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' 9/26/25 Response to Defendants' 9/12/25 Motion for Summary Disposition**

*Oral Argument Requested*

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## I. COUNTER STATEMENT OF FACTS

Plaintiffs concur with Defendants' Relevant Factual Background with the exception of its statement giving a reason that Governor Whitmer signed the Acts into law. No evidence is provided as to the Governor's intention and none is necessary—the explicit language of the Acts speak for itself and should guide the law. But to the extent that Defendants state that the Governor only sought to give collective bargaining rights to home care givers, Plaintiffs disagree because the Acts takes authority away from the Civil Service Commission and impermissibly allows the Legislature to create state employees beyond the control of the Commission.

## II. STANDARD OF REVIEW

Plaintiffs concur with Defendants' stated standard of review. But would add that, pursuant to MCR 2.116(I)(2): "If it appears to the court that the opposing party, rather than the moving party, is entitled to judgement, the court may render judgment in favor of the opposing party." "The trial court properly grants summary disposition to the opposing party under MCR 2.116(I)(2) if the court determines that the opposing party, rather than the moving party, is entitled to judgment as a matter of law." *Washburn v Michailoff*, 240 Mich App 669, 672 (2000).

## III. ARGUMENT

### A. Introduction.

These matters have already been thoroughly briefed[1] and the issues have been sharpened and focused. The key difference between the sides is that Plaintiffs recognize that our state Constitution places control of state employees almost entirely beyond the reach of the Legislature

[1] See Plaintiffs' 7/30/25 Brief in Support of Plaintiffs' Motion for Preliminary Injunction and Mandamus, Defendants' 8/22/25 Response to Plaintiffs' 7/30/25 Motion, Plaintiffs' 9/5/25 Brief in Reply to Defendants' 8/22/25 Response Brief, Intervening Defendant SEIU Healthcare Michigan's 9/5/25 Opposition to Plaintiffs' 7/30/25 Motion, and Plaintiffs' 9/12/25 Reply to Intervening Defendant's 9/5/25 Opposition.

and in the hands of the Civil Service Commission, while Defendants and Intervening Defendant maintain that the Legislature can create whole new classifications of state employees whose employment is limited or expanded at the will of the Legislature and can deprive the Michigan Civil Service Commission of its constitutional authority entirely.

Defendants and Intervening Defendant have cited no authority to support their position. What they have provided is caselaw that says that the Legislature can, in limited circumstances, alter positions that fall under the Michigan Civil Service Commission and transfer these positions to one of the constitutional exceptions specifically provided for in Const 1963, art 11, § 5. Additionally, they have shown that the Michigan Civil Service Commission can delegate its authority and use independent contractors who are not members of the classified civil service. None of these cases apply to what the Legislature has done here, nor does the reasoning of those cases support this attempt.

Plaintiffs have argued that forcing them to accept a union as their agent who speaks on their behalf over their objections violates their First Amendment right to be free from compelled association. Plaintiffs have acknowledged that no precedent binding on this court has held as such yet. But the precedent and logic of recent United States Supreme Court decisions, specifically *Knox v SEIU Local 1000*, 567 US 298, 309 (2012), *Harris v Quinn*, 573 US 616 (2014) and *Janus v AFSCME*, 585 US 878 (2018), compel such a result. The United States Supreme Court has not held to the contrary—indeed it has not ruled at all directly on the question. The binding precedent cited by Defendants and Intervening Defendant, *Minn State Bd of Comm Colleges v Knight*, 465 US 271 (1984), did not address this question and the question was not raised by the parties there. Instead, *Knight* dealt with the question of whether nonunion faculty members had a right to compel their employer to listen to them on employment matters—a distinctly different question.

### B. The Michigan Constitution explicitly takes determinations about state employment out of the hands of the Legislature and Governor.

The state first instituted a constitutionally required and defined civil service by amending the Constitution in 1940. Const 1908, art 6, § 22. Prior to that, there had been civil service statutes, but the Legislature exempted certain state employees from the requirements of that civil service and ignored qualifying tests and requirements, leading to the voters constitutionalizing the arrangement. "We must conclude that the civil service amendment was written into the fundamental law in part at least because of popular dissatisfaction with then existing conditions. It is a proper inference that the citizens of Michigan may have desired and intended to bring about a betterment in administration of State employment civil service." *Reed v Civ Serv Comm'n*, 301 Mich 137, 154 (1942). *Reed* would further describe the impetus for codifying the civil service in the Constitution rather than leaving it to the machinations of the Legislature and Governor:

> Under [1937 PA 346], 'heads of divisions' were exempt from its provisions. A controversy arose over giving employees a preferred exemption by creating many heads of divisions.
> …
> In 1939, the legislature, by [1939 PA 97], discarded the results of such qualifying tests, but increased the number of exempt positions. Filling of vacancies continued to be provided for from eligible register lists prepared under the same indefinite yardstick set up by the former act.

*Id* at 155.

The Constitutional Convention convened in 1961 and considered the history of previous attempts to undermine the civil service and drafted the current provision. Although the commentary of the convention delegates cannot contradict the plain language of the Constitution, it may shed some light if there are any ambiguities:

> Our primary goal in construing a constitutional provision is to give effect to the intent of the people of the state of Michigan who ratified the Constitution, by applying the rule of "common understanding." We locate the common understanding of constitutional text by determining the plain meaning of the text as

> it was understood at the time of ratification. Interpretation of a constitutional provision also takes account of "the circumstances leading to the adoption of the provision and the purpose sought to be accomplished." The Address to the People, which was distributed to Michigan citizens in advance of the ratification vote and which explained in everyday language what each provision of the proposed new Constitution was intended to accomplish, and, to a lesser degree, the constitutional convention debates are also relevant to understanding the ratifiers' intent.

*Mich Coal of State Employees v Mich*, 498 Mich 312, 323-24 (2015) (cleaned up and internal footnotes omitted).

The language of the Const 1963, art 11, § 5, is explicit and the "common understanding" should be clear: "The classified state civil service shall consist of ***all*** positions in the state service except those [specifically listed]." (Emphasis added.) But if we need to delve further, we will see that the drafters and the Address to the People recognized that all state employees were subject (unless explicitly exempted) and that the intention was to take the power to control state employees away from the Legislature.

John B. Martin chaired the Committee on Executive Branch at the Constitutional Convention and introduced "Committee Proposal 22"[2] which would become art 11, § 5. Chairman Martin addressed the Convention and stated the purpose of the proposal:

> [T]he citizens of the state, with leadership from various people, at least 2 of whom are in this convention as delegates, passed the civil service amendment, and since then we have had over 20 years of operation under the present amendment. It has not been without controversy. ***On something like 14 occasions the legislature has endeavored to in some way alter the situation by legislation of one kind or another. In general, the supreme court has upheld the position and responsibility of the commission***…

1 Official Record, Const Convention 1961, p 641, attached as Exhibit 13 (emphasis added). The exceptions—state employees who were exempt from the civil service—were debated at length. State university employees, certain positions in the Governor's office, board and commissions,

[2] 1 Official Record, Const Convention 1961, p 558, attached as Exhibit 12.

etc., were all subjects of debate to arrive at the language found in the current constitutional provision.[3] If the intention was to allow the Legislature to create more exceptions, as Defendants claim, there would have been no need to debate and create these exceptions and enshrine them in the Constitution, as occurred at the Constitutional Convention.

The Address to the People by the elected delegates similarly sheds light on the interpretation and how it was read by the people. The Address does not explain what the proposed constitutional provision meant where it said, "The classified state civil service shall consist of all positions in the state service except [those provided herein]." Presumably the elected delegates did not think the people needed an explanation of what "all" meant there. The delegates did inform the people that the intention was to strictly limit legislative control. "[Proposed art 11, §5] continues rigid limitations on political patronage, yet strengthens the role of the chief executive and administrator and ***provides for limited legislative control of wage increases under specified circumstances***." 2 Official Record, Const Convention 1961, p 3405 (emphasis added)[4].

