STATE OF MICHIGAN
IN THE COURT OF CLAIMS

MARTIN, *et al*,

Plaintiffs,

v

MICHIGAN EMPLOYMENT RELATIONS COMMISSION, *et al*,

Defendants,

and

SEIU HEALTHCARE MICHIGAN.

Intervening Defendants.

Case No. 25-000124-MM

Hon. Brock A. Swartzle

Plaintiffs' 9/5/25 Brief in Reply to Defendants' 8/22/25 Response Brief

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PLAINTIFFS' 9/5/25 BRIEF IN REPLY TO DEFENDANTS' 8/22/25 RESPONSE BRIEF

The Legislature cannot take away the Civil Service Commission's jurisdiction over state employees such as Plaintiffs.

In Defendants' Response, they essentially confirm and make Plaintiffs' argument for them when they state, "In the plainest of text, the Legislature has not created new state employees subject to MCSC's authority." (Def Br at 1.) Or, slightly reworded, the Legislature has created new state employees who are not subject to the Civil Service's authority. The Legislature cannot do this.

The Constitution does not define the civil service. It merely says that: "the classified civil service shall consist of all positions in the state service…" and then lists a number of exceptions—none of which have been claimed to apply here. Const 1963, art 11, § 5. The dictionary definition of civil service is: "Those branches of public service that are not legislative, judicial, or military and in which employment is usually based on competitive examination. The entire body of persons employed by the civil branches of a government."[1] It was no different in 1963 when the Constitution was ratified: "All branches of the public service which are not military, naval, legislative, or judicial."[2] This is plain enough, but assuming, arguendo, that it is a legal term of art, Black's Law Dictionary abridged 9th ed p 224, defines civil service as "1. The administrative branches of a government. 2. The group of people employed by these branches."

Here, the relevant Acts make Plaintiffs, and others, employees of the Department of Health and Human Services—a state agency. As they do not fit into one of the Constitution's exceptions, such as boards and commissions or employees of a state university, their position is part of the civil (i.e., nonmilitary[3]) state service.

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[1] The American Heritage Dictionary of the English Language, 5th Edition, accessible here: https://www.wordnik.com/words/civil%20service

[2] Webster's New Collegiate Dictionary, 1961 by G & C Merriam Co, p 151.

[3] The plain language use of "civil" excludes the military, but this is also the holding of our courts. "Persons in the armed forces of the state are excepted because they are not part of the *civil* service."

As employees of the civil service, the Michigan Employment Relations Commission (MERC) has no authority over them and no ability to hold a representation election. This has already been determined by our courts. *Welfare Employees Union v Michigan Civil Service Commission*, 28 Mich App 343 (1970). In *Welfare Employees*, members of the civil service sought to collectively bargain under the Public Employee Relations Act (PERA) under the aegis of MERC. The lower court held: "[Part] A. Michigan's public employment relations act of 1965 is not applicable to state employees in the classified service of the state under the jurisdiction of the Michigan civil service commission for any of the legal processes, provisions, and administrative remedies which that act provides to all other public employees." *Id* at 347. The Court of Appeals explicitly affirmed this: "Part A of the declaratory judgment states that the public employees' relation act is not applicable to state employees in the state classified civil service. We agree." *Id* at 351. The *Welfare Employees* court continued:

> The Michigan constitution of 1963 clearly gives the civil service commission supreme power over its employees. In fact, the legislature is constitutionally precluded from enacting laws providing for the resolution of disputes concerning public employees in the classified service. Const 1963, art 4, s 48. The constitutional supremacy of the Michigan civil service commission with respect to state employees in the classified civil service has been consistently recognized by the Michigan Supreme Court.
> ****
> The employees represented by the plaintiff union are members of the state classified service and thus do not fall within the provisions of the public employees' relation act.

Id at 351-52 (internal footnotes omitted).

