERC:	Unclear.

II. Under PERA, are or were home help providers public employees?

Appellants:	No.
Appellee SEIUHM:	Unclear.
Appellee MQCCC:	Unclear.
MERC:	Unclear.

III. Was the April 9, 2012 extension of the collective bargaining agreement improper due to a conflict of interest?

Appellants:	Yes.
Appellee SEIUHM:	No.
Appellee MQCCC:	No.
MERC:	No.

IV. Can MERC order relief to home help providers other than Appellants?

Appellants:	Yes.
Appellee SEIUHM:	No.
Appellee MQCCC:	No.
MERC:	No.

V. Does PERA's 6-month statute of limitations bar this action?

Appellants:	No.
Appellee SEIUHM:	Yes.
Appellee MQCCC:	Yes.
MERC:	Yes.

INTRODUCTION

This matter concerns the improper unionization of over 40,000 home help workers that led to tens of millions of dollars being misappropriated as "union dues." The unionization occurred because in 2005 the Michigan Employment Relations Commission (MERC) critically failed to determine whether home help workers were public employees under the Public Employment Relations Act (PERA). This Court has limited MERC's jurisdiction to public employees. Because MERC lacked jurisdiction, its order certifying the home help workers as a statewide bargaining unit was void *ab initio*, and this made collection of mandatory union dues or agency fees improper.

Appellant Patricia Haynes provides care for her two adult children with cerebral palsy, and Appellant Steven Glossop provides care to his elderly mother. Ex. 1.[1] They made three claims at MERC: (1) that the April 19, 2005 MERC certification of home help providers was improper as they were not public employees under PERA; (2) even if claim (1) was incorrect, and they were public employees in 2005, due to the March 9, 2012 passage of 2012 PA 45, which changed the definition of public employee by adding a 20-factor test, home help workers were no longer public employees under PERA and the April 9, 2012 extension of the collective bargaining agreement was improper;[2] and (3) even if both (1) and (2) were wrong, the April 9, 2012 extension was improper due to a conflict of interest between the Appellees, SEIU Healthcare Michigan ("SEUIHM") and Michigan Quality Community Care Council

[1] The Exhibit numbers are from Appellants' initial filing at MERC. To prevent confusion, any reference to an exhibit in this brief will correspond to the exhibit number the item had at MERC.

[2] Recently, the manner of passage of 2012 PA 45 was held to violate the Michigan Constitution. *Toth v Callaghan*, __ FSupp2d __ (ED Mich 2014). This case is currently on appeal at the Sixth Circuit. *Toth v Callahagn*, No 14-1351. The impact of the *Toth* ruling on Appellants' claims will be discussed below, but if it stands, it would make Appellants' second claim more difficult to prevail upon.

("MQCCC").

Haynes and Glossop seek return of any dues or fees they personally paid in the six months prior to filing this matter and any dues and fees they paid after that date. This amounts to hundreds of dollars. They seek similar relief for the other home help workers. This amount would be roughly $6 million.

A serious question needs to be addressed regarding the errors that MERC made here and in other instances related to jurisdictional matters. With the recent passage of right to work legislation in Michigan, MERC's role is not going to become any less important and its fundamental misunderstanding of jurisdictional matters needs to be rectified as soon as possible.

STATEMENT OF FACTS

A. General definitions and facts

The Home Help Program (HHP) is part of the state Medicaid plan. HHP is a needs-based federal program that is administered in Michigan by the Department of Human Services (DHS) and the Department of Community Health (DCH). Ex. 2. The program helps provide unskilled care to HHP recipients living independently:

> Home help services . . . are provided to enable functionally limited individuals to live independently and receive personal care services in the most preferred, least restrictive settings. . . . The services that may be provided consist of unskilled, hands-on personal care for twelve activities of daily living (ADL), (eating, toileting, bathing, grooming, dressing, transferring, mobility) and instrumental activities of daily living (IADL), (taking medication, meal preparation and cleanup, shopping and errands, laundry, housework).

Id. at 1.

Michigan began the home help program in 1981. According to "Medicaid and Long Term Care," a document issued by the Michigan State Long Term Care Ombudsman Program, the applicant must apply to the Medicaid program through the DHS. Ex. 5 at 8. The Medicaid program has income thresholds. *Id*. at 4. If the income-eligibility requirements are met and a

physician certifies a need for the service, the DHS conducts an in-home visit with the care recipient and provider. *Id*. at 8-9. During the visit, the DHS determines which activities the recipient needs assistance with. The DHS then determines the number of weekly provider-hours it can pay for. *Id.* at 9.

B. Organized labor's attempts to unionize home help providers in other states prior to Michigan

The instant matter occurred 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 for a service rendered.

Organized labor has had substantial impediments to organizing home help employees, since these workers are not in a traditional employer-employee relationship. Organizing the workers under the federal National Labor Relations Act (NLRA) was not an option; the NLRA defines "employee" to exclude both those "in the domestic service of any family or person at his home" and "any individual having the status of an independent contractor." 29 USC § 152(3). Further complicating matters for organized labor was the NLRA definition of "employer," which excludes "any State or political subdivision thereof." 29 USC § 152(2).

In 1985, the Service Employees International Union (SEIU) tried to unionize all home help providers in Chicago and portions of Cook County. The state labor board held help providers were not public employees, stating:

> Embodied in . . . the Illinois Public Labor Relations Act (Act) . . . is a statement of the Act's fundamental purpose and this Board's resulting responsibility "to regulate labor relations between public employers and employees." An application of this Act to the relationship between [the state agency] and the service providers would render this purpose meaningless. The facts herein present us with a very unique situation which is virtually impossible for us to regulate. There is no typical employment arrangement here, public or otherwise; rather, there simply exists an arrangement whereby the state of Illinois pays individuals (the service providers) to work under the direction and control of private third parties (the service recipients).

State of Illinois Dept of Cent Management Serv and Dept of Rehabilitation Serv and Serv Employees Int Union, AFL-CIO, 1985 WL 1144994 (Illinois State Labor Relations Board Dec 18, 1985); Ex. 8 at 2.

After the Chicago failure, the SEIU's next attempt was in California. There, the SEIU brought suit when Los Angeles County refused to negotiate with it. The California Court of Appeals held that the home help providers were not employees under the controlling statute. *Service Employees International Union, Local 434 v Los Angeles Co*, 275 Cal Rptr 508 (Cal Ct App 1991). Subsequently, California passed a statute 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). This public authority would be deemed "the employer of in-home supportive services personnel [who were] referred to [HHP] recipients," although the recipients would "retain the right to hire, fire, and supervise the work of any in-home supportive services personnel. . . ." 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 one single organizing drive netted organized labor 74,000 additional members and was 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 next to allow the organization of home help providers, doing so in 2000 through a state constitutional amendment. In 2001, Washington passed a similar law through the initiative process, which in pertinent part is codified at Wash Rev Code § 74.39A.270.

Despite the 1985 labor board ruling, on March 4, 2003, Illinois issued an executive order requiring state recognition of a union of home help providers under Illinois' Labor Relations Act.

Illinois Exec Order 2003-8 (March 4, 2003) at 3; Ex. 9. In 2005, the Illinois Legislature codified the arrangement. 5 Ill Comp Stat 315/3(f), (n), (o); 5 Ill Comp Stat 315/7(4).

Thus, in other states, two generic organizing drives were held to be insufficient by the adjudicative bodies (California and Illinois). Successful unionization of home help workers had occurred only after traditional legislation (California), a constitutional amendment (Oregon), initiated legislation (Washington), and an executive order (Illinois).

C. Certification of Michigan Home Help Providers

Unlike the aforementioned states, when it came to Michigan, a new method was chosen – use of an interlocal agreement. An "interlocal agreement" is an administrative arrangement between at least two local government entities permissible under the express terms of Const 1963, art 7 § 28. That provision states in pertinent part:

> The legislature by general law shall authorize <u>two or more counties, townships, cities, villages or districts, or any combination thereof</u> 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; . . . .

Id. (emphasis added). Additionally, the Urban Cooperation Act, PA 7 of 1967, MCL 124.501, *et seq*., indicated 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 contractual.

On April 2004 an interlocal agreement between DCH and the Tri-County Aging Consortium (TCAC) created the appellee MQCCC. Ex. 10. This interlocal agreement was used to create a putative public employer for home help workers, the MQCCC[3] so the union would have something to organize against.

[3] The MQCCC is sometimes referred to as the "MQC3," the "QC3," or the "Michigan QCCC." Appellants refer to it as the MQCCC unless quoting a source.

1. The interlocal agreement's terms

Section 6.03 of the interlocal agreement recognized the "Consumers' exclusive right to select, direct, and remove the Provider who renders Personal Assistance Services." *Id*. at 17.

Section 6.11 stated: "[MQCCC] shall have the right to bargain collectively and enter into agreements with labor organizations. [MQCCC] shall fulfill its responsibilities as a public employer subject to 1947 PA 336, MCL 423.201 to 423.217[,] with respect to all employees."

Section 6.05 listed a number of "PAYROLL MANAGEMENT AND DISBURSEMENT SERVICES" that MQCCC was allegedly going to perform. Included were thing like obtaining an Employer Identification Number for providers, authorizing timesheets, withholding for taxes, generating paychecks, providing benefits, and issuing bonuses and raises. Despite this section, MQCCC never performed any payroll services for home help providers. A December 21, 2004, Transfer Agreement kept all payroll matters with the DCH. Ex. 11 at p. 3. Further, the DCH agreed to "not charge the [MQCCC] for its continuation under this Transfer Agreement for the payroll processing services that it currently provides for payment for covered Home Help Services." *Id*. In the course of its existence, MQCCC never managed the payroll. Also, the appropriations for the HHP went to DCH and not MQCCC.