> Increases in compensation can be authorized by the commission only at the start of the fiscal year and after prior notice to the governor so he can accommodate the increases in the budget he submits to the legislature. Power is given to the legislature, however, to waive such notice and permit increases at a time other than the beginning of the fiscal year.
> Power is also given to the legislature, within 60 days … to reject or reduce the rates recommended – but their action must be by two-thirds vote of the members elected to and serving in each house. In no case may the legislature reduce rates of compensation below those in effect at the time nor may the legislature change pay differentials established by the commission.

*Id*. The Address reiterates that the Legislature's power over these employees is very restricted and confined to reducing or rejecting pay rates by supermajority only.

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[3] 1 Official Record, Const Convention 1961, p 644-650, attached as Exhibit 14.

[4] 2 Official Record, Const Convention 1961, p 3405, attached as Exhibit 15

Yet Defendants would interpret this as giving the Legislature the authority to create its own exceptions to the Civil Service Commission covering "all positions in the state service." There is nothing in the Address which indicates to the people that the meaning was to give broad powers to the Legislature, and much to indicate that the Legislature's power was curtailed and only applicable in certain instances not present here. Further, the Address reiterates that it is the Civil Service Commission's prerogative to create or abolish positions: "Appointing authorities may create or abolish positions for reasons of administrative efficiency."[5] *Id*. The Legislature is not the appointing authority.

The Department of Health and Human Services (DHHS), a principal department of the state, is named as the ostensible employer here. "[I]ndividual home help caregivers are considered, by virtue of this section, public employees of the director of the department of health and human services or the director's representative." MCL 400.804(1). But recall that the Constitution dictates how many positions in a principal department can be exempt from the civil service: "[A]nd within each principal department, when requested by the department head, two other exempt positions, one of which shall be policy-making. The civil service commission may exempt three additional positions of a policy-making nature within each principal department." Const 1963, art

[5] By the Rules of the Civil Service Commission, the State Personnel Director is the "appointing authority." Civil Service Rule 1-4.2 (emphasis added):

> **1-4.2 State Personnel Director**
> (a) Appointment. The state personnel director is a member of the classified civil service selected by the commission after open competitive examination.
> (b) Authority. The administration of the powers of the civil service commission is vested in the state personnel director, who is responsible to the commission. ***The director is the appointing authority for the civil service commission***. The director exercises any constitutional or delegated powers independently of other executive branch entities, including any principal department in which the commission may be placed for organizational purposes.

11, § 5. Up to five employees may be exempt. The attempted bargaining unit here numbers 31,616 which is substantially more employees than the up-to-five employees of DHHS that are allowed to be exempt. The number of exemptions allowed the departments was carefully debated and arrived at by the Constitutional Convention delegates, 1 Official Record, Constitutional Convention 1961, p 644-650, supra. The Legislature cannot exceed that amount.

**C. The cases cited by Defendants do not support the position that the Legislature may create exceptions to the requirement that all positions in the state service fall under the Civil Service Commission.**

Defendants cite three opinions for the proposition that the Legislature can create categories of employment that are exempt from the state civil service. Only one of those cases actually involves an action of the Legislature, *Civil Service Comm'n v Dep't of Labor*, 424 Mich 571 (1986). There it was found that the Legislature could eliminate employment positions that had been in the civil service system. But the crucial point in that opinion is that the Legislature can, under certain conditions, move the duties of these positions to one of the state civil service exceptions *that are already provided for in the Constitution*. The Legislature cannot create a new exception. In that matter, after much investigation, the Legislature 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 eliminated the civil service position of workers' compensation hearing officer and entrusted that function to a newly-created 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. Const 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 any other exceptions) on a whim. The court there analyzed the matter to ensure that this was a legitimate transfer and did not violate the purpose of this constitutional provision.

The *Civil Service Comm'n* court 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 they 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 would-be state employees of DHHS, fit into one of the constitutional exceptions to the state civil service system. The Legislature cannot create new exceptions. But using the analysis of *Civil Serv Comm'n*, 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 state employees who are only state employees for the purpose of joining a union is a subterfuge.

Defendants cite two more cases for the proposition that not all serving the state are employees within the state civil service system. But these cases are instances of independent contracting—arguably a power of the Civil Service Commission—and these were actions taken by the Civil Service Commission, not the Legislature.

*Michigan State Emp Ass'n v Civil Service Comm'n*, 141 Mich App 288 (1985) is an opinion that involves independent contractors performing 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 Emp Ass'n*, 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 missed the crucial point—it was the Civil Service Commission using its authority to make that decision and not the Legislature. The Civil Service Commission has the constitutional power to create or abolish positions. "The appointing authorities may create or abolish positions for reasons of administrative efficiency without the approval of the commission. Positions shall not be created nor abolished except for reasons of administrative efficiency." Const 1963 art 5, §11. It follows from this that the Commission may hire independent contractors. "Accordingly, we hold that allowing [the ***Civil Service Commission***] to utilize independent contractors does not violate the Michigan Constitution." *Id* at 293 (emphasis added). While the Civil Service Commission can make such determinations to cede or delegate some of its control, the Legislature generally cannot.

The Civil Service Rules have been developed and show that independent contracting by the Civil Service Commission is allowed but is done at the discretion of the State Personnel Director. See Civil Service Rules Chapter 7 attached as Exhibit 16. Civil Service Rule 7-1.1

requires that "An appointing authority shall not make or authorize disbursements for personal services outside the classified service until the provisions of article 11, section 5, of the constitution and the civil service rules and regulations have been complied with in every particular." *Id*. Civil Service Rule 7-3 sets the standards for when services may be outsourced. *Id*. And Civil Service Rule 7-5 governs disbursement to independent contractors. *Id*. At all times in these rules the authority for independent contracting and payments to non-civil service employees lies with the "appointing authority," which is the state personnel director (Civil Service Rule 1-4.2, supra), not the Legislature.

*Mich State Emp Ass'n* also has other holdings that work against Defendants' position. The court there found that such independent contracting did not go against the purposes of the Constitutional provision, reasoning that, "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 as Plaintiffs have argued.[6] Further, even if the Civil Service Commission allows independent contracting, control of collective bargaining rights remained with the Civil Service Commission, not the Michigan Employment Relations Commission (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.

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

[6] See Plaintiffs' 7/30/25 Brief in Support of Preliminary injunction at pages 8-9, and Plaintiffs' 9/12/25 Reply to Intervening Defendant's 9/15/25 Opposition Brief at pages 4-6.

Exhibit 17. 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).

As these caregivers are employees of a state principal department, MERC has no authority over them and no ability to hold a representation election. This has already been determined by our courts. *Welfare Emp Union v Mich Civil Serv Comm'n*, 28 Mich App 343 (1970). In *Welfare Emp*, 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 the Legislature can supersede the Constitution and can create state employees who are exempt from the Civil Service's control and authority.

**D. Defendants fail to address the core issue regarding the First Amendment claim—the standard used when evaluating such claims.**

Defendants are correct when they state that the United States Supreme Court has not explicitly held what Plaintiffs are asking for in their First Amendment count. Further, Plaintiffs acknowledge that various federal district courts have held to the contrary. But Plaintiffs will show that, as a matter of law, this court is not bound by lower federal court decisions, and that the United States Supreme Court precedent does favor Plaintiffs' position, as it explicitly mandates that the government's actions here are subject to a higher level of scrutiny than mere rational basis. Defendants do not address the level of scrutiny that the courts must apply. The proper scrutiny is the threshold issue that this court must evaluate.

The right of free association in the labor context had been neglected by our federal courts until recently. *Minn State Bd for Comm Colleges v Knight*, 465 US 271 (1984), relied on by Defendants, found no reason to apply any higher standard than rational basis: "There being no other reason to invoke heightened scrutiny, the challenged state action 'need only rationally further a legitimate state purpose' to be valid." *Knight* at 291.

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 infringements on free association—including on impediments to the right to refrain from association.