Despite the clear mandate that only the Civil Service has jurisdiction over state employees and that MERC cannot act regarding labor matters of these state employees, Defendants argue that

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Civil Service Commission v Department of Labor, 424 Mich 571, 616 (1986) (emphasis in original).

the Legislature can supersede the Constitution and can create state employees that are exempt from the Civil Service's control and authority. They cite court opinions to that claimed effect, but these do not apply here and do not stand for what Defendants state.

One opinion cited for the proposition that all those in service of the state are not subject to the civil service is *Michigan State Employees Association v Civil Service Commission*, 141 Mich App 288 (1985). This opinion involves independent contractors who perform work for the state. While, on the surface, that may seem to be analogous to the situation here, the text of the holding makes it plain that it does not apply. In *Michigan State Employees Association*, the issue was whether the Civil Service Commission could contract out to independent contractors to "take advantage of "substantial long-term savings to the state as compared with having the services performed by classified state employees…" *Id* at 291. But Defendants miss the crucial point—it was the Civil Service Commission using its authority to make that decision. Not the Legislature. "Accordingly, we hold that allowing [the ***Civil Service Commission***] to utilize independent contractors does not violate the Michigan Constitution." *Id* at 293 (emphasis added). Whereas the Civil Service Commission can make such determinations to cede or delegate some of its control, the Legislature generally cannot.

Michigan State Employees Association also has other holdings that work against Defendants' position. The court there found that such subcontracting did not go against the purposes of the Constitutional provision, namely that such subcontracting was not a bad faith attempt to work around the prohibition on reintroducing the spoils system. "Plaintiffs have not alleged that there was any bad faith or an attempt to reintroduce the 'spoils system' on the part of defendants." *Id* at 292-93. But that is exactly what is occurring here and Plaintiffs have alleged it. Further, even if the Civil Service Commission allows subcontracting, control of collective

bargaining rights remains with the Civil Service Commission, not MERC. "Plaintiffs argue that their due process rights are violated by the [Civil Service Commission's] amendment to the Employee Relations Policy which prohibits any collective bargaining agreements that limit independent contracting. This argument is meritless. There is no constitutional right to collective bargaining by civil service employees." *Id* at 293.

Defendants also cite an opinion wherein it was found that the Legislature could take employment positions that had been in the civil service and remove them. *Civil Service Commission v Department of Labor*, 424 Mich 571 (1986). But the crucial point in that opinion is that the Legislature can, under certain conditions, move these positions to one of the exceptions *that are already provided for in the Constitution*. The Legislature cannot create a new exception. In that matter, after much investigation, it was found that the state's workers' compensation process was not functioning well. There was a "five- to six-year backlog" of cases. *Id* at 582. As part of a plan to rectify the problem, the Legislature removed the civil service position of workers' compensation hearing officer and entrusted that function to a governor-appointed (and therefore politically-accountable) board and commission. This was challenged but was held to be permissible. The Constitution already provides that "members of boards and commissions" are exempt from the civil service. Con 1963, art 11, § 5. But this still did not mean that the Legislature could just transfer a position and name it a board or commission (or other exceptions) on a whim. The Court analyzed the matter to ensure that this was a legitimate transfer and did not violate the purpose of this constitutional provision.

The primary element analyzed by the majority and the dissent was whether this was a true board or commission when individual members could make determinations individually instead of acting as a whole. *Id* at 590-601, 634-655. That aspect isn't relevant here. But the Court also

evaluated whether the positions were the same before and after their removal from the civil service and found that they were not. The new positions were vested with more authority than they had under the Civil Service Commission and made decisions for the state. "The decision of a workers' compensation magistrate will, however, stand as the decision of the government, and will not be reviewable de novo." *Id* at 613. "The resultant increase in the power of civil servants who operate free of supervision may lead to legislation creating a board or commission to increase political accountability." *Id* at 615. "[I]t is clear that a real or true board or commission may be created to perform no function other than to adjudicate particular cases." *Id* at 616. "The constitution does not preclude the Legislature from requiring political accountability of persons who make quasi-judicial decisions involving fact find and law finding." *Id* at 618-19 (footnote omitted). "The members of the Board of Magistrates are appointed by, and accountable only to, the Governor." *Id* at 617. And lastly, and importantly for our matter, "There is nothing pretextual about the increase in power of workers' compensation hearing officers." *Id* at 620.