2. 2005 Presentation to MERC

In January 2005, SEIU and the MQCCC filed a representation petition wherein the parties sought to consent that home help providers are "public employees" and that MERC thereby had jurisdiction:

> 6. The Parties acknowledge that MERC has jurisdiction over questions related to the representation of such employees[,] as the individuals are employees, as defined by the PERA, of the **Michigan QCCC**, a public body corporate[,] even though the individual persons receiving care retain authority over their personal selection and retention of particular homecare workers.

Ex. 13 at p. 2 (emphasis in original).[4]

This Section 6 quoted above from the "addendum" filed with the representation petition, should have clearly alerted MERC to a concern over MERC's jurisdiction regardless of the parties "consent." However, MERC did not examine its jurisdiction sua sponte; rather, assuming that home help workers were public employees, MERC ran a mail vote. In a proposed bargaining unit of 41,000 workers, 6,949 voted in favor of unionization and 1,007 were opposed. Ex. 15. SEIU was certified as the collective bargaining agent on April 19, 2005.

D. First two purported "collective bargaining agreements" and collection of "dues and fees"

The first purported collective bargaining agreement was entered in April 2006. It indicated that consumers retained control over hiring and firing providers:

> The parties reaffirm that Home Help Consumers have the sole and undisputed right to: 1) hire Providers of their choice . . . ; 2) remove Providers from their service at will and for any reason; and 3) determine in advance and under all circumstances who can and cannot enter their home.
>
> The parties reiterate their prior acknowledgements that: the persons receiving service each, individually, retain control over the physical conditions at the work location and individually direct the performance of services and that such authority and control on the part of the individual consumers will not be, and is not, diminished in any way by this Agreement, nor by the outcome of any subsequent contractual negotiations between these parties.

Ex. 16 at 2. The parties were MQCCC and Service Employee International Union Heal Michigan (SEIUHM)'s predecessor, SEIU Local 79.

The "agreement" allowed the union to collect dues and agency fees if the home help providers performed a minimum number of hours of service. *Id*. at 5-6. The parties admitted that their wage schedule of hourly compensation rates for home help providers was merely their request to the Legislature, and that the actual compensation would be determined by the

[4] The quoted material appears in a document titled "Addendum to Consent Election Agreement," but was actually part of the original filing of the representation petition.

legislative process. *Id*. at 7.

The second purported collective bargaining agreement was to be effective from October 1, 2009 to September 20, 2012. Ex. 17 at 21. It maintained the language regarding consumer control of hiring, firing, and control over the premises. *Id*. at 2. The dues language eliminated the minimum hours qualification and allowed the SEIU to take 2.75% of a provider's compensation as dues. *Id*. at 6. The state budget section remained substantively the same, but was changed to read: "The parties agree that the 2009/10 wage improvements will be determined by the 2009/10 State budget." *Id*. at 9. This agreement was between MQCCC and SEIUHM.

Collection of the purported "dues" began in October 2006. As of March 29, 2012, the DCH had transferred $31,317,790.40 to the SEIUHM as dues/agency fees. Ex. 18. This sum represents approximately $480,000 per month.

E. Defunding of MQCCC, passage of 2012 PA 45 and 76, and collective bargaining extension

The issue of the labor movement's expansive new view of public employment began to receive heavy public scrutiny when MERC's certification of a purported public employee union of home-based *day care* providers was challenged in late 2009. The home-help situation began to draw attention at that time as well. The legislature responded in two ways: (1) by defunding MQCCC; and (2) by passing two amendments to PERA's definition of "public employee."

On June 21, 2011, the Michigan Legislature defunded the MQCCC for the 2011-12 Fiscal Year. There was no explicit line in the budget for this defunding; rather, the elimination was rolled into the general home-help appropriation line.

The statutory definition of "public employee" was amended twice in 2012. The first revision was 2012 PA 45, which amended MCL 423.201(1)(e) to add subsection (iii), which indicated that no one could be classified as a government-agency employee who did not qualify

as an employee of that agency under a 20-factor Internal Revenue Service employment test. The law was enacted and became effective on March 13, 2012.[5]

There were some indications that the MQCCC was going to shut down after it was defunded. Ex. 19. Instead, it started accepting money from nongovernmental sources. By April 2012, it had accumulated $22,000, of which the SEIU had provided $12,000 (the SEIU amount was provided on January 18, 2012). Ex. 20. MQCCC moved its mailing address to the personal address of its purported director, Susan Steinke. Ex. 21 at 1. Ms. Steinke contended she could work only a limited number of hours on MQCCC business, since she was collecting unemployment insurance. *Id*. at 3-5. On April 9, 2012, Ms. Steinke signed an extension of the collective bargaining agreement between MQCCC and the SEIU; the extension took the purported collective bargaining agreement from September 2012 to February 2013. Ex. 22.

April 9, 2012 was also the day that Governor Snyder signed 2012 PA 76, which explicitly rejected the new labor employment theory and amended MCL 423.201(1)(e)(i) to clarify that those who receive "a direct or indirect government subsidy in his or her private employment" are not public employees. This second amendment to the public employee definition became effective on April 10, 2012.

F. Federal litigation regarding 2012 PA 76

The passage of 2012 PA 76, did not stop processing the so-called "dues" and "fees." The practice was temporarily ended only after an informal legal opinion from the Attorney General indicated that the enactment of 2012 PA 76 should terminate the withdrawals. Ex. 23.

On May 29, 2012, the SEIUHM filed a federal lawsuit against three Snyder Administration officials in their official capacities. *SEIU Healthcare Michigan v Snyder*, Case

[5] In *Hammel v Speaker of House of Representatives*, 297 Mich App 641 (2012), this Court rejected a claim that 2012 PA 45 did not have immediate effect. But, as noted above, in *Toth v Callahagn*, it was held that the manner of the passage of 2012 PA 45 was improper.

No 12-cv-12332 (ED Mich). The union contended enforcement of 2012 PA 76 constituted an impairment of a contract — the collective bargaining agreement with its extension until February 2013 — under US Const, art I, § 10.

On June 21, 2012, Judge Nancy G. Edmunds issued an Opinion and Order granting the union preliminary relief requiring that the DCH continue taking out "union dues and agency fees." Ex. 24. No Michigan cases exploring the limits of public employment were cited. The entirety of the federal court's analysis of the public-employee issue was the following:

> Additionally, PERA's broad definition of a public employee, before [2012 PA 76], clearly encompasses the home help providers. Even if one does not consider [the MQCCC] an employer, a public employee under PERA is a "person holding a position by appointment or employment . . . in any other branch of public service." Mich. Comp. Laws § 423.201[(1)](e). A home help provider, paid through Medicaid and registered and regulated by a state-created agency, is within this broad umbrella of "public service."

Ex. 24 at 11. The case has since been mooted. *SEIU Healthcare Michigan v Snyder*, Case No 12-cv-12332 (ED Mich), PACER Docket Entry 55 (August 28, 2013).

G. End of dues collection and dissolution of MQCCC

The Snyder Administration refused to extend the collective bargaining agreement past February 2013. MQCCC was disbanded in April 2013.

H. MQCCC and DCH statements about employment status

Before this matter was filed, both DCH and MQCCC repeatedly indicated that the help recipients were home help workers' employers and the MQCCC was not. For example, DCH began requiring each home help provider to fill out a "Medical Assistance Home Help Provider Agreement." On page two of that form, the provider is informed that: "As an individual provider of Home Help services, I agree that the beneficiary is considered the employer. I will not be employed by the Department of Community Health (DCH), the Department of Human Services (DHS), or the State of Michigan." Ex. 25 at 2. No mention was made of MQCCC.

DCH sent out an informational sheet on federal tax treatment of home help payments. The document discussed an employment relationship between the care recipient and the care provider. No mention was made of the MQCCC. In pertinent part, the document states:

> The IRS considers all payments in Independent Living Services (ILS) Programs as reportable for tax purposes. . . .
>
> The IRS recognizes the State of Michigan is serving as the reporting agent for the benefit recipients to address their household employer/employee W-2 reporting requirements. In that capacity, the State of Michigan sends payment as a dual check to both the beneficiary and the provider. **The relationship between the beneficiary and the provider is generally considered an employment relationship**. . . . These payments are generally considered by the IRS payments for domestic services and, as such, are treated as wages to the provider (not the client but the helper). . . .

Ex. 26 (emphasis added).

The MQCCC website did not claim that MQCCC is the employer of the providers; rather, only consumers were named as employers. On its "About the Home Help Program" page, the MQCCC stated:

> Who Provides the Services?
>
> Home Help Consumers employ thier [sic] own providers. Providers are not employed by DHS or the State of Michigan. Providers may be friends, relatives, neighbors, or employees of home help agencies. . . . Some DHS offices keep lists of people willing to perform these services.

Ex. 27. On its "Frequently Asked Questions" page, no mention is made of the MQCCC acting as an employer. Further, the care recipient was labeled the employer of the providers, and MQCCC proposed to train the care recipients in using that power. The MQCCC stated:

> Frequently Asked Questions
>
> How will the QC3 help?
>
> . . .
>
> For Providers, the QC3 offers tools to find work, use their skills, and to find other Consumers to care for.