Defendants cite only one United States Supreme Court opinion, *Knight*, supra, in support of their position, and it is one that is not applicable and has since likely been fatally undermined—although not overturned by name—by Janus, supra. They also cite a 6th Circuit opinion, *Thompson v Marietta Education Association*, 972 F3d 809 (2020) which held, "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. The holding of *Thompson* that *Janus* did not overrule *Knight* 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 Gen Motors Corp*, 469 Mich 603, 606 (2004) (cleaned up). The same non-binding status is true of a Minnesota District Court opinion cited by Defendants, *Bierman v Dayton*, 227 FSupp 3d 1022 (2017).[7]

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 refraining 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

[7] Intervening Defendant provided a list of similar non-binding lower federal court decisions. See Intervening Defendant's 9/5/25 Brief at page 15.

member. Both *Knight* majority and dissent acknowledged that there was a potential question about whether there was a right to refrain from association, but the ruling 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." *Knight* at 273. The Court further explained the issue before it: "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.

This would be an extremely broad—and false—reading of the *Knight* opinion to say that it 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*, supra. "Freedom of association … plainly presupposes a freedom not to associate." *Knox* at 309. 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* at 289. Deciding that there was no First Amendment issue, the majority concluded that it need only apply the rational basis test, rather than any heightened scrutiny. *Id* at 291. As we'll see, this application of rational basis is no longer good law.

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, dissenting) (internal footnote omitted).

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 Bd of Educ*, 431 US 209 (1977), which has since been explicitly overturned by *Janus*,[8] 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.'" *Id* at 914. Forced association with such an organization which speaks on one's behalf, even if one does not become a dues-paying member, is still forced association.

Michigan courts have recognized that public employees lose their own 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

[8] "*Abood* is therefore overruled." *Janus* at 886.

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 designated unit* includes…" *Id* at 661 (emphasis added). Lastly, "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 did, 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 an association. Therefore, it cannot be claimed that freedom of association is not implicated. If an association exists and is imposed by the state on unwilling participants, 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).

While true that neither *Janus* nor *Harris* explicitly addressed the question of forced association, it is irrelevant because that was not the question before the court in those cases. The parties did not plead the question nor brief it and therefore if the Court were to decide it, it would have been a violation of the party presentation principle:

> In our adversary system, in both civil and criminal cases, in the first instance and on appeal, we follow the principle of party presentation. That is, we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present. … But as a general rule, "[o]ur adversary system is designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief." [*Castro v United States* 540 US 375, 386 (2003)] (SCALIA, J., concurring in part and concurring in judgment). As cogently explained:

> "[Courts] do not, or should not, sally forth each day looking for wrongs to right. We wait for cases to come to us, and when they do we normally decide only questions presented by the parties. …"

*Greenlaw v United States*, 554 US 237, 243-44 (2008).

But what *Harris* and *Janus* did decide was that heightened scrutiny must be applied. At a minimum exacting scrutiny for First Amendment matters was required in *Harris* at 651, and *Janus* at 895. Under such heightened scrutiny, the government must have more than a rational basis for its action. Under *Knox* at 310 *Harris* at 648-49, and *Janus* at 896, the scrutiny for First Amendment issues is "exacting" scrutiny, if not the more stringent "strict" scrutiny. Under exacting scrutiny, infringements on First Amendment rights are only allowable where the action serves a "compelling state interest ... that cannot be achieved through means significantly less restrictive of associational freedoms." *Harris* at 648-649 (cleaned up).

Defendants here would have to show that their interest in obtaining home caregiver feedback is a compelling state interest and could not be met in a less restrictive way, because none of the other justifications usually used to justify such compelled association suffice, per *Harris*. In addition to providing the proper standard, *Harris* established the reasons why situations such as here with the home caregivers cannot withstand a heightened scrutiny. None of the justifications used to meet even the rational basis standard to endorse labor union impingements on First Amendment rights exist here. Caregivers are usually taking care of friends or family—they are not likely to strike against them or otherwise have an adversarial relationship. Strikes would be highly unlikely and therefore avoiding them cannot be a compelling state interest. *Harris* at 650. The caregivers do not work together in a common facility with similar concerns. Instead, they work in individuals' homes. *Id*. And in *Harris*, as here, "The union's very restricted role under

Illinois law is also significant. Since the union is largely limited to petitioning the State for greater pay and benefits, the specter of conflicting demands of personal assistants is lessened." *Id*.

Defendants' motion to dismiss should be denied as Plaintiff has clearly stated a claim under the law for a First Amendment violation. Forcing Plaintiffs to associate with a union, whether or not they pay dues, is forced association, and there is no government interest that can overcome a heightened scrutiny. Indeed, because of the unique situation involving homecare workers, it likely cannot survive even rational basis scrutiny.

**E. The MERC Commissioners are proper defendants.**

Admittedly, it is not always easy to determine which government defendants are the correct parties. For example, naming the Legislature as a defendant may be proper, but only where the state agency who executes the disputed policy agrees with a plaintiff—something that cannot likely be determined prior to filing suit: "The United States Supreme Court has 'long held that Congress is the proper party to defend the validity of a statute when an agency of government, as a defendant charged with enforcing the statute, agrees with plaintiffs that the statute is inapplicable or unconstitutional.'" *League of Women Voters of Mich v Sec of State*, 506 Mich 561, 628 (2020), citing *Immigr & Naturalization Serv v Chadha*, 462 US 919, 940 (1983).

Plaintiffs have properly pled that they "do not seek monetary damages and this court has jurisdiction to hear federal constitutional claims against state officials under 42 USC § 1983 for prospective relief but not monetary damages. See *Smith v Dept of Public Health*, 428 Mich 540, 585 (1987): "The [US] Supreme Court, therefore, found that the Eleventh Amendment did not preclude official-capacity suits for injunctive relief because such suits 'stripped' an official of his 'official or representative character,' thus exposing only the individual occupying the office

to liability." Cited in the Complaint, paragraph 5. Therefore, the state official Defendants as persons in their official capacity are proper parties because they are "persons" within the meaning of § 1983. This should be true regardless of whether they act individually or collectively on behalf of the state agency. By naming all three MERC Commissioners, Plaintiffs ensure that they can obtain the relief they seek.

LEO and Director Corbin are a more difficult matter. Defendants persuasively cite MCL 16.103(a) to the effect that "Any board, commission or other agency granted a type I transfer shall exercise its prescribed statutory powers, duties and functions of rule-making, licensing and registration including the prescription of rules, rates, regulations and standards, and adjudication independently of the head of the department." However, that same statute also states: "When any board, commission, or other agency is transferred to a principal department under a type I transfer, that board, commission or *agency shall be administered under the supervision of that principal department*." *Id* (emphasis added).

Plaintiffs' interests are in obtaining the relief they seek and casting a broad net is the best way to ensure they get full relief. One could easily imagine a different scenario where LEO (or the state, in our hypothetical) was not named, and defendants put forth a different defense that plaintiff's claims fail for not naming LEO (or the state) as the proper party as supervisor over MERC. But Plaintiffs concur with Defendants that the plain reading of MCL 16.103(a) and the caselaw interpretation of that statute favors the holding that relief can be had against MERC and its commissioners without LEO and its director: "Indeed, had the Legislature intended to confer discretionary power to the CIS director to divest the commissioner of adjudicative powers over contested cases, it would have expressly stated so in the statute." *Mich Mut Ins Co v Dep't of Consumer and Indus Serv*, 246 Mich App 227, 239 (2001).

## IV. SUMMARY AND RELIEF

For the reasons stated above, Defendants have not met their burden and not shown that they are entitled to relief as a matter of law. Therefore, their motion for summary disposition should be denied.

To the contrary, it is Plaintiffs who have shown that they are entitled to judgment as a matter of law, and this Court could grant them their relief requested in their Complaint pursuant to MCR 2.116(I)(2).

If this Court does not find that this matter can be disposed of at this stage in favor of Plaintiffs, then it should be because there are factual matters that must be developed—such as whether the subject Acts reinstitute a form of the spoils system, or whether and to what extent the factual details of this unique employment arrangement can overcome the higher First Amendment standard used when forcing Plaintiffs to associate with a labor union as their representative—do facts establish that the state lacks a sufficient interest in creating a bargaining unit such that it can overcome Plaintiffs' First Amendment right to be free of association with which they disagree.