Here, Defendants have not alleged that Plaintiffs, as state employees of DHHS, fit into one of the constitutional exceptions. The Legislature cannot create new exceptions. But using the analysis of *Civil Service Commission*, supra, makes it clear that Plaintiffs' employment does not have great independence in acting on behalf of the state nor do they set policy for the state. They are not politically accountable to the governor, and the creation of this new class of public employees who are only state employees for the purpose of collective bargaining is a subterfuge and is for the prohibited purpose of a spoils system which rewards a politically-connected union and patron politicians.

Lastly, Defendants cite an unreported case with no precedential value. *AFSCME v Civil Service Commission*, per curium, Docket Nos. 170606, 170893 (1996 WL 33324117) attached as

Exhibit 9 here. This case does not help Defendants. First, again, that was a decision of the Civil Service Commission to delegate its authority—not the Legislature's. *Id* slip copy at 1. The court there found that hiring independent contractors was permissible "where there is no bad faith or attempt to reintroduce the spoils system. Moreover, the approval or disapproval of contractual personal services remains with the Civil Service Commission." *Id* slip copy at 2 (internal citations omitted). Here, it is the Legislature trying to delegate the Civil Service Commission's authority—which it cannot do. And the Civil Service Commission not only does not retain any control—it is specifically denied any. This attempt, "finely tuned" (Def Br at 8) or not, is not constitutional.

These Acts violate the First Amendment rights of association.

The right of free association in the labor context had been neglected by our federal courts until recently. But the United States Supreme Court has changed direction and, in decisions this Court is bound to follow in First Amendment interpretation, found that rights of association are co-equal with free speech rights, and that courts must apply a heightened form of scrutiny to impediments to free association—including on impediments to the right to refrain from association.

Defendants cite only one United States Supreme Court opinion, *Minnesota State Board for Community Colleges v Knight*, 465 US 271 (1984), in support of their position, and it is one that is not applicable and has since likely been fatally undermined—if not overturned by name—by *Janus v AFSCME*, 585 US 878 (2018). They also cite a 6th Circuit opinion, *Thompson v Marietta Education Association*, 972 F3d 809 (2020) which held that "To be sure, *Knight*'s reasoning conflicts with the reasoning in *Janus*. But the Supreme Court did not overrule *Knight* in *Janus*." *Id* at 814. This is a debatable position, and one that this court is not required to follow—although it might be persuaded by it:

> Although state courts are bound by the decisions of the United States Supreme Court construing federal law, *Chesapeake & O R Co v Martin*, 283 US 209, 220–221 (1931), there is no similar obligation with respect to decisions of the lower federal courts. *Winget v Grand Trunk W R Co*, 210 Mich 100, 117 (1920). See generally 21 CJS, Courts, § 159, pp 195–197; 20 Am Jur 2d, Courts, § 171, pp 454–455.

Abela v General Motors Corp, 469 Mich 603, 606 (2004) (cleaned up). The same non-binding is true of a Minnesota District Court opinion cited by Defendants, *Bierman v Dayton*, 227 FSupp 3d 1022 (2017).

The misapplication of *Knight* to these other cited opinions and to this matter is that *Knight* did not decide the right to refrain from association. Both speech and association have positive and negative rights—both the right to speech and the right to refrain from speaking, and the right to associate and the right to refrain from compulsory association. "We have held time and again that freedom of speech 'includes both the right to speak freely and the right to refrain from speaking at all.' The right to eschew association for expressive purposes is likewise protected." *Janus* at 2463. *Knight* only decided that the First Amendment did not give public employees a right to be heard on equal terms with the union representing their bargaining unit of which they chose not to be a member. Both majority and dissent acknowledged that there was a question about whether there was a right to refrain from association but did not decide it.