> For Consumers, the QC3 offers a tool for finding, choosing, and hiring a Provider. This is the Registry, or list, of Providers. **The QC3 may also provide information about how to act as an employer to Providers, and training in how to be an employer**.
>
> What will NOT change?
>
> The Consumer will still choose, hire, and train the Provider as is fitting for the needs of both parties. Consumers will also still be able to fire Providers. . . .

Ex. 28 (emphasis added). The "FAQ Consumers" page again only mentioned consumers as the employer and made no mention of an MQCCC employment role:

> The QC3 also offers Consumers information about being an employer of an in-home Provider. The QC3 will also help with training for Consumers who want to learn more about being an employer.

Ex. 30.

The MQCCC held some training sessions for would-be providers. As part of this session, slides were displayed. Under the section "What is the QC3," a slide stated:

> **The main purpose of the QC3…**
>
> Is to maintain a Registry of available Home Help Providers. The main goals of the Registry are to assist Providers in finding Home Help work and to make it easier for Home Help Consumers to find Providers. . . .

Ex. 31 at 6 (emphasis in original). The next slide discussed "What the QC3 is not," and it stated: "**We are not your employer.** The consumer is your employer." *Id*. at 7 (emphasis in original).

I. 2012-2013 Proceedings at MERC

This matter was filed as an unfair labor practice charge and/or a request for declaratory ruling at MERC on September 20, 2012 (while the third collective bargaining agreement was still in effect). Patricia Haynes and Steven Glossup brought the charges against SEIUHM and the MQCCC. Appellants Haynes and Glossup included a 50-page brief explaining why they were not and had never been public employees under PERA as home help providers. This brief traced

the history of the employee definition of PERA and all of the pertinent case law. It also contained a section on primary jurisdiction wherein it was shown that MERC should decide whether home help workers were ever public employees under PERA.

Appellants made three claims: (1) that the April 19, 2005 MERC certification of home help providers was improper as they were not public employees under PERA; (2) even if claim (1) was incorrect, due to the passage of 2012 PA 45 on March 9, 2012, home help workers were no longer public employees under PERA and the April 9, 2012 extension of the collective bargaining agreement was improper; and (3) even if both (1) and (2) were wrong, the April 9, 2012 extension was improper due to a conflict of interest between the SEUIHM and MQCCC.

On November 15, 2012, MERC issued an "Order to Show Cause," which, not counting subparts, contained 14 questions for the parties. Included was a specific question (#5) on the central issue in the case - whether home-help workers were public employees. An affirmative answer to question #5 would have led to the dismissal of Appellants' first claim. An answer that home help providers were public employees in 2005 and remained so despite the passage of 2012 PA 45 would have led to the dismissal of Appellants' second claim.

Appellant Haynes and Glossop's answer to question #5 referred to their initial brief where the statutory history and case law was discussed. Despite question #5 offering a direct way for SEIUHM and MQCCC to prevail on the first two claims presented by Haynes and Glossop, neither Appellee directly answered question #5. Appellee MQCCC stated: "[Haynes and Glossop] state in their response that they are not currently public employees within the meaning of PERA. If they are not public employees, then MERC does not have jurisdiction over their claims." Appellee SEIUHM stated: "[Haynes and Glossop] assert . . . that they are not and have never been public employees. . . . [MERC] does not have jurisdiction over individuals who are

not public employees. . . ."

Oral argument was held before MERC on March 12, 2013.

On April 11, 2013, MERC issued a "Decision and Order on Summary Disposition." Appellants' claims were largely based on the theory that MERC failed to exercise its duty to examine its own jurisdiction in 2005 – this jurisdictional question turned on whether home help workers were public employees. If they were, then MERC had jurisdiction and the certification of the union was proper. If they were not, then the certification was void *ab initio* since the orders of a tribunal without subject matter jurisdiction are void.

Thus, in its order, MERC had the opportunity to authoritatively eliminate Appellants' first claim by showing that when it certified home help workers in 2005 that those workers met the statutory and case law tests for public employees under PERA. Similarly, it could have authoritatively eliminated Appellants' second claim by showing that not only were home help workers public employees in 2005, but that they remained so despite the passage of 2012 PA 45 by analyzing home help workers under the 20-part IRS test. It did neither. Rather, it relied on a type of Catch-22 logic and completely ignored the primary-jurisdiction doctrine. MERC, which assumed (without examining) that it had jurisdiction in 2005, indicated that it would not be the place to challenge its allegedly improper actions.

In dismissing Appellants' claim that the actions related to the 2005 certification were improper, MERC stated:

> Inasmuch as § 10(1)(b) applies only to public employment, there can be no violation of § 10(1)(b) if [Appellants] are not public employees. Moreover, other than their assertion that home help employees are not public employees, [Appellants] have alleged no facts to support a finding that the bargaining unit of home help providers is not an appropriate unit. If the home help providers are not public employees and, for that reason, the bargaining unit is not appropriate, we have no jurisdiction over this matter and there is no claim under § 10(1)(b).

April 11, 2013 Order at 6. MERC's rejection of Appellants' second claim was similar:

> Assuming that home help providers are public employees, [Appellants] have alleged no facts to indicate that the members of the bargaining unit have been denied their rights under § 9 of PERA "to negotiate or bargain collectively with their public employers through representatives of their own free choice."
>
> We note that the allegation that [Appellee] SEIU Healthcare Michigan failed "to let the public employees 'negotiate or bargain collectively with their public employers through representative [sic] of their own free will'" is inconsistent with [Appellants'] claims that home help providers are not public employees. However, [Appellants'] assertion that the SEIU Healthcare Michigan's agreement to extend the collective bargaining agreement appears to be based on their contentions that the home help providers are not public employees. . . .[T]here is not merit to the allegation . . . if the home help providers are not public employees. If [Appellants], who are home help providers, are not public employees, we have no jurisdiction over this matter and must dismiss this action on that basis.

Id. at 6-7. The Catch-22 theory was used three more times on pages 8-9 of the order.

MERC also indicated that it was justified in failing to examine its own jurisdiction in 2005:

> In 2005, both [Appellees] agreed that the Commission had jurisdiction under PERA to conduct the representation election. **There was no challenge to the Commission's jurisdiction to the election or to the status of the home help providers as public employees.** It was, therefore, the responsibility of the Commission to conduct the election and to certify the representative for whom the majority of the bargaining unit members voted. **Since the election was a consent election and, at the time, there were no objections by the interested parties, the Commission was required to rely on the representations made by the parties as to the appropriateness of the bargaining unit's composition.**

Id. at 7 (emphasis added).

In rejecting Appellants' first claim, MERC held that MCL 423.216(a) required that any claim should have been filed within 6 months of the 2005 election. April 11, 2013 Order at 7.

MERC also cited to the since-mooted federal decision as a justification for not examining whether the 2005 certification was proper:

> Moreover, in *SEIU Health Care Michigan v Richard Snyder, et al*, Case

> No. 12-12332 (ED Mich, 2012), the judge held that the contract clause of the U.S. Constitution prohibits enforcement of the 2012 legislation removing home help providers from the category of public employees as it would impair an existing contract. Based on the reasoning in that decision, we must refrain from finding the collective bargaining agreement between SEIU Healthcare Michigan and Michigan Quality Community Care Council to be void.

April 11, 2013 Order at 9.

Appellants' third claim was rejected as there was no "legal authority that would support a finding that a public employer's receipt of funds from a union is an unfair labor practice." MERC distinguished Appellants' proffered NLRB conflict-of-interest case. *Id*. at 8.

Finally, MERC rejected Appellants' claim seeking relief for all similarly situated home help providers:

> Finally, Charging Parties seek reimbursement of agency fees not only for the named parties but for similarly situated home help providers. They have failed to allege that any other persons have authorized Charging Parties to represent them in seeking such relief on their behalf. The other home help providers have the right to choose whether they will continue to support SEIU Healthcare Michigan as their bargaining representative. More importantly, Charging Parties have offered no authority to support the contention that the Commission has the authority to grant relief to persons who are not names as parties in this action in the absence of evidence that they have been harmed by an unfair labor practice committed in violation of PERA.

Id. at 9.

DISCUSSION

I. Since home help workers were not public employees in 2005 then the MERC certification order was void *ab initio* due to lack of jurisdiction.

A. Standard of review

MERC legal determinations are reviewed de novo. *Macomb Co v AFSCME Council 25*, 494 Mich 65, 77 (2012).

B. Argument

At this point, it is abundantly clear that neither MERC nor Appellees is willing to argue

that home help workers were properly classified as public employees when MERC certified them as such in 2005. Both Appellees and MERC have shunned repeated opportunities to show that home help workers were public employees in 2005. In fact, Appellees both brushed off MERC's demand to make an argument on the matter. Despite both Appellees and MERC in essence ceding this point, it is central enough to Appellants' argument that it will be affirmatively shown below in Argument IV.