Respectfully submitted,

September 26, 2025

By: /s/ Derk A. Wilcox
MACKINAC CENTER LEGAL FOUNDATION
*Attorneys for Plaintiffs*

# EXHIBIT 12

# EXHIBIT 12

# EXHIBIT 12

VICE PRESIDENT DOWNS: Referred to the committee of the whole and placed on general orders.

SECRETARY CHASE: Mr. Martin, for the committee on executive branch, introduces

**Committee Proposal 22,** A proposal pertaining to state civil service. Amends article VI, section 22;

with the recommendation that it pass.

John B. Martin, chairman.

*For Committee Proposal 22 and the reasons submitted in support thereof, see below, page 637.*

VICE PRESIDENT DOWNS: Referred to the committee of the whole and placed on general orders.

SECRETARY CHASE: Mr. Brake, for the committee on finance and taxation, introduces

**Committee Proposal 23,** A proposal to prohibit the issuance of evidences of state indebtedness, except as authorized by the constitution, to authorize state borrowing and prescribe the method therefor, to limit the use of state credit and to permit the loaning of state funds to school districts under certain conditions, and covering the general subject matter found in sections 11, 10, 12 and 28 of article X of the 1908 constitution;

with the recommendation that it pass.

D. Hale Brake, chairman.

*For Committee Proposal 23 and the reasons submitted in support thereof, see below, page 602.*

VICE PRESIDENT DOWNS: Referred to the committee of the whole and placed on general orders.

SECRETARY CHASE: Mr. Brake, for the committee on finance and taxation, introduces

**Exclusion Report 2007,** A report recommending the exclusion of article X, section 27.

D. Hale Brake, chairman.

*For Exclusion Report 2007 and the reasons submitted in support thereof, see below, page 707.*

VICE PRESIDENT DOWNS: Referred to the committee of the whole and placed on general orders.

SECRETARY CHASE: The committee on administration, by Mr. DeVries, chairman, submits the following report to the constitutional convention and recommends its adoption:

1. That the budget be amended by adding item **"0. Michigan constitutional convention handbooks — $2,086.60"**, that the **Contingency fund** of $23,897.68 be reduced by this amount leaving a balance of $21,811.08.

2. That the following transfers be made to the **Contingency fund** from:

| | | |
|---|---|---|
| **B.** | **Office supplies and printed matter** | |
| | 2. Journal (Speaker-Hines and Thomas) | $25,000 |
| **C.** | **Rental and lease of building** | |
| | 1. Civic center | 3,000 |
| **D.** | **Other contractual services** | |
| | 5. Convention reporter | 5,000 |
| | 6. Police | 2,000 |
| **F.** | **Telephone** | |
| | 2. Toll calls | 5,000 |
| **G.** | **Fees and compensation** | |
| | 1. Mileage and subpoena fees for persons called before convention committees | 4,000 |
| **I.** | **Travel and subsistence** | |
| | 2. Reimbursement for committee trips | 26,000 |
| **J.** | **Educational supplies and library** | |
| | 2. Additional materials | 800 |
| | Eisenhower fund balance | 256.75 |
| | **Total transfers** | **71.056.75** |
| | **Contingency fund balance** | **21,811.08** |
| | **Total** | **$92,867.83** |

3. That the following transfers be made from the **Contingency fund** to:

| | | |
|---|---|---|
| **A.** | **Rental, lease and purchase of equipment** | $19,000 |
| **B.** | **Office supplies and printed matter** | |
| | 3. Office supplies | 7,500 |
| **D.** | **Other contractual services** | |
| | 2. Sound system | 4,000 |
| | 3. Clipping service | 100 |
| | 4. Freight for chairs | 700 |
| **H.** | **Maintenance services** | 1,500 |
| | **Total transfers** | **32,800** |
| | **Contingency fund balance** | **$60,067.83** |

Walter DeVries, chairman.

VICE PRESIDENT DOWNS: Mr. DeVries.

MR. DeVRIES: Mr. President and fellow delegates, the committee on administration, not to be outdone by Governor Swainson and President Kennedy, has prepared for you its "state of the budget" message. We are happy to report to you in the second annual budget message that: one, we have a balanced budget. Our appropriations are within our revenues. We have $920,000 earmarked for operations. We have spent as of December 31, $447,211.00, for a balance of $472,789.00. Our economy is sound and we have projected our budget to May 15, as we did at the beginning of the convention.

What we are asking you to do today is to transfer some line items in our budget in order that we can bring the budget into balance. We have overexpended in some line items. Item 2 in the report on your desk is designed to accomplish that, to take some money from the contingency fund and place it into these various items, so that the budget will be balanced.

The second thing we are asking you to do is to transfer into the contingency fund excess moneys which resulted from economies effected by the convention and the committee on administration.

Mr. President, I move the adoption of this report.

VICE PRESIDENT DOWNS: The question is on concurring in the committee recommendation. All those in favor, signify by saying aye. Opposed, no.

The recommendation is concurred in and the budget changes adopted.

Mr. DeVries.

MR. DeVRIES: Mr. President, I would further move that the budget analysis which accompanies this, that is in Secretary Chase's hands, be considered read and printed in the journal for the benefit and the information of the delegates.

VICE PRESIDENT DOWNS: Without objection, it will be so ordered.

# EXHIBIT 13

# EXHIBIT 13

# EXHIBIT 13

of history, the matter was first brought up at our last constitutional convention and was rejected. Some 30 years later we established a civil service commission by statute that lasted one year and then the ripper bill tore out about half of the state civil service employees and reduced the appropriation from $250,000 to something like $75,000. A year later the citizens of the state, with leadership from various people, at least 2 of whom are in this convention as delegates, passed the civil service amendment, and since then we have had over 20 years of operation under the present amendment.

It has not been without controversy. On something like 14 occasions the legislature has endeavored to in some way alter the situation by legislation of one kind or another. In general, the supreme court has upheld the position and responsibility of the commission, including its right to a mandatory appropriation, and its power to fix rates of pay. At one time such pay raises were made without reference to whether appropriation bills had been acted upon or not, or rather without regard to what the state of the appropriations was at that time. This created a great deal of friction—battling between the legislature and the civil service commission.

In recent times there has been a different practice — since about 1956—and I want to give you just a word on this because it is not fully understood as to what that practice is today. The commission has a staff which makes continuing studies of the rates of pay in private enterprise and in public service both inside and outside the state of Michigan. Those studies go on at all times for the purpose of preparing material for the commission itself so they can judge as to whether the rates of pay in particular parts of the civil service in Michigan are comparable with the rates of pay for comparable work in both private enterprise and in public service outside the state of Michigan. The object of this — and this is important—is to attract and retain qualified personnel for state service and to maintain a stable work force with a minimum turnover. And for that reason it is the policy of the commission to maintain the compensation of state employees at a level which is comparable to and competitive with private enterprise, with the federal government and with the other states. The purpose, of course, is to prevent raiding and to prevent qualified employees from being drawn off into other service. The reason is that good employees are hard to get, and new employees are costly to train. The turnover before the civil service provisions were placed in the constitution, according to the study made by the civil service study commission which went into this matter rather carefully, was about 25 per cent each year.

I can't give you all of the testimony which we had before the committee on this matter, but it ran through some 40 witnesses of all kinds: government employees, members of the commission, former governors, former state administrative board members, present board members, members of employee organizations and experts on the subject of civil service from this state and from other states, but I can quote to you very briefly some figures from the report which was made in 1936 on this subject:

The turnover in the state service averaged 25 per cent a year, and this figure held for years when there was no party change, and even for years when there was no change in the governor.

Turnover was due to politics, to low pay, to lack of security or lack of opportunity for advancement, poor conditions of work, to absence of retirement plans.

Nepotism was rampant. One in 5 employees had relatives in the service.

Political activity took much of the employee's time. Contributions to the "flower fund" were a must no matter how meager the pay.

Only 56 per cent of the employees had reached the twelfth grade in school. Twenty-five per cent had not gone beyond the eighth grade.