Justice O'Connor authored the majority opinion and framed the question and holding in this way: "The question presented in this case is whether this restriction on participation in the nonmandatory-subject exchange process violates the constitutional rights of professional employees within the bargaining unit who are not members of the exclusive representative and who may disagree with its views. We hold that it does not." *Id* at 273. The Court further explained the issue before it: "[Appellees] do not contend that certain government property has been closed to them for use in communicating with private individuals or public officials not acting as such

who might be willing to listen to them. Rather, they claim an entitlement to a government audience for their views." *Id* at 280. "Thus, appellees' principal claim is that they have a right to force officers of the state acting in an official policymaking capacity to listen to them in a particular formal setting." *Id* at 282. "This conclusion is erroneous. Appellees have no constitutional right to force the government to listen to their views." *Id* at 283. "Appellees thus have no constitutional right as members of the public to a government audience for their policy views." *Id* at 286.

This would be an extremely broad—and false—reading of the *Knight* opinion to say that this covers what Plaintiffs here are arguing. Or, for that matter, what the plaintiffs in *Bierman* or *Thompson* argued. Nevertheless, those opinions claimed to base their holdings on following *Knight*. *Knight* did touch on associational freedoms, but only to waive it away in a manner that has been superseded by *Knox v SEIU Local 1000*, 567 US 298, 309 (2012): "Freedom of association … plainly presupposes a freedom not to associate." The *Knight* court stated: "Similarly, appellees' associational freedom has not been impaired. Appellees are free to form whatever advocacy groups they like. They are not required to become members of [the union], and they do not challenge the monetary contribution they are required to make to support [the union's] representation activities." *Knight*, 465 US at 289. Deciding that there was no First Amendment violation, the majority concluded that it need only apply the rational basis test, rather than any heightened scrutiny. *Id* at 291.

Justice Brennan, dissenting, noted that the *Knight* majority failed to make the distinction between the right to be heard and the right to refrain from association:

> It is crucial at the outset to recognize that two related First Amendment interests are at stake here. On the one hand, those faculty members who are barred from participation in "meet and confer" sessions by virtue of their refusal to join MCCFA have a First Amendment right to express their views on important matters of academic governance to college administrators:

> At the same time, they enjoy a First Amendment right to be free from compelled associations with positions or views that they do not espouse. In my view, the real vice of the Minnesota Public Employment Labor Relations Act (PELRA) is that it impermissibly forces non-union faculty members to choose between these two rights.

Id at 296-97 (J. Brennan, dissent).

In sum, the *Knight* opinion did not base its holding on an evaluation of the right to refrain from associating with the union which speaks on behalf of employees in the unit. That question was not before the Court. And *Knight* relied on *Abood v Board of Education*, 431 US 209 (1977), which has since been explicitly overturned by *Janus*[4], for its holding. *Knight* does not apply here and its misapplication by the lower federal courts should not be persuasive.

A public-employee labor union is an expressive organization that takes positions on numerous public policy questions. *Janus*, 585 US at 910-914. "These are sensitive political topics, and they are undoubtedly matters of profound 'value and concern to the public.' We have often recognized that such speech 'occupies the highest rung of the hierarchy of First Amendment values' and merits 'special protection.'" *Id* at 914. Forced association with such an organization, even if one does not become a dues-paying member, is still forced association. Michigan courts have recognized that employees lose their agency when they are in a collective bargaining unit. Because of this the courts have created a quasi-fiduciary duty on the part of labor unions. See *Goolsby v Detroit*, 419 Mich 651 (1984): "[I]n many ways, the relationship between a union and its members is a fiduciary one…If the courts have stopped short of declaring the union and member relationship a fully fiduciary one, it is because the union, by its nature, has a divided loyalty." *Id* at 662-63. This duty to members of bargaining units exists, regardless of their union membership. "Under this doctrine, the exclusive agent's statutory authority to represent *all members of a*