Before addressing jurisdiction, a couple of general propositions will be discussed. First, public-sector unionism is not a federal constitutional right. In *Smith v Arkansas State Highway Employees, Local 1315*, 441 US 463 (1979), the U.S. Supreme Court discussed government workers' First Amendment right to join a union: "The First Amendment protects the right of an individual to speak freely, to advocate ideas, to associate with others, and to petition his government for redress of grievances. And it protects the right of associations to engage in advocacy on behalf of their members." *Id*. at 464. In that same decision, however, the court clarified that the states are not obligated to engage in collective bargaining with public-sector unions — in other words, that public-sector unions have no First Amendment right to engage in collective bargaining. *Id*. at 464-65. Thus, the decision whether to allow public-sector bargaining belongs to each state, and states can choose to permit anything from wide-spread public-sector bargaining to no public-sector bargaining at all.

Where a state does allow public-sector bargaining, the choice to allow mandatory agency fees, as under Michigan's MCL 423.210(2), leads to serious constitutional questions. Because a public-sector union takes many positions during collective bargaining that have powerful political and civic consequences, the compulsory fees constitute a form of compelled speech and association that imposes "significant impingement on First Amendment rights." *Knox v Service*

Employees International Union, Local 100, 132 SCt 2277, 2289 (2012).[6]

In Michigan, the scope of public-sector unionism is governed by only two entities: (1) the Legislature through Const 1963, art 4, § 48; and (2) the Civil Service Commission through Const 1963, art 11, § 5. By passing PERA in 1965, the Legislature began allowing those "public employees" not under the jurisdiction of the Civil Service Commission to unionize.

Neither a court nor an administrative agency can exercise legislative power:

> Simply put, legislative power is the power to make laws. In accordance with the constitution's separation of powers, this Court "cannot revise, amend, deconstruct, or ignore [the Legislature's] product and still be true to our responsibilities that give our branch only the judicial power." While administrative agencies have what have been described as "quasi-legislative" powers, such as rulemaking authority, these agencies cannot exercise legislative power by creating law or changing the laws enacted by the Legislature.

In re Complaint of Rovas Against SBC Ameritech, 482 Mich 90, 98 (2008). In Michigan, to protect this principle, agency interpretations of a statute are reviewed de novo. *Id*. at 102.

Michigan's de novo review standard stands in marked contrast to the federal administrative system, wherein the federal courts defer to agency interpretations of statutes under the doctrine from *Chevron USA Inc v Natural Resources Defense Council*, 467 US 837 (1984).

In *Lansing v Carl Schlegel, Inc*, 257 Mich App 627 (2003), this Court upheld a MERC ruling limiting the MERC's "subject-matter jurisdiction" to public employees. *Id*. 632.[7] Subject matter jurisdiction "can never be waived or forfeited." *Gonzales v Thaler*, 132 SCt 641, 648 (2012). Subject-matter jurisdiction cannot be enlarged by the courts or by consent of the parties.

[6] The United States Supreme Court is currently considering the constitutionality of the public sector unionization of home help workers. *Harris v Quinn*, No 11-681. In that same case, the Supreme Court may also reconsider the propriety of allowing mandatory dues in the public sector.

[7] There is one caveat: Under the Michigan Labor Relations and Mediation Act, the Commission also regulates small-scale private-sector unionization not governed by the National Labor Relations Act. This is not at issue here.

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). In 2003, this Court held that the requirement to examine jurisdiction sua sponte applied to the Tax Tribunal, an administrative agency:

> Petitioner asserts that the Tribunal erred in ruling sua sponte. However, our Supreme Court, in *Fox v University Board of Regents*, 375 Mich 238, 242 (1965), stated that a court (here the Tribunal): "At all times is required to question sua sponte its own jurisdiction whether over a person, the subject matter of an action, or the limits on the relief it may afford."

General Products Delaware Corp v Leoni Twp, unpublished per curiam of the Court of Appeals, decided (May 8, 2003) (Docket No. 233432). MERC has previously recognized the need to examine its jurisdiction: "Our review of the MERC's written decision discloses that the MERC recognized that its jurisdiction might be questioned, and, therefore, it, sua sponte, undertook to address the issue of NLRA preemption before proceeding to a decision on the merits." *Michigan Council 25, AFSCME v Louisiana Homes, Inc*, 203 Mich App 213, 220 (1993).

The instant case is one of three times that MERC has failed to properly address its own subject-matter jurisdiction sua sponte in the last eight years. The three instances concern: (1) the home help workers involved here; (2) home-based day care workers; and (3) graduate student research assistants at the University of Michigan.

The second group to be certified without a jurisdictional determination was home-based day care providers. The representation petition in that matter was filed in September of 2006. The proposed unit was 40,532 members and included everyone within the state who was a "home-based child care provider[] receiving reimbursement payments from the Michigan Child Care Development & Care Program." With this election, there were 5,921 votes in favor and 475

opposed. The results were certified on November 27, 2006.

Two lawsuits were eventually filed related to the day care providers' certification. On behalf of three providers, the undersigned filed a mandamus action against the Department of Human Services in this Court contending that the home-based day care providers were not public employees. *Loar v Dep't of Human Services*, Court of Appeals No. 294087. During the entirety of the litigation, DHS pointedly refused to argue that home-based day care providers were public employees and argued procedural matters only.

In the second lawsuit, *Schlaud v Granholm*, 1:10-cv-00147-RJJ, the plaintiffs were home-based day care providers who alleged that their unionization as public-sector employees violated their First Amendment rights. In that proposed federal class action case, Governor Granholm and the Director of DHS were sued. While discussing MERC and public employees, the 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), Pacer Page ID ## 133-34 (May 5, 2010).[8] Thus, Governor Granholm (through the Attorney General's office, which was representing her) was unwilling to argue to a federal judge that home-based day care providers were public employees under PERA. This reluctance only highlights the question of why MERC failed to investigate its subject-matter jurisdiction before it held an election.[9]

[8] This case was dismissed as moot after the purported public employer was disbanded. But, Plaintiffs have since filed a writ of certiorari on the denial of their class, which prevented their wider damages claim.

[9] That litigation produced evidence that this unionization was a major policy goal of the Granholm Administration and that Governor Granholm did not want the Legislature to become

Publicity around the home day care and home help unionizations drew the Legislature's attention to the unionization process. On May 4, 2010, MERC Director Ruthanne Okun testified before the Senate Appropriation Subcommittee for the Department of Human Services. The questioning largely centered on the unionization of the day care providers, although the unionization of the home help workers was briefly discussed as well. Director Okun repeatedly indicated that the MERC did not examine its jurisdiction sua sponte and would look at jurisdiction only if a challenge was presented.[10]

Director Okun's testimony also indicated that either an employer or a member of a purported proposed bargaining unit could challenge MERC's jurisdiction. That issue arose with a proposed unionization of graduate student research assistants at the University of Michigan.

The University of Michigan had allowed all of its graduate students, including research assistants, to organize in 1974, and after a vote, the students did so. While negotiating a second contract, conflicts developed between the union and the University. The University sought the dismissal of a grievance, and the union filed an unfair labor practice charge contending that the University was demanding dismissal before it would execute a second contract. The University's sole defense was that MERC lacked jurisdiction because the graduate students were not public employees under PERA. *Regents of the University of Michigan and Graduate Employees Organization*, 1981 MERC Labor Op 777, 790. Eventually, it was decided that some types of graduate students – those teaching undergraduates – were public employees, while others – graduate student research assistants (GSRAs), generally those merely engaged in their own studies – were not. Neither side appealed.

---

aware of the attempt to unionize day care providers. *Schlaud v Granholm*, Case No. 1:10-cv-147 (WD Mich), Pacer Page ID # 1123 (March 11, 2011).

[10] A full transcript can be found at Ex. 14.

In 2011, the same union that had sought to unionize the GSRAs in 1981 filed a representation petition. Initially, MERC did not take notice of its prior decision. Before a consent election was held, the undersigned represented a GSRA (and ultimately a group of over 300 GSRAs) who sought to challenge whether GSRAs were public employees. A twist was that this time, unlike in 1981, the Regents of the University of Michigan (the purported employer) wanted to consent to a public-employee designation for GSRAs.

MERC ordered an evidentiary hearing to determine whether GSRAs should now be considered public employees. Both the Attorney General and the dissenting graduate students sought to intervene as parties to this hearing. But MERC limited direct participation to the employer and the union, which were in agreement on the issue. This unique procedure was appealed to the Michigan Supreme Court, and that body held it did not have jurisdiction to decide the issue at that time. *Univ of Michigan v Graduate Employees Org*, 807 NW2d 714 (Mich Feb 3, 2012). While agreeing with the holding, Justice Markman highlighted the flaws in the MERC's procedures and chastised MERC for showing hostility based on its perception that a party was opposed to public-sector unionism as a matter of general policy. *Id*.

The MERC evidentiary hearing ground to a halt with the passage of 2012 PA 45, which specifically exempted GRSAs from PERA's definition of public employee.

The three unionizations discussed above have impacted over 40,000 day care providers, over 40,000 home help workers, and over 2,000 GRSAs. The union/dues fees involved were around nine million dollars annually (with six million dollars annually being the home-help number). These were significant and important questions about the bounds of public employment and MERC should have looked into all three matters without prompting.

Except for Michigan's rejection of *Chevron* deference, the legal principles set out above

were all clearly established in 2005, the year of SEIU's representation request. The proposed "number of employees in unit" in that representation request, 41,000, was huge. There was no geographical limitation to the unit other than the state's borders. Any home help provider in the state of Michigan was alleged to be within the bargaining unit.