In experience, 20 per cent had never worked anywhere before, and 53 per cent had less than 5 years' experience before entering the state service.

There was no pay plan. Each department was a law unto itself. With wide inequalities in pay for equal work, the person with the most political backing got the best pay.

We found great laxity in payroll procedures, few deductions for lost time, no supervision of sick leaves, vacations or hours of work. The employee was paid a straight salary, and the check kept coming until a dismissal order came through. Payroll padding was always a possibility.

And then just this additional. All this added up to a great financial loss to the taxpayer. Conservative estimates of the cost of breaking in new employees every year was half a million dollars. Today, with over 30,000 employees, the cost could run to perhaps $2 million.

Double salaries for the same job were paid for weeks and months at a time, as the outgoing employee was held over to train the new one. Other costs to the taxpayer resulting from the spoils system came from loose payroll practices, time lost in political activities, excessive salaries to political favorites and excessive numbers of jobs.

I only quote that little bit to indicate that we are dealing with a matter which today we don't fully realize was as serious as it was then.

Now, the practice today, then, is that after these studies are made by the commission, if adjustments are found to be necessary, the commission communicates whatever adjustments it thinks are required, either blanket raises or individual adjustments in individual departments, to the budget division, and it does this in November or December, as early as it can. The figures transmitted are then included in the budget, because they are there in plenty of time to be included in it, and they are submitted to the legislature not later than the date on which the budget is submitted by the governor. This enables the legislature to plan forward, because the proposed adjustments do not come into effect until the following July first. This gives the legislature some 4 to 6 months to do its planning. The result has been that friction has been largely eliminated, and that relations between the commission and the legislature are, by general agreement, vastly improved.

Now, this again is important, the legislature can do one of two things with this information. The legislature can approve the requested increase or it may hold the total available for personnel, either across the board or in particular departments, to the preceding level, or it may reduce that total, so that the result is that the individual agency has to absorb, if that is done, the increase in pay raises. It can do this either by not filling jobs which fall vacant, or it can do it by laying off employees. The alternative to that, of course, is to place the general control of pay rates in the hands of the legislature. But, as we will point out in connection with the minority report, we feel that the present method of control is a better one than turning the problem of pay rates over to the legislature.

The conclusions which the committee reached were these: after as thorough and searching a study as we could make—and in doing that, we listened to every possible complaint and criticism that we could find, and examined it as carefully as we could—we concluded, first, that no one on the committee, certainly, and we don't really believe anyone in this convention wanted to return to the spoils system as we had it in 1936. Second, we were impressed with the kind of system that we have, because we concluded from the testimony that the Michigan civil service system is outstanding in the United States and that it is one of the 2 or 3 best systems in the country. Third, we concluded that this is true because it has constitutional protection, not in general terms but in some detail. Fourth, that this system had vastly improved the quality of state service, and that it had reduced to a fraction the enormous amount of time formerly spent by department heads dealing with job hunters and their proponents. Fifth, that it has enabled the state to both get and keep good personnel, because state salaries are on a level with those in private enterprise and in other government activity; that a good civil service system is not cheap—we don't think this is an inexpensive operation—but that Michigan's system has not been extravagant, and in

# EXHIBIT 14

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CHAIRMAN DeVRIES: Mr. Hatch, it is the Chair's understanding that the committee has 2 amendments to offer to the body of the proposal, and I thought we were considering those.

Mr. Durst.

MR. DURST: I would prefer to take, as it appears in the committee comment or in the committee report, the first clause. Whatever amendments there are to that, let's consider that as a unit and then pass on to the next clause.

CHAIRMAN DeVRIES: Mr. Martin.

MR. MARTIN: Mr. Chairman, I wonder if you would let Mr. Durst review the committee amendments in the first paragraph, and then the committee could just simply indicate there their purpose, and then we can consider the committee amendments and any other amendments to that paragraph and proceed down in that way.

CHAIRMAN DeVRIES: The Chair understands that in Committee Proposal 22 we will consider it paragraph by paragraph, and at this time you want to consider the first paragraph of the proposal?

MR. MARTIN: Consider the first paragraph from line 5 to line 16, if Mr. Durst would review the explanation for those changes, and then we will consider the committee amendment, and then after that any other amendments which are offered to that paragraph.

CHAIRMAN DeVRIES: Mr. Allen.

MR. ALLEN: Mr. Martin may have answered the question I was going to raise. Delegate Durst referred to looking at the printed journal, but so far in our procedure whenever we have had an amendment come in and we have discussed anything, we have referred to the committee proposal itself as is given to us on the green sheets. I think we are going to get awfully confused if we start considering any amendments in terms of looking at the journal, Mr. Durst. We can read our comments in the journal, but when we are talking about the amendments, refer back to this.

MR. DURST: That is fine, Mr. Allen. All I would like to do is break it up in consideration as it is in the committee report of reasons, because if we get all changes at one time, we won't know what we are going to be talking about. It is broken down in major areas in the report.

CHAIRMAN DeVRIES: Mr. Durst, I think Mr. Allen's point is well taken. We should stick with the established procedure and use the committee proposal on green paper as the basis for our discussion.

MR. DURST: You want to do it paragraph by paragraph; is that it?

CHAIRMAN DeVRIES: We are discussing lines 5 through 16 of the first paragraph in the committee proposal.

MR. DURST: All right. The secretary will read the paragraph then.

SECRETARY CHASE: The first paragraph:

[Paragraph 1 of Committee Proposal 22 was read by the secretary. For text, see above, page 637.]

MR. DURST: We have had the committee amendment offered already, haven't we, Mr. Chairman?

SECRETARY CHASE: The committee amendment is as follows:

[The amendment was again read by the secretary. For text, see above, page 642.]

CHAIRMAN DeVRIES: Mr. Durst, speaking on the committee amendment.

MR. DURST: Mr. Chairman, the first change which has been made here is to add to the group of people who are exempt from being covered by civil service the chief executive officer of boards and commissions heading principal departments.

We should first of all realize that the committee is making a presumption here. We face the same problem the committee on finance and taxation had, that it is impossible to submit everything to the floor at one time. But we do have under consideration in our committee a proposal which would require executive reorganization, mandatorily require the reduction of the present 120 agencies of the state to a figure somewhere in the vicinity of 20, we will say. If this committee or the convention does not adopt that proposal and require executive reorganization, then it will be necessary to reconsider these proposals in light of what we do later, but this civil service amendment is drafted with the idea in mind that that executive reorganization will ultimately be put into the new constitution.

So what we have in mind here is where we have a board or commission which heads a principal department — if there are 20 departments or 30 departments, some of these may be made up of boards or commissions — that the chief executive officer would be a political appointee. He would not be able to be classified under civil service, and would be exempt as are the heads of departments. Now, we have limited it by the amendment to the boards or commissions heading principal departments. It was called to our attention that it is possible under this reorganization that you might have all types of little minor commissions under principal departments. It was not the intention of the committee to open up this whole field to exempting the officer from civil service, but it is our desire — and we recommend to you — that the chief executive officer of these boards and commissions be exempt.

Now, the second change on line 8 provides that the —

CHAIRMAN DeVRIES: Mr. Durst, would you like the committee to vote on your first amendment before we proceed to the second?

MR. DURST: All right.

CHAIRMAN DeVRIES: Mr. Ostrow.

MR. OSTROW: I would like to ask a question before you vote on it. And I want to preface it by saying I am for civil service. I helped Governor Murphy put it in and get it going in '37, and I have no quarrel with the benefits of civil service for the employees of the state. My question is, taking for example the University of Michigan, last year I think we paid $35 million in support of the University of Michigan. Why shouldn't the janitor at the University of Michigan — I am speaking of the nonteaching employees; we don't want to influence the teaching there — have the same job security and the same benefits of civil service as a janitor in the state capitol?

CHAIRMAN DeVRIES: Mr. Ostrow, are you addressing that question to the Chair, Mr. Durst, or Dr. Pollock?