[4] "*Abood* is therefore overruled." *Janus*, 585 US at 886.

designated unit includes…" *Id* at 661 (emphasis added). Lastly, "It is also not disputed that the State may require that a union serve as exclusive bargaining agent for its employees—itself a significant impingement on associational freedoms …" *Janus* at 916.

It cannot be maintained, as Defendants do, that "Collective bargaining with a union on terms and conditions of Plaintiffs' employment does not equate to forced association with a union." (Def Br at 11.) A labor union has a fiduciary or quasi-fiduciary duty to all members of a bargaining unit and a fiduciary relationship is definitely an association. Therefore, it cannot be claimed that freedom of association is not implicated. If an association exists and is unwillingly imposed by the state, then forced association must be evaluated under a heightened standard rather than mere rational basis. "Our later cases involving compelled speech *and association* have also employed exacting scrutiny, if not a more demanding standard." *Janus* at 925 (emphasis added).

Respectfully submitted,

September 5, 2025

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CERTIFICATE OF WORD COUNT

The undersigned hereby certifies that this reply brief contains 3,195 words (excluding this certification) as counted by MS Word, being less than the limit of 3,200 words for reply briefs found in MCR 7.212(G).

September 5, 2025

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EXHIBIT 9

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1996 WL 33324117
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES (AFSCME), AFL CIO, Plaintiff/Cross-Defendant Appellee,
v.
CIVIL SERVICE COMMISSION, Defendant,
and
DEPARTMENT OF MENTAL HEALTH. Defendant/Cross-Plaintiff Appellant,
and
OFFICE OF STATE EMPLOYER, Cross/Plaintiff-Appellant.
AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES (AFSCME), Plaintiff/Cross-Defendant Appellee,
v.
MICHIGAN CIVIL SERVICE COMMISSION Defendant-Appellant,
and
DEPARTMENT OF MENTAL HEALTH, Defendant/Cross-Plaintiff,
and
OFFICE OF STATE EMPLOYER, Cross-Plaintiff,

Nos. 170606, 170893.
|
July 5, 1996.

Before: BANDSTRA, P.J., and GRIBBS and C.O. GRATHWOHL,* JJ.

Opinion

PER CURIAM.

***1** This is a consolidated matter. In case no. 170606, defendant/cross-plaintiff Department of Mental Health, and cross-plaintiff, Office of State Employer (collectively referred to as DMH) appeal by right the circuit court order. The order vacated the decision of the Michigan Civil Service Commission (commission), refusing plaintiff/cross-defendant American Federation of State, County and Municipal Employees' (AFSCME) request to classify employees of CK Homes Inc (CK Homes), into the Civil Service Commission(Commission). In case no. 170893, defendant commission appeals the same order. We reverse.

The parties articulate several issues in this matter. However, the essential underlying questions are whether DMH and CK Homes are joint employers of the mental health employees at issue, and whether a finding of joint employment requires the Civil Service Commission to classify the employees in the state civil service.

In this case, the Commission approved the Employment Relations Board's decision that DMH was a joint employer with CK Homes, but found that such a designation did not necessarily mean that the employees should be classified in the civil service. After a detailed analysis of the appropriate standard, the Commission held that CK Homes employees did not hold positions in the state service, and that classification in the civil service was neither required nor permitted. Both parties appealed to the circuit court and the trial court disagreed with the standard and analysis employed by the Commission. The trial court concluded, in a lengthy opinion that the Commission's refusal to classify the positions was unauthorized by law and unsupported by competent, material and substantial evidence on the whole record.