A strong argument can be made that any proposed 41,000-member statewide unit would be under the jurisdiction of the Civil Service Commission, not MERC. But that was not the only indication that MERC's subject-matter jurisdiction was in doubt. The original representation petition, stated in part:

> 6. The Parties acknowledge that MERC has jurisdiction over questions related to the representation of such employees[,] as the individuals are employees, as defined by the PERA, of the Michigan QCCC, a public body corporate[,] even though the individual persons receiving care retain authority over their personal selection and retention of particular homecare workers.

While this document sought to alleviate a jurisdictional concern, it shows that the parties knew that jurisdiction was questionable. The fact that parties cannot consent to jurisdiction is a second reason that MERC should have examined the question in 2005. A third reason to examine jurisdiction in 2005 was that the two states, Illinois and California, which had judicially examined whether home help providers were public employees under their labor laws had both concluded that they were not. *Service Employees International Union, Local 434 v Los Angeles Co*, 275 Cal Rptr 508 (Cal Ct App 1991); and *State of Illinois Dept of Cent Management Serv and Dept of Rehabilitation Serv and Serv Employees Int Union, AFL-CIO*, 1985 WL 1144994 (Illinois State Labor Relations Board Dec 18, 1985).

Undisputedly, a purported union election occurred in 2005. But, MERC's lack of subject-matter jurisdiction voids its certification of the SEIU as the home help providers' bargaining agent:

> 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) (emphasis added); 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.").

As a result of the lack of legitimate certification, no collective bargaining unit existed; home help providers should not have been governed by a collective bargaining agreement; there was no authority requiring them to pay "dues" or "agency fees"; and so-called "dues payments" taken from checks were improper. Appellants should be permitted to retrieve the six months of money previously collected as so-called "union dues" and "agency fees" prior to filing and any "dues" or "fees" collected after the date of filing.

Taken together, the above cases show that MERC lacks a fundamental understanding of jurisdiction. Without it, a tribunal lacks the power to act. Also, a tribunal has the duty to examine jurisdiction sua sponte if it might be lacking. Its April 11, 2013 Decision and Order on Summary Dispositions indicates MERC still fails to understand this rudimentary concept:

> In 2005, both [Appellees] agreed that the Commission had jurisdiction under PERA to conduct the representation election. There was no challenge to the Commission's jurisdiction to the election or to the status of the home help providers as public employees. It was, therefore, the responsibility of the Commission to conduct the election and to certify the representative for whom the majority of the bargaining unit members voted. Since the election was a consent election and, at the time, there were no objections by the interested parties, the Commission was required to rely on the representations made by the parties as to the appropriateness of the bargaining unit's composition.

April 11, 2013 Decision and Order on Summary Dispositions at 7. This is egregiously wrong. It should have been readily apparent that the home help workers' status as public employees was in

doubt in 2005 and MERC had a duty to examine that matter before ordering an election. MERC failed at this basic task.

MERC made another jurisdictional error here by failing to apply the doctrine of primary jurisdiction, which gives agencies the first opportunity to adjudicate the matters that are administrative in character. *Travelers Ins Co v Detroit Edison Co*, 465 Mich 185 (2001). This doctrine exists to "promote consistent application in resolving controversies of administrative law." *Id*. at 199. In three other instances, MERC has asserted primary jurisdiction. *Smigel v Southgate Community School Dist*, 388 Mich 531 (1972); *In re Michigan Employment Relations Commission Order*, 406 Mich 647 (1979); and *Jackson Fire Fighters Ass'n, Local 1306, IAFF, AFL-CIO v Jackson*, 227 Mich App 520 (1998). Oddly, MERC does not assert the doctrine here, nor does it even mention it in its order.

As noted above, MERC's failings related to jurisdiction are not limited to the instant matter. Just as in the instant case, the day-care matter was another instance where no one was willing to argue that a large group of "employees" (home-based day care providers) were properly classified as public employees.

With the graduate student research assistants, MERC first failed to recognize its own 1981 ruling that should have prevented it from proceeding with the representation petition until jurisdiction was determined. Even once it was alerted to the jurisdictional matter, it managed to complicate the matter by preventing parties opposed to the unionization from participating and instead limiting the proceedings to two parties that wanted unionization.

At least with the graduate students, MERC took some action when it (belatedly) recognized there was a question as to jurisdiction. Unfortunately, in the instant matter, MERC has backslid. It no longer seems to recognize the need of a tribunal to sua sponte consider its own

jurisdiction where that jurisdiction is questionable.

MERC's serial failures related to its jurisdiction highlight the need for a remand. It has repeatedly erred in critical cases affecting thousands to tens of thousands of individuals and millions of dollars in improper dues. Due to the recent passage of right to work, 2012 PA 349, MERC will not be any less important in the near future. MERC must be required to comprehend the foundational concept of subject matter jurisdiction.

II. Under PERA, home help providers are not public employees

A. Standard of review

MERC legal determinations are reviewed de novo. *Macomb Co v AFSCME Council 25*, 494 Mich 65, 77 (2012).

B. Argument

Michigan began allowing public-sector collective bargaining in 1965, with the enactment of PERA. Soon thereafter, the courts created a four-factor test to determine government employment. That test has been applied even as the Legislature has altered PERA's definition of "employee." An application of that test will show that home help providers are not government employees. Moreover, the last three amendments to PERA's "employee" definition show the Legislature meant to prevent labor-organizing theories creating new classes of potential government employees.

1. Home help providers are not public employees under statutory definitions or case law.

a. Statutory definition of "public employee"

Currently, MCL 423.201(1)(e) states in pertinent part:

> (e) "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) A person employed by a private organization or entity who provides services under a time-limited contract with this state or a political subdivision of this state or who receives a direct or indirect government subsidy in his or her private employment is not an employee of this state or that political subdivision, and is not a public employee. This provision shall not be superseded by any interlocal agreement. . . .
>
> . . .
>
> (iii) An individual . . . whose position does not have sufficient indicia of an employer-employee relationship using the 20-factor test announced by the internal revenue service of the United States department of treasury in revenue ruling 87-41, 1987-1 C.B. 296 is not a public employee entitled to representation or collective bargaining rights under this act.

As originally implemented in 1947 PA 336, the Hutchinson Act (which would eventually be transformed into PERA) merely mentioned "employee" in the prohibition of strikes provision:

> No person holding . . . 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).

The enactment of PERA in 1965, which significantly altered state law concerning public employees, did not alter the definition of "employee" found in MCL 423.202.

As part of 1994 PA 112, the employee definition was relocated to MCL 423.201(1)(e) and slightly rearranged. In 1996, the first sentence of MCL 423.201(1)(e)(i) was added as part of 1996 PA 543 to state:

> (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.

On March 13, 2012, subsection (iii), which adopted the 20-part IRS test for public employment and specifically excluded graduate student research assistants from being public employees, was enacted. On April 10, 2012, subsection (i) was modified to clarify that receipt of direct or indirect government subsidies does not make one a public employee. The amended language also stated explicitly that this provision could not be changed by an interlocal agreement. 2012 PA 76.

Thus, there are four relevant periods regarding the public employee definition: (1) the 1965 implementation of PERA to the 1996 amendment; (2) 1996 to March 13, 2012, when 2012 PA 45 became effective; (3) March 13, 2012, to April 10, 2012, when 2012 PA 76 became effective; and (4) April 10, 2012, to the present.

The certification took place in the second of these periods. The first and second purported collective bargaining agreements took place in period (2) as well. The purported collective bargaining extension took place in period (3).

As noted above, the manner of enactment of 2012 PA 45 was held to violate the Michigan Constitution. As a result, the federal court held that the act was "invalid and unenforceable." *Toth v Callaghan*, __ FSupp2d at __. Specifically, the federal court held that the law violated Const 1963, art 4 § 24 – the Title-Object clause in that there was a change of purpose from the original bill to the passed act.

As a primary matter, a federal court interpretation of a state law is not binding on this Court. *Besic v Citizens Ins Co of the Midwest*, 290 Mich App 19, 32 n. 4 (2010). Also, there is no issue preclusion based on that decision since Appellants were not part of the *Toth* litigation. Nor have Appellees made any claim in this litigation regarding the constitutionality of 2012 PA 45.

Further, this Court has indicated that when reviewing all Title-Object challenges that "all possible presumptions should be afforded to find constitutionality." *People v Loper*, 299 Mich App 451, 468 (2013) (citation omitted). Finally, the case is being appealed.

Were that case to be upheld and were its reasoning considered persuasive by this Court then Appellants would not be able to make their second claim – that if the 2005 certification was proper, the 20-part IRS test should have prevented the April 9, 2012 collective bargaining agreement extension. On the presumption that *Toth* is likely to be overturned at the Sixth Circuit or otherwise held not to be controlling here, Appellants will still present their claim based on 2012 PA 45.

b. Case law related to the meaning of "public employee" during periods (1) and (2) — i.e., from the passage of PERA to the passage of 2012 PA 45

Helpful guidance about the meaning of "public employee" is provided by case law during the period from PERA's creation through the 1996 amendment to 2012 PA 45 — i.e., the periods (1) and (2) discussed above. Similar guidance is provided by case law from those periods regarding what constitutes a "public employer." This case law will show that Michigan courts have relied on a four-factor test to determine whether there is a public employer-employee relationship, and that this test had been long established by 2005.[11] Under this test, Appellants

[11] Much of the case law surrounding MCL 423.202 (where "public employee" was defined until 1994) is not relevant here. For instance, many of the "public employee" cases involved supervisory or executive workers. Typically, the disputes in these cases concerned bargaining composition, not whether the workers were public employees. *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 Prof Command Ass'n v Co of Muskegon (Sheriff's Dep't)*, 186 Mich App 365 (1991). Another case dealt with whether teachers without a contract were still public employees under PERA. *Holland School Dist v Holland Ed Ass'n*, 380 Mich 314 (1968). Yet another concerned whether PERA applied to public universities. *Bd of Control of Eastern Michigan Univ v Labor Mediation Bd*, 384 Mich 561 (1971).

were not employees of MQCCC or any other putative public employer; rather, if they are employees of anyone, it is the home help consumers.