MR. OSTROW: Anybody that wants to answer it. I have been trying to get the answer since 1937. (laughter)

MR. DURST: I don't know. Maybe Dr. Pollock can give a better answer, Mr. Ostrow, but I would say that as it presently stands, there is no school of higher education operated by the state of Michigan which has its employees under civil service. All of them do have, to my knowledge, separate merit systems of their own. Certainly the University of Michigan does and I am sure Michigan State does. None of these people from any of these institutions have made any request whatsoever to our committee to be included, and as far as we can determine, they are perfectly happy under the systems they have now.

MR. OSTROW: That may or may not be. I want to know why they are exempted.

MR. DURST: Dr. Hannah, do you want to make a comment?

MR. J. A. HANNAH: I would only say that when you are talking about nonteaching employees, a university has a great many employees that are technically trained. The only folks that we regard as teaching employees are those that come in the ranks of professors, associate professors, assistant professors or instructors. There are a great many technical employees that are research assistants, technicians of all kinds in the sciences and elsewhere, and it would certainly hamper us in our operations if we were required to have these people operate through the state civil service system.

The response that you have made with reference to the University of Michigan, Michigan State and Wayne — and I assume it is true at the other institutions — is we do have a classified service, and I think that our people feel that those in the classified service are at least as well off as they are under state civil service. They have many opportunities that those

under the state civil service system do not get. There has been no demand at all on the part of our employees for it. I am sure they are better off as they are taken care of now. They have all the protection and job security they would have under the state civil service commission.

MR. OSTROW: May I ask you, Dr. Hannah, how permanent is that security that they have? Do they have a right to it as they do under this constitution?

MR. J. A. HANNAH: Well, I think they have all of the rights. I know of no personnel policies that are more secure or deeply entrenched than those in universities, often to the embarrassment of the institutions themselves.

CHAIRMAN DeVRIES: Dr. Pollock.

MR. POLLOCK: Mr. Chairman, I can only add the historical reason when the amendment was originally drafted. We took, of course, the best advice and experience that existed in the country, and we were persuaded at that time that all institutions of higher learning should be exempted entirely from the operation of civil sevice. This has continued to be the policy throughout the country. And, as Mr. Durst has indicated, the experience under it has been entirely satisfactory. There has been no request from these institutions to include any of their employees under civil service.

MR. OSTROW: What would be the objection to including them?

MR. POLLOCK: I think it would be the question of running employees outside of Lansing from Lansing.

MR. OSTROW: Don't you have that with the state institutions all over the state of Michigan?

MR. POLLOCK: Yes, but again I have said educational institutions have always been considered to be in a different category, and the preservation of their independence is always considered to be a very great necessity.

MR. OSTROW: You mean a janitor has to be independent or a clerk has to be independent?

MR. POLLOCK: No, no, obviously not, but those employees are already taken care of and managed properly by their own systems in each one of these institutions.

CHAIRMAN DeVRIES: Gentlemen, may I suggest that you submit your remarks through the Chair. The question is on the amendment of the committee on executive branch and offered by Mr. Durst. Is there any further discussion on the amendment? If not, all those in favor will say aye. Those opposed, no.

The amendment is adopted. The secretary will read.

MR. DURST: He read the whole paragraph. Do you wish to proceed then, Mr. Chairman?

CHAIRMAN DeVRIES: Do you wish to discuss the paragraph further before we pass on that?

MR. DURST: I take it what you want to do is go to the next committee amendment. Is that right?

CHAIRMAN DeVRIES: It was your suggestion, Mr. Durst, or it was the Chair's ruling, that we take this paragraph by paragraph and approve each paragraph.

MR. DURST: Right. Well, we have no further amendments. Do you wish to have the rest of this paragraph explained at this time?

CHAIRMAN DeVRIES: I will ask if there are any further amendments to be made to the first paragraph of Committee Proposal 22.

MR. DURST: You don't want the changes explained?

CHAIRMAN DeVRIES: We just adopted the amendment you offered to the first paragraph, Mr. Durst.

MR. DURST: What about the rest of the substantive changes in the paragraph? Do you wish to adopt them without discussion?

CHAIRMAN DeVRIES: You want to explain the committee's position on the rest of the paragraph; is that correct?

Mr. Martin.

MR. MARTIN: Mr. Chairman, that is what I would like to have done, if Mr. Durst would go ahead and explain the position, the reasons for these later changes in the rest of the paragraph, then if there are other amendments to the paragraph, we will take them and act on them.

MR. DURST: Is that agreeable, Mr. Chairman?

CHAIRMAN DeVRIES: Yes, sir.

MR. DURST: We have already discussed Mr. Ostrow's question, the second change made there. We have eliminated state institutions recognized by the state constitution, so it will cover any state higher educational institution regardless of whether it is recognized in the constitution or not.

Now, we have made a change, changing "military and naval forces" to "armed forces." This is merely to accord with the language previously adopted by this committee in regard to this matter.

We have exempted 8 positions in the office of the governor. Now, no one seriously questioned, of those we came in contact with, the idea that the governor should have staff in his office which were of his own choice. In the past the constitution required, really, that these people be civil service personnel except for the 2 exempt positions. What they have done, apparently, since the adoption of civil service is make provisional appointments as the governor might suggest, and then they just never got around to giving the qualifying examination and giving the employee permanent civil service status. While we are not here to be critical of what has been done — it apparently was done with the concurrence of all parties — we do feel it is desirable to make the constitution accord with practice, and therefore we are putting a provision in specifically exempting positions in the governor's office.

Now, we picked the figure of 8 because this seems to accord with the practice of the last few years in the governor's office. This seems to be the number of personnel which he needs of this policy type. Now, he can have, of course, civil service personnel, if he wants typists and other personnel of that sort, above and beyond the exemption.

We did consider a provision which would read that all positions in the governor's office should be exempt, and this was rejected on the ground that it opens the field up, because it is possible to put all kinds of functions in the governor's office. This has happened — not to evade civil service — in New York under their reorganization. When they have a new agency, they put it in the governor's office, and the executive office of the governor became a very large establishment. And this could happen here, either inadvertently or specifically to escape the provisions of civil service. This is why the language is so specific. Now, the exemptions that you have there, as I say, must be considered in light of impending provisions requiring executive reorganization.

The first question we had is, should there be 2 exempt positions which cannot be classified? As I am sure most of you are aware, at the present time civil service has classified several employees who were in previously exempt positions, just as they have classified some chief executive officers of agencies. There have been requests from departments to classify more and more of these people, so that you have some departments operating today that have no employees exempt from civil service. Now, certainly, if you keep these positions exempt, you have the advantage of always having positions which are sensitive to policy changes, whether in the same administration or a change of administration. The weight against this is the argument that some agencies just do not need unclassified personnel. This was the argument made to us by Mr. Lock in regard to his department of revenue. Just briefly, he claimed that the department of revenue is purely an administrative agency. He went on to say that they had no policy making functions in his department. He said some proposals have been made to enlarge the number of unclassified positions in various state departments.

> Insofar as the department of revenue is concerned, I wish to voice my objections to these proposals. If you would take 5, 7 or 10 employees of the department of revenue occupying the key positions and authorize their appointments to be made on partisan considerations, it would completely wreck the morale of the department as it now exists.

He further said:

> It should likewise be pointed out that there is no place for political determinations in the revenue department

administering state taxes. There should never be a situation where a change in the administration of state government would result in the substitution of a hard policy or a soft policy in tax determinations or vice versa.

Now, this is one consideration. The other was that there are some departments whose deputies and top administrators are really technical personnel such as in the department of mental health where often the top deputy will be a very qualified psychiatrist. These people are difficult to obtain on a political basis in a nontenure job. So there is some argument on the other side that it should not always be mandatory that you have these 2 exempt positions at the top.

So what we have tried to do here is to give it flexibility, trying to preserve the idea of being able to change with policy changes but still be able to give job security to the top administrators if necessary, so that the way this system works is that all the personnel in the department, other than the department head, may be classified under civil service but the top administrator may, if he so desires, bring in 2 exempt positions whenever he should find it necessary. Now, we have required mandatorily that one of these positions be policy making. This, of course, is an attempt to keep this exempt position for important positions. We have left the other one open because we feel it is desirable that the administrator have the right, if he so desires, to have a confidential secretary. We realize this could be subject to some abuse, but it seemed under all the circumstances to be desirable.