This Court reviews decisions of the Civil Service Commission to determine whether they are authorized by law, and whether the decision is supported by competent, material and substantial evidence on the whole record. Const 1963, art 6, § 28; *Viculin v. Dep't of Civil Service,* 386 Mich. 375, 392; 192 NW2d 449 (1971). This Court accords due deference to administrative expertise and should not invade the province of exclusive administrative factfinding by displacing the agency's choice between two reasonable different views. *AFSCME v. Louisiana Homes, Inc,* 192 Mich.App 187, 189-190; 480 NW2d 280 (1991), vacated 441 Mich. 883 (1992), reinstated on remand 203 Mich.App 213; 511 NW2d 696 (1993). This Court may not substitute its judgment even if

it would have reached a different conclusion sitting as the agency. *Knowles v. Civil Service Comm,* 126 Mich.App 112, 117-118; 337 NW2d 247 (1983).

In this case, the circuit court rejected the Commission's finding that DMH is a joint employer of the CK Homes employees, and determined that DMH was the sole employer. The issue of whether DMH was a joint employer, along with a nonprofit residential home care provider, of direct-care employees has been addressed by this Court in *Louisiana Homes,* supra. *Louisiana Homes* was an appeal from a Michigan Employment Relations Commission finding that DMH was a joint employer and required to collectively bargain with the employees. A panel of this Court concluded that the finding of joint employment in *Louisiana Homes* was authorized and supported by competent, material and substantial evidence on the whole record. In analyzing the question of coemployer status, the Court noted that the "general characteristics of employers are: (1) they select and engage the employee, (2) they pay the wages, (3) they have the power of dismissal, and (4) they have power and control over the employee's conduct." Id at 190. In *Louisiana Homes,* this Court emphasized that DMH mandated the budget guidelines for the residential home, and established guidelines for personnel decisions and requirements, training requirements, minimum staff qualifications, and contract provisions. Id.

***2** In this case, the evidence of control by DMH is similar. Although CK Homes recruits and hires its own employees, DMH established the minimum qualifications and training requirements. Employee compensation is determined by consideration of DMH regulations governing expenditures for overall personnel costs at each residential home. Although CK Homes is able to discipline and dismiss employees, they must do so within the intent of DMH policy. Further, while CK Homes directs and supervises employees on a day-to-day basis, it is always with the intent of implementing DMH's policies and procedures. In light of the similarity between the circumstances in this case and the facts of *Louisiana Homes,* we must conclude that the Commission's finding of joint employment in this case was supported by competent, material and substantial evidence.

However, a finding of joint employment does not necessarily require classification in civil service. There is "no requirement that all who provide service for the state must be in a civil service position. *Michigan State Employees Ass'n v Civil Service Comm,* 141 Mich.App 288, 293; 367 NW2d 846 (1985). The Michigan Constitution does not prohibit the Civil Service Commission from using independent contractors where there will be substantial long-term savings, and where there is no bad faith or attempt to reintroduce the spoils system. Id. Moreover, the approval or disapproval of contractual personal services remains with the Civil Service Commission. *Detroit Automobile Inter-Ins Exchange v Comm'r of Ins,* 125 Mich.App 702, 711-712; 336 NW2d 860 (1983). The cases relied upon in this case by the trial court, which involve the state accident fund, and do not involve a joint employment situation, were inapposite. Further, in *Louisiana Homes,* supra, this Court recently affirmed the Commission's decision that similar group home employees were subject to collective bargaining rather than to classification as civil servants. In light of *Louisiana Homes,* we cannot say that the Commission's decision not to classify the employees of CK Homes was unreasonable. Because the Civil Service Commission has plenary authority over all aspects of civil service employment, and because not everyone who provides service for the state must be classified, the Commission's decision not to classify the CK Homes employees should not be second-guessed by the courts.

Reversed.

All Citations

Not Reported in N.W.2d, 1996 WL 33324117

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