In *Wayne County Civil Service Commission v Board of Supervisors*, 22 Mich App 287 (1970), this Court 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. This Court set forth the four-factor test for identifying the employer:

> (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.

Id. at 294. The court took note of a stipulation that the Road Commission could "hire, fire, demote, promote, discipline, and pay its employees performing road work." *Id*. at 298. That led to a holding that the Road Commission — not either of the other two entities — was the public employer of the road workers. The Michigan Supreme Court, without applying the four-factor test, affirmed. *Wayne Co Civil Service Comm v Bd of Supervisors*, 384 Mich 363, 375-76 (1971).

In *Regents of University of Michigan v Employment Relations Commission*, 389 Mich 96 (1973), the Michigan Supreme Court faced the question of 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.

The Michigan Supreme Court disagreed. Without applying the four-factor test, it held that the personnel were both students and employees. Specifically, the court examined whether this group constituted employees. It noted that the university provided them with W-2 forms and

withheld a portion of their pay 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. They performed many tasks for which their employer, the university, was compensated, and they were entrusted with important decisions, such as writing prescriptions, admitting and discharging patients, and performing surgeries with little to no supervision. *Id*. at 112. All these factors tended to show that these people were employees.

In *Prisoners' Labor Union at Marquette v Department of Corrections*, 61 Mich App 328 (1975), this Court faced the question of whether state prisoners who provided labor under the Correctional Industries Act were public employees for purposes of PERA. The court noted that: "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.

This Court then examined the details of the Correctional Industries Act. While the court recognized that the act set up "trappings of conventional employment," it held the act's primary purpose was corrections, not employment. *Id*. at 332-33. Thus, although it did not apply the four-factor test, the court determined that the prisoners were not public employees.

Michigan courts have also recognized doctrines involving multiple public-sector employers. *St Clair Prosecutor v AFSCME*, 425 Mich 204 (1986). In *St Clair Prosecutor*, the Michigan Supreme Court adjudicated the question of who should serve as the public employer during collective bargaining with the county's assistant prosecutors. In rendering its decision, the court recognized the concept of "coemployers." *Id.* at 227. The Michigan Supreme 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. The court 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, has the power "to control the number and remuneration" of the assistant prosecutors. *Id*. at 226. The court therefore held that the county prosecutor and the county board were coemployers and that both had a right to sit at the collective bargaining table. *Id.* at 227.

Genessee County Social Services Workers Union v Genessee County, 199 Mich App 717 (1993) raised questions similar to *St. Clair Prosecutor*. This Court 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 MERC's *St. Clair Prosecutor* gloss that limited coemployer status to those who could hire and fire a worker due to a statutory grant.

In *Saginaw Stage Employees, Local 35, IASTE v Saginaw*, 150 Mich App 132 (1986), this Court sought to determine whether the city of Saginaw was a public employer under PERA in the case of stagehands at the Saginaw Civic Center. The stagehands performed work for the city, but the Saginaw Stage Employees union was responsible for hiring and firing them, distributing their hourly pay, and deciding which of them worked when the city needed extra help. MERC agreed with the union that the stagehands were city employees. This Court applied the four-factor test. *Id*. at 134-35. It reversed and held that the union members were not city employees because the union, not the city, controlled the activity of the workers.

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 determination that it, and not the individual school districts which had separate contracts with their local teachers' unions, was the employer of the adult education teachers. The local education unions claimed that under the state

school code, a consortium could not be an employer. The court 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 shares in common and which each might exercise separately." *Id.* at 250. Having determined that a consortium could have employees, this Court affirmed MERC's determination that the consortium, rather than the individual school districts, was the proper employer. The four-factor test was not used.

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,* was before this Court 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 was asked to decide whether the Michigan Department of Mental Health (DMH) was a joint employer of residential care workers at three private facilities operated by Louisiana Homes under an agreement with the state of Michigan.

The Court of Appeals held that DMH was a joint employer:

> 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.

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 (NLRB) had denied the union the ability to organize under the NLRA, specifically because "an employer health-care institution like Louisiana Homes" was too closely affiliated with Michigan's DMH, an arm of the state. 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 impact of this decision was 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). This Court 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. *AFSCME*, 215 Mich App at 15.

According to the Michigan Senate Fiscal Agency's Bill Analysis for 1996 PA 543, *Louisiana Homes* and *AFSCME v Department of Mental Health* triggered the 1996 amendment to MCL 423.201(1)(e). 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.

In the time between the 1996 amendment and the enactment of 2012 PA 45 (i.e., period (2)), this Court issued one decision that dealt with a public-employee question: *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), a unionization attempt that MERC denied.

This Court applied the four-factor test to hold 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.

c. Other case law

In *Harris v Quinn*, 656 F3d 692 (7th Cir 2011), a suit brought against the state of Illinois by home help providers, the Seventh Circuit held that the First Amendment was not violated when the unionization of the providers led to a union security clause that required the payment of either dues or agency fees. The court referred to the 1985 Illinois labor board decision and the subsequent executive order contrary to the labor board's holding. *Id*. at 695. The court also acknowledged the executive order in the Illinois unionization and the passage of a state law indicating that the home help providers were "employees solely for purposes of collective bargaining under Illinois law." *Id*. at 697.

The Seventh Circuit refused to accept that statutory contention; rather, it claimed the need to "consider the relationship itself and decide whether the State is an employer for purposes of compelling support for collective bargaining." *Id*.

The Seventh Circuit found the State of Illinois to be joint employers with the consumers:

> While the home-care regulations leave the actual hiring selection up to the home-care patient, the State sets the qualifications and evaluates the patient's choice. And while only the patient may technically be able to fire a personal assistant, the State may effectively do so by refusing payment for services provided by personal

> assistants who do not meet the State's standards. When it comes to controlling the day-to-day work of a personal assistant, the State exercises its control by approving a mandatory service plan that lays out a personal assistant's job responsibilities and work conditions and annually reviews each personal assistant's performance. Finally, the State controls all of the economic aspects of employment: it sets salaries and work hours, pays for training, and pays all wages—twice a month, directly to the personal assistant after withholding federal and state taxes. In light of this extensive control, we have no difficulty concluding that the State employs personal assistants.

Id. at 698 (citations omitted). The court then held that if one joint employer is a governmental entity, compelled support for the union was appropriate under the United States Supreme Court's decision in *Abood v Detroit Board of Education*, 431 US 209 (1977). *Harris*, 656 F3d at 698.

The Seventh Circuit clarified that the employment relationship with the State was key:

> We once again stress the narrowness of our decision today. We hold that personal assistants in the Illinois home-care Medicaid waiver program are State employees solely for purposes of applying *Abood*. We thus have no reason to consider whether the State's interests in labor relations justify mandatory fees outside the employment context. We do not consider whether *Abood* would still control if the personal assistants were properly labeled independent contractors rather than employees. And we certainly do not consider whether and how a state might force union representation for other health care providers who are not state employees, as the plaintiffs fear. We hold simply that the State may compel the personal assistants, as employees—not contractors, health care providers, or citizens—to financially support a single representative's exclusive collective bargaining representation.

Id. at 699. Essentially, the Seventh Circuit contradicted the 1985 Illinois state labor board's finding and held that the Illinois equivalent of Michigan's DCH and/or DHS was an employer. As noted above, the United States Supreme Court has granted certiorari and heard oral argument on *Harris* and a decision is expected before the end of June.

Here, however, even if the Seventh Circuit's reasoning were sound, the court's holding would not change the Appellants' claims. If Appellants were arguendo employees of the DCH of DHS, they would be regulated not by MERC, but rather by the Civil Service Commission. Const 1963, art 11, § 5. Thus, MERC's 2005 certification would still be improper.

The Michigan Supreme Court has held that for purposes of a worker's compensation an individual who did work similar to home help workers was a public employee of what is now DHS. *Walker v Dep't of Social Services*, 428 Mich 389 (1987). There is one key factual distinction between the employee in *Walker* and home help workers. In *Walker*, the Michigan Supreme Court noted that the worker had been hired by DHS's predecessor. *Id*. at 394. With home help workers, the care recipient is the one who does the hiring. This distinction has prevented home help workers from receiving workers' compensation when they are injured while performing services for the care recipient. See *Grossman v Michigan Dep't of Community Health*, WCAC Case No 05-0251, which discussed *Walker* and found that a home help worker was not employee of the State. Just as with *Harris*, even if there were a controlling opinion holding that home help workers were employees of a State agency that would merely give the Michigan Civil Service Commission jurisdiction, it would not provide subject matter jurisdiction to MERC.

2. Analysis of public-employee status in periods (1) and (2) — i.e., from the passage of PERA to the passage of 2012 PA 45

In 2005, when MERC improperly authorized the certification election for home help providers, the statutory language and the body of case law concerning public employees under PERA were clear. Both show that home help workers were not employees of the MQCCC or any other public employer, such as DCH or DHS. If they were public employees, they would have been employees of the DCH or DHS, not the MQCCC.