Now, the last provision there of the exemption section is an attempt to give some flexibility. There was a great deal of testimony that to require, rigidly, 2 exemptions for each department does not meet the needs of the various departments of the state; that there are many departments which have a need for more exempt personnel, and some less.

So what we have done is allow for the appointment of 3 additional policy making positions on exempt basis and left the determination of when this should be established to the civil service commission. We could have given this power to the governor; we could give it to the legislature; we could give it to the department heads. Frankly, the present governor said he wasn't interested in having it, and by the same token the present civil service commission said they were not interested in having this power. But in the total decision of the committee, it seemed preferable that this power be given to this commission which is normally charged with the responsibilities in this area.

Now, how we arrived at the figure of 3. There has been some criticism here of people just arriving at a consensus view such as on the exemption section that the committee on legislative powers brought forth. There is no book you can turn to and say, "What shall this figure be?" We did have testimony from Commissioner Mackie that 5 or 6 exempt positions were all that he felt were necessary in his department. He has perhaps the department which is not necessarily the largest but the one that is mentioned most often as needing more exempt personnel. So this provision would give him 5, and it was felt to be sufficient under all circumstances.

CHAIRMAN DeVRIES: Mr. Wanger.

MR. WANGER: Mr. Chairman and members of the committee, I have a question of the committee about the first paragraph regarding the words "chief executive officer." First of all, I have looked at it and I have studied it and I have looked at the present language and I am a little bit confused as to what the words chief executive officer mean precisely. The committee report on page 313 of the journal talks about chief administrative officers. It goes through in that regard. It would seem that administrative is a little bit more clear, and I would like to have that clarified.

And then the second question I have in this regard is simply that if the intent and perhaps the meaning of this word executive officer is that of administrative officer, I would like to ask isn't that exactly the type of position that we want to keep classified? The professional administrator who from years of experience and work knows the workings of one of these departments so that he can be the professional key man; and the appointee, the head of the department, can be the policy or political key man in the running of these departments. That is the second question, and I yield for the answer.

CHAIRMAN DeVRIES: Mr. Durst.

MR. DURST: Mr. Wanger, I would say that this chief executive officer first of all applies only where you have a board or commission, and it is the feeling of the committee that where you have this situation, the chief executive officer really is the head of the department. While he doesn't have control of the department, I suppose, he still is making a great many policy decisions, and we felt he should be exempt and subject to being appointed by that board as it saw fit without being classified in civil service.

As to your suggestion that it read chief administrative officer rather than chief executive officer, the words, I think, to the committee mean the same, and if this whole committee feels the word administrative is better than executive we would have no objection.

CHAIRMAN DeVRIES: Mr. Wanger.

MR. WANGER: I was wondering if in some cases the chief administrative officer or executive, as one would call him, actually is the head of the department, actually does make policy decisions. If this is the case, is this any failure on his part, or is it not perhaps the fact that the man who was politically appointed as head of the department is inadequate?

MR. DURST: If I may, Mr. Chairman, it is not a man appointed head of the department; it is a commission. Now, some commissions are very strong. Some commissions are not so strong. But I submit that when you have a commission, that ultimately the chief administrative or executive officer, whatever you want to call him, will have a great deal of responsibility, and he should be exempt. This, at least, is the committee's recommendation.

CHAIRMAN DeVRIES: Mr. Hutchinson.

MR. HUTCHINSON: Mr. Chairman, following along on this same problem, I would like to raise this aspect of it. Mr. Durst's reference to Mr. Lock reminded me of a problem. I think that Mr. Lock is under civil service as commissioner of revenue. Mr. Maxey, as the chief executive or administrative officer of the social welfare department, is under civil service. Now, I think they are both there by legislative act. My question, which I think is an aspect of this same question Mr. Wanger raises, is, would it be within the power of the legislature to place under civil service the head of a department such as the department of revenue, or the chief executive officer of a principal department, such as I assume the department of social welfare would continue to be?

CHAIRMAN DeVRIES: Mr. Martin.

MR. MARTIN: Mr. Chairman, I think that under this provision it would not be in the hands of the legislature to make such determination. Mr. Lock and Mr. Maxey are there under different provisions. As I understand it, I think Mr. Lock is there under a legislative act, although the statute or the constitution says that the head of a department shall be exempt. I don't know what the legal status of the legislative act in that case would be, but I believe Mr. Maxey is there by direct classification by the civil service commission on request of the social welfare commission.

CHAIRMAN DeVRIES: Mr. Hutchinson.

MR. HUTCHINSON: Mr. Chairman, to respond to the answer, do you think that Mr. Maxey is there by decision of the social welfare commission?

MR. MARTIN: No, by request of the social welfare commission to the civil service commission.

MR. HUTCHINSON: My recollection of it was that he was there pursuant to legislative act just like Mr. Lock is, but assuming that that is the true situation, ought it not be within the power of the legislature at its own discretion, to place the heads of some departments under civil service? Certainly in both cases illustrated there is a wealth of good reasons why both of those officers should have the protection of civil service. It gives them a certain independence in fields which otherwise might be subjected to a great deal of, shall we just bluntly call it, pressure.

MR. MARTIN: It seems to me that they should either all be there or perhaps none of them should be there. The committee made a decision one way rather than the other. But if the legislature is empowered to place various jobs under civil service, I think you would find all kinds of pressures and perhaps jockeying to bring about the appointment of other chief executive officers of other boards and commissions to a civil service status.

CHAIRMAN DeVRIES: Delegate Durst, do you wish to speak to this point?

MR. DURST: Yes, I do, Mr. Chairman. I would like to say, Mr. Hutchinson, I disagree just a little bit with Mr. Martin, if I may. Mr. Lock is not under civil service. He is appointed by the civil service commission pursuant to a legislative act. Now, maybe it amounts to the same thing, but he is not covered by this constitutional provision. It has been an act of the legislature which says the civil service commission shall appoint him and they shall set his pay. I don't know whether they set his pay or not, but at least that is how he gets under civil service. He is not appointed by the governor. Mr. Maxey, of course, has been classified by the commission at the agency's request. Mr. Maxey's job, under this provision, if that is a principal department of the state government, would not be subject to being classified under civil service, but I still assume that it would be possible for the legislature to pass an act, as they have in Mr. Lock's case, to set up their own little civil service, if you will, in regard to a department head.

CHAIRMAN DeVRIES: Mr. Hutchinson.

MR. HUTCHINSON: Mr. Chairman, in response to that, may I say I would sincerely hope that it would be within the power of the legislature to do that in its wisdom, and this is an interesting twist. The presentation and the history and everything indicates that everybody would assume the legislature was very antagonistic to placing anybody under civil service, so that if the legislature finally was induced to do it, why, there certainly would be very clear and cogent reasons.

As a matter of fact, I wouldn't agree with the premise that the legislature is antagonistic to civil service, certainly not in these days. I won't go into that further because it isn't precisely on the point before us. But I wanted to put this in the record — and I hope somehow or other to clear it up — that this would not be construed as a limitation upon the legislature to increase the scope of civil service if it saw fit.

CHAIRMAN DeVRIES: Mr. Martin.

MR. MARTIN: Well, Mr. Chairman, I am not sure that we would object to that interpretation as long as it wasn't an interpretation put on the record giving the legislature authority to do away with any of these jobs. If it is a matter of adding to civil service personnel, I see no strong objection to it.

CHAIRMAN DeVRIES: Mr. Wanger.

MR. WANGER: Mr. Chairman, members of the committee, I am a little bit confused by Mr. Martin's reply to Mr. Hutchinson's question. If, say, the department of revenue, for example, or some other large department, was made one of the principal departments, would the legislature have any room to act in that field with regard to its chief executive or chief administrative officer if the proposal is adopted as you now propose it? I don't see where the legislature could act in that particular department.

CHAIRMAN DeVRIES: Mr. Martin.