Under the statutory language of MCL 423.201(1)(e)(i) as it existed in periods (1) and (2), only those with long-term continual employment with a public employer were to be considered public employees. Home help providers did not meet that criterion. Assuming there was a contractual relationship between a public employer and the provider, it was at best, an indirect

relationship between a state agency and the provider through the consumer. Home help providers did not contract with the state or MQCCC to make their services available. Payment for services to benefit a third party did not represent a long-term relationship under PERA.

It was also telling that the Legislature's 1996 revision of the MCL 423.201(1)(e) was an attempt to reduce the pool of workers who could be organized into public employee unions. The Legislature was attempting to foreclose avenues to public employment, not open up novel ones.

A review of the four-factor test likewise shows that no public employment relationship was involved here. Under the test, a potential public employer is evaluated on these criteria:

> (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.

Applying this test, it was not the MQCCC that engaged a particular provider; rather, it was (and still is) the HHP consumers, a point that was explicitly acknowledged by the "collective bargaining agreement" between the MQCCC and the SEIU. Ex. 16 at 2. It was not the MQCCC that paid the home help providers; rather, it was the HHP consumers with the DCH's administrative assistance, as discussed in the DCH 2011 tax treatment letter. Ex. 26. It was not the MQCCC that has the power of dismissal over the provider; rather, it was the HHP consumers, as affirmed in the "collective bargaining agreement" and conveyed on the MQCCC website. Ex. 28 at 1. It was not the MQCCC that controls the hours that care will be provided to consumers; rather, it was the consumer, the provider, and the DHS, as noted in the "Medicaid and Long Term Care" ombudsman's document. Ex. 5 at 9. It was not the MQCCC that exercised control over the providers' work conduct; rather, it was the consumers, as explicitly stated in the collective bargaining agreement. Ex. 16 at 2. Hence, the MQCCC in no way qualified as a public employer of home help providers under the four-factor test, and there was nothing to substantiate

the claim that home help providers were public employees of the MQCCC.

It is true that, as with the medical interns in *Regents of University of Michigan*, home help providers do have a portion of their compensation withheld for "the purposes of federal income tax, state income tax, and social security coverage." Before 2010, the tax treatment of home help providers was less clear, but as of that tax year, they all received W-2s. Ex. 26. But the W-2s listed the consumer, not the MQCCC (or the DCH), as the employer. The DCH, not the MQCCC, was the entity running paycheck withdrawals for those home help providers who have taxes withheld. Also, unlike *Regents of University of Michigan*, no governmental unit charges or collects fees for the providers' services.

Once again, there was nothing to substantiate the claim that home help providers were public employees of the putative public employer MQCCC. The certification of home help employees occurred in 2005, which was in period (2), the time between the 1996 PERA amendment and the passage of 2012 PA 45. The statute and the case law as they existed at that time clearly indicate that home help providers were not public employees of the MQCCC.

Nor can home help providers be considered public employees of the MQCCC under the joint-employer doctrine. This doctrine is meant to determine whether two employers should be combined into a single management entity for bargaining purposes. *St Clair Prosecutor*, 425 Mich at 224 n. 2 (citing *Pulitzer Publishing Co v NLRB*, 618 F2d 1275, 1279 (8th Cir 1980)). In order to establish the existence of a joint-employer relationship, the same four-factor analysis must be applied to each of the putative joint employers. As already shown, the MQCCC did not possess a single element of a potential employment relationship with home help providers and therefore cannot be part of a joint-employer entity.

Nor, for the same reason, would the coemployer doctrine apply. There is no indication

that the MQCCC meets any of the criteria from the four-factor test. Therefore, the MQCCC cannot qualify as one of a group of coemployers.

Only the HHP consumer is undisputedly an employer. Assuming arguendo that a joint-employer or coemployer arrangement existed, the arrangement would not have involved the MQCCC. Instead, it would have involved the consumer and either the DHS, with its joint role in helping establish hours of care, or the DCH, with its role in issuing checks. The MQCCC, in contrast, did not rise even to these minimum potential qualifications.[12]

3. The 20-factor IRS test and Period (3) — i.e., from the passage of 2012 PA 45 to the passage of 2012 PA 76.

Not surprisingly, given how recently 2012 PA 45 was passed, there is no Michigan case law on the application of the 20-factor IRS test. The United States Supreme Court discussed the proper statutory interpretation method used to analyze a statute which uses the term "employee" where the "statute containing the term does not helpfully define it." *Nationwide Mutual Ins Co v Darden*, 503 US 318, 322 (1992). The Supreme Court rejected the idea that where "employee" is not clearly defined, the courts should look at a statute's broad "remedial purposes." *Id*. at 326-27. Instead, courts are to apply the common-law test for identifying an "employee," and the Supreme Court cited the IRS 20-part test as a helpful tool. *Id*. at 324.

The 20-factor test is most often used to determine whether a particular individual is either an independent contractor or an employee. Each factor is meant to weigh more toward one or the other, and the 20 factors are considered as a whole. The more control a potential employer has over a worker, the more grounds for finding employment, rather than a contract relationship.

[12] In the Court of Appeals' first *Louisiana Homes* ruling, the court held that licensing requirements and grant money alone are not sufficient to create an employment relationship. *Louisiana Homes*, 192 Mich App at 193. In the instant matter, the MQCCC did not reach even that threshold: It acts neither as a licensor nor as a payroll administrator.

Appellants will next address the 20 factors in the order the IRS presents them.[13] As will become obvious, the test, which is constructed primarily to discriminate between employers and contractors, lists some factors that do not apply to the MQCCC at all, either as a potential employer or as a potential contractor.

a. Instructions

The MQCCC had no say over when, where, or how a home provider was to perform services for a consumer. This factor does not suggest an employer-employee relationship between the MQCCC and home help providers.

b. Training

The MQCCC merely offered voluntary training opportunities; there was no training requirement. Again, this does not suggest an employment relationship between the MQCCC and home help providers.

c. Integration

This factor considers whether the worker's services are integrated into the business' operation. This factor was really not applicable in the instant matter, since the MQCCC did not offer services for sale and thus had no traditional business operation. To the extent that a public service is involved, it was provided by the DHS and the DCH not the MQCCC.

d. Services rendered personally

Under this test, the MQCCC would have more of an employer relationship with home help providers if it had been equally involved in *how* the providers provided service as it was in *whether* the provider provided the service. The MQCCC, to the extent that it had any relationship with the providers at all, was primarily interested in designating and enumerating them for collective bargaining purposes. It did not attempt to enforce methods of service delivery and had

[13] These are attached as Exhibit 32.

no power to do so. This factor does not suggest an employment relationship.

e. Hiring, supervising, and paying assistants

A worker's hiring of assistants is one indicator of independent contractor status. Individual home help providers, by definition, do not hire home help assistants. By the same token, the MQCCC did not hire home help assistants either, and thus the MQCCC did not exhibit the behavior of an employer with regard to home help providers. To the extent hiring occurs, it occurs between the HHP consumers and the home help providers.

f. Continuing relationship

A continuing relationship between the worker and a putative employer tends to show employment. Here, the provider has a continuing and very personal relationship with the consumer, providing such services as feeding, toileting, bathing, grooming and dressing in the HHP's consumer's home. The home help provider had no such relationship with the MQCCC.

g. Set hours of work

The hours of care are set after a doctor identifies a need; the DHS means-tests the consumer; and the DHS determines which tasks the consumer needs to have performed and how many hours are required to perform them. The MQCCC had no role in this process.

h. Full time required

An employer is usually in a position to claim full-time work from an individual and effectively to preclude that person from working elsewhere. The MQCCC had no such relationship with a home help provider. (To some extent, in contrast, the HHP consumer does.)

i. Doing work on the employer's premises

The home help provider works in the consumer's home, and did not work at the MQCCC. Thus, this does not suggest the MQCCC was the home help provider's employer.

j. Order or sequence set

The MQCCC had no role in determining the order in which providers supply their services to consumers. Nor did the MQCCC have the ability to influence that order. Again, this factor does not suggest the MQCCC had an employment relationship with home help providers.

k. Oral or written reports

Providers did not give any oral or written reports to the MQCCC, again suggesting the lack of an employee-employer relationship.

l. Payment by hour, week, month

Providers are paid monthly, which generally points to an employer-employee relationship. But the providers were not paid by the MQCCC; rather, the DCH issues a check from the State of Michigan to the provider and consumer. The MQCCC did not issue any payment, and it did not have a budget sufficient to compensate providers. To the extent that the method of payment shows an employment relationship between anyone other than the provider and consumer, it would be between the provider and the DCH.

m. Payment of business and/or traveling expenses

The MQCCC did not pay either business or traveling expenses for home help providers, again failing to suggest an employment relationship.

n. Furnishing of tools and materials

The MQCCC did not furnish any tools or materials to home help providers. Furnishing such tools or material would tend to suggest an employer-employee relationship.

o. Significant investment

This factor looks at whether the worker invests in facilities that he or she uses in performing services. Typically, a worker's lack of investment in facilities points to employment,

since it indicates the worker's dependence on the employer for maintaining the means of performing the work and receiving income.

This factor suggests an employee-employer relationship between a home help provider and the HHPs consumer, since the "facility" is the consumer's home. This factor does not suggest an employee-employer relationship between a home help provider and the MQCCC, since the MQCCC provided no home help facilities for providers.

p. Realization of profit or loss

Typically, a worker must have a risk of loss in order to be an independent contractor. Generally, this risk is realized through investments and expenses — for example, salaries for subordinate employees. Home help providers normally will not suffer a loss, but if this suggests an employment relationship, it suggests employment by the consumer, the DCH or both. It does not indicate employment by the MQCCC, which did not pay the home help provider.

q. Working for more than one firm at a time

An independent contractor is more likely to perform services for multiple clients. A minority of home help providers do provide services for more than one HHP consumer. The MQCCC was powerless to limit the number of consumers a home help provider works for.

r. Making service available to the general public

Offering services to the general public is more typical of an independent contractor. Most home help providers, however, work with a single consumer. Again, to the extent that this suggests an employment relationship, it is between the home help provider and the consumer, not between the home help provider and the MQCCC.

s. Right to discharge

By the express terms of the collective bargaining agreement, and by the repeated

statements of the DCH and the MQCCC, only the consumer has the right to discharge a provider. The MQCCC did not. This factor does not suggest an employer-employee relationship between the MQCCC and home help providers.

t. Right to terminate

A worker's ability to end the relationship without incurring liability generally indicates an employer-employee relationship. In the case of home help providers, providers can stop providing care without liability.

But again, the relationship in question is between the provider and the consumer, not between the provider and the MQCCC. This factor does not indicate an employee-employer relationship between home help providers and the MQCCC.

Now consider the 20 factors as a whole. Note that, in general, an application of the 20-factor test finds that a worker is either an independent contractor or an employee. In the instant case, however, as the analysis above indicates, home help providers have *neither* relationship with the MQCCC. Not only are they not employees of the MQCCC; they are not even independent contractors with the MQCCC.

The 20-factor analysis shows that home help providers and the MQCCC had no employer-employee relationship. The State of Michigan recognizes an employer-employee relationship, but this relationship is between the consumer and the provider - as indicated by the State's current role as the consumers' tax reporting agent and issuance of W-2s to all home help providers on behalf of HHP consumers. Indeed, no mention was made of the MQCCC on the 2011 DCH tax-explanation document mailed to the home help providers explaining tax withholdings. Ex. 26.

A finding that home help providers are employees of the consumers does not automatically foreclose a finding that there could be a coemployer or joint employer. *Vizcaino v*

United States Dist Court for the Western Dist of Washington, 173 F3d 713, 723-25 (9th Cir 1999). However, under the language added to PERA by 2012 PA 45, each potential employer must now be judged on the 20-factors, which definitively shows that the MQCCC is not an employer of home help providers.

III. The April 9, 2012 extension of the collective bargaining agreement was improper due to a conflict of interest.

A. Standard of review

MERC legal determinations are reviewed de novo. *Macomb Co v AFSCME Council 25*, 494 Mich 65, 77 (2012).

B. Argument

1. An exchange of significant sums of money between an employer and a collective bargaining agent during the conduct of negotiations voids any agreement made during that period.

The collective bargaining agreement extension signed on April 9, 2012, sought to continue the agreement from September 21, 2012, to February 28, 2013. As noted above, the MQCCC was not funded by the Legislature in fiscal 2011-2012. To cut costs, the MQCCC moved to its director's home. The council also accepted a $12,000 gift from the SEIU in January 2012. The issue presented is whether this gift caused an inherent conflict of interest.

It is proper to disqualify a party from the collective bargaining process when there is a "clear and present danger of a conflict of interest interfering with the bargaining process." *NLRB v North Shore Univ Hospital*, 724 F2d 269, 273 (1983). Further, "It is well settled that a union may not represent the employees of an employer if a conflict of interest exists on the part of the union such that good-faith collective bargaining between the union and the employer could be jeopardized." *Massachusetts Society for Prevention of Cruelty to Children v NLRB*, 297 F3d 41, 48-49 (1st Cir 2002). Typically, in these cases, it is the employer who alleges a conflict of

interest. The employer then faces a "considerable" burden to mount a conflict-of-interest disqualification against a bargaining agent. *Id*. at 49.

In *Local 1814, International Longshoreman's Association, AFL-CIO v NLRB*, 735 F2d 1384 (DC Cir 1984), an employer gave kickbacks to high-level union officials. Over three consecutive years, these kickbacks amounted to $15,000, $16,000, and $28,700, respectively. *Id*. at 1389. The NLRB noted, "[A]t or about the same time . . . contract modifications" were being negotiated, "concealed payments of large sums of money were changing hands." *Id*. The board held, "*We find that these concurrent actions operated to taint and undermine the bargaining relationship between [the parties] and the contract which was negotiated by them while the payments were being made." Id*. at 1392 (emphasis in DC Cir opinion). Due to the taint of the monetary exchange, the NLRB ordered an end to the union's certification and a termination of the collective bargaining agreement negotiated during that time. The union and the employer were further ordered to return all dues paid by employees under the collective bargaining agreement negotiated during this period. *Id*.

In the instant matter, the conflict is obvious. The MQCCC needed money to survive and do even minimal things like make a token payroll. In turn, SEIUHM needed the continued existence of the MQCCC, so that the union would have something to nominally "bargain" against in order to extend the contract and continue collecting dues money.

Thus each had an incentive to protect the other. This incentive could easily have prevented the best possible agreement from being negotiated for home help providers. The suddenness of the six-month extension of the previous terms is itself curious. It is not difficult to believe — and under conflict of interest doctrines, should be presumed — that the SEIU wanted to survive as a collective bargaining agent more than it wanted to pursue the providers' best

interests, even as the MQCCC was more interested in its survival than in engaging in effective collective bargaining.

The April 9, 2012 extension of the collective bargaining agreement should be voided as the product of a conflict of interest. The collection of so-called "union dues" and "agency fees" after September 20, 2012, would therefore be improper. Furthermore, no new collective bargaining agreements or extensions would have been valid due to the passage of 2012 PA 76. Clearly, even if home help providers qualified as public employees prior to the passage of that act, 2012 PA 76 would change their status on April 10, 2012, the act's effective date.

IV. MERC can order relief to home help providers other than Appellants

A. Standard of review

MERC legal determinations are reviewed de novo. *Macomb Co v AFSCME Council 25*, 494 Mich 65, 77 (2012).

B. Argument

Appellants have sought return of any dues or fees paid during the six months prior to their MERC filing and any dues or fees paid after that date. Further, they have sought that remedy for those similarly situated. Contrary to MERC's contention that no authority exists to allow class-like relief, MERC's own Rule, R. 423.157 states:

> Persons having such an interest in the subject of the action that their presence in the action is essential to permit the commission to render complete relief shall be made parties and aligned as charging parties or respondents in accordance with their respective interests. If the persons have not been made parties, then the commission or administrative law judge shall, on the motion of either party, order them to appear in the action, and may prescribe the time and order of pleading.

Id. Thus, on remand, MERC could order the return of dues and fees to all parties similarly situated to Appellants.

V. PERA's 6-month statute of limitations does not bar this action

A. Standard of review

MERC legal determinations are reviewed de novo. *Macomb Co v AFSCME Council 25*, 494 Mich 65, 77 (2012).

B. Argument

MERC indicated that any claim Appellants made to challenge the 2005 certification "would be untimely" since under "Section 16(a) of PERA, a charge must be brought within six months of the date the charging party knows or has reason to know of the unfair labor practice." April 11, 2013 Decision and Order on Summary Disposition at 7. MERC further noted that the "six-month statute of limitations is jurisdictional and cannot be waived." *Id*. Likening Appellants' claim to one of a continuing violation, MERC indicated that "to the extent that the charges relate to actions occurring at the time of or prior to, the 2005 election, the charges are untimely and must be dismissed on that basis." *Id.*

In *Michigan Properties, LLC v Meridian Township*, 491 Mich 518 (2012), the Michigan Supreme Court indicated that previous errors outside a limitations period could be challenged to the extent that they serve as a basis of a current harm. The Michigan Supreme Court noted that its holding prevented errors "from being set in stone." *Id*. at 536. Thus, Appellants are not prevented from challenging the 2005 certification; rather, they are limited to seeking six months of damages prior to their MERC filing (and any damages accumulating after that filing), which is exactly what they sought.[14]

[14] The fact that the 2005 certification is not "set in stone" makes MERC discussion of the results of the 2005 election and decertification process a non sequitur. Appellants' position is that the 2005 certification should be declared void *ab initio* since the home help providers were not public employees at that time. Assuming that is correct (neither Appellees nor MERC has deigned to counter this assumption), then it is legally as if the certification and election never

RELIEF REQUESTED

For the above reasons, this Court should declare the original certification of SEIUHM as the collective bargaining representative for home help providers void *ab initio*, order the return to Haynes and Glossop and those similarly situated of six months of so-called "union dues" and "agency fees" collected before this matter was filed and any "union dues" and "agency fees" collected after this matter was filed. Alternatively, it should remand this matter to MERC for a determination whether Appellants were ever public employees and, if not, the entry of proper relief.

Respectfully Submitted,

/s/Patrick J. Wright
Patrick J. Wright (P54052)
Attorney for Appellants
Patricia Haynes and Steven Glossop

Date: May 23, 2014

---

occurred. Thus, there is no bargaining unit to decertify.