MR. MARTIN: Well, Mr. Chairman, Mr. Wanger, that was Mr. Hutchinson's interpretation of it. I said I was willing to let that stand as his interpretation. If there is a question on that point, my own interpretation is that it does not permit legislative action to either enlarge or contract the civil service positions.

CHAIRMAN DeVRIES: Mr. Hodges.

MR. HODGES: If I am clear on what Mr. Hutchinson was referring to, I think I would take issue with it and support the committee, because I think it would be really opening the door if every time you had a change of administration, the legislature could then blanket under civil service these top positions and top department heads. I think this would be defeating the whole purpose of allowing some flexibility for policy making decisions at the top.

CHAIRMAN DeVRIES: Mr. Iverson.

MR. IVERSON: Mr. Chairman, I have 3 questions. I am not sure whether Mr. Martin or Mr. Durst wants to answer them. Wouldn't the language which the committee proposes to place in here "and the chief executive officer thereof" in effect take Mr. Maxey out from under civil service and make him a noncivil service employee?

CHAIRMAN DeVRIES: Mr. Martin.

MR. MARTIN: Mr. Chairman, Mr. Iverson, I think that this is correct. The committee did not make its decision on the question of whether one or another employee would be in or out. We tried to make a decision based upon the total picture, and we were influenced by the fact that in a number of cases boards and commissions had moved to bring their executive officers under civil service. The commission has classified them in certain cases. The result has then been that there were no exempt positions in the department, and that a new board or commission which might not want this particular executive officer had no power or authority to select anyone else. So we did not make our decision with regard to any particular person holding a particular job because we felt we have a broader problem than that.

MR. IVERSON: Mr. Chairman, my second question is, am I right in assuming that placing the word "state" before "educational institutions" and eliminating the language "recognized by the state constitution" would have the effect of removing from protection of the civil service all employees of all state colleges and universities, many of which now are covered by civil service?

MR. MARTIN: I will have to defer to Dr. Pollock on that one as to whether the other institutions of higher learning are in fact covered by state civil service.

CHAIRMAN DeVRIES: Mr. Martin yields to Dr. Pollock.

MR. POLLOCK: Mr. Chairman, I think that Mr. Nisbet could give the exact answer on that from his own experience.

CHAIRMAN DeVRIES: Dr. Pollock yields to Mr. Nisbet.

MR. NISBET: I will defer to Dr. Hannah. I think he knows the answer better than I do. (laughter)

CHAIRMAN DeVRIES: Mr. Nisbet yields to Dr. Hannah.

MR. J. A. HANNAH: This looks like we are handing a hot potato from one to another, but as a matter of fact, I do not know, except for the brief constitutional provision. Mr. Anspach, former president of one that isn't constitutional, could tell us exactly.

CHAIRMAN DeVRIES: Dr. Hannah yields to Dr. Anspach. (laughter)

MR. ANSPACH: This is getting into the game of animals. The youngster went to school and the teacher said — (laughter) — the teacher said, "What games do you play at home?" He said, "Dad and mother play a game of animals." The teacher said, "What is that?" "Well," he said, "he passes the buck to mother and he gets her goat." (laughter)

So this is passing the buck back and forth. The answer to it is: just before I came into this state in 1939, I believe it was, the institutions other than the 3 major universities were exempt from civil service. Now, how that was done and so forth I do not have the background to explain, but at the present time the educational institutions of the state are not under civil service. They were prior to '39. What happened in '39 I will have to defer, I think, to my colleague from Michigan State. I can't give the background.

But when I came to this state, the institutions of higher education in the state were exempt from civil service. Each institution, as far as I know, has its own code adopted by its board. For instance, President Nisbet was president of the board of education for a period of 18 years. Sixteen of those years we worked together. During that time the 4 colleges — universities now — under the control of the state board of education set up a complete system of classifications, salary schedule, method of appointment, method of dismissal, right of appeal. This was done in those days because we had some difficulty in the matter of defining positions; we were always referring back to the civil service. As a result, Mr. Reid, whom many of you know, who was quite active in the AFL at that

time, was one person I conferred with as well as others. He suggested that the colleges should draw up a code to more or less parallel civil service, which was adopted by the board. Mr. Nisbet was president of the board. And the colleges operate under that code now.

CHAIRMAN DeVRIES: Have the pedagogues satisfactorily answered your question, Mr. Iverson?

MR. IVERSON: I think so. I assume then that the committee is clarifying a situation which has gone on for a number of years.

CHAIRMAN DeVRIES: That is correct.

MR. IVERSON: Now, my third and last question, Mr. Chairman, is on the last amendment, which apparently adds 3 additional exempt positions to each department which I assume exempts them from civil service, the department head and 5 additional ones. Is this proposed in light of the fact that this convention is perhaps going to adopt a proposal which cuts the number of departments to, say, 20 or thereabouts, and if it does not cut it to 20, do you still propose to exempt 5 or 6 employees of 120 or 130 departments?

CHAIRMAN DeVRIES: Mr. Martin.

MR. MARTIN: Mr. Chairman, Mr. Iverson has stated the proposition correctly. It is based on the idea of a consolidation which has been approved in our committee and which will be submitted to the constitutional convention. We couldn't decide all the questions at once. If it develops that that proposal is not adopted, then the committee will subsequently offer an amendment to delete the 3 additional positions and leave it as it is now.

CHAIRMAN DeVRIES: Mr. King.

MR. KING: Mr. Chairman and fellow delegates, as a member of the committee on executive branch and as a member of the subcommittee which worked on this particular problem, the subcommittee concerning civil service, I would like to respond to the remarks by Senator Hutchinson by pointing out that it is my understanding as a member of this subcommittee that the first sentence on page 314 expresses the position of the committee, and that is, "This language will permanently prevent such classification and reserve these positions for political appointment without tenure." Now, with regard to Mr. Lock specifically, it is not my understanding that he has civil service status. He was selected by civil service, I believe, at the request of the legislature, but he does not have civil service status. I want to make it very clear that I don't want the legislature or anyone else to interfere with these 2 exempt positions along with the head of the department or the executive director of the board or commission. That is my position, and if Mr. Martin is in disagreement with that, I would like the record to so show.

CHAIRMAN DeVRIES: Mr. Martin.

MR. MARTIN: Mr. Chairman, I might add that by the phrasing now prepared by the committee, a board or commission could not request an executive officer be made nonexempt.

CHAIRMAN DeVRIES: Mr. Downs.

MR. DOWNS: Mr. Chairman and delegates, Mr. King made the comments I was going to make, so I will try to be extremely brief. I believe that in the committee report you will find that the sentence, before the one Mr. King read on page 313, says:

> Because of an ambiguity in the constitution, the civil service commission classified the chief administrative officers of 9 boards or commissions at the request of these boards or commissions.

And then the language that follows is that that Mr. King read to the committee. My construction of this is that the committee strengthened what I think was the original intent of the civil service amendment by the language that was added.

I think then we get into a very basic concept of government. We did the other day readopt the principle of separation of powers. That principle provides that the legislature adopt the laws and that the governor be the chief executive officer for their administration. And I submit that to hold the governor responsible for the sound administration of government, he should have the power to make these key appointments, and that the other operation of government is properly done through a career civil service. This language, which Mr. King read, seems to me to point out very clearly that the intent is that the position that is the chief executive or administrative head, or the chief administrative officer—or the chief executive officer—as spelled out in line 7, provides that the governor would have the responsibility for making that appointment, and that that power of the governor could not be taken away by the legislative branch. Thank you.

CHAIRMAN DeVRIES: Mr. Wanger.

MR. WANGER: I would like to ask a question, Mr. Chairman. Mr. Chairman and members of the committee, although we hear so much about the "ripper bill" of 1939 and consider the legislature in that regard, I think we all, upon reflection, fully realize that the temptation for spoils is not abolished, and furthermore that that temptation applies with full force to the executive branch, as it does to the legislative branch as a general rule. And I ask, suppose we get a situation where the admittedly political appointee, the chief administrative officer of the section, is not well qualified to carry out the task of actually running that particular department. That seems to be the premise on which it is based. What will that do to the morale of the people in the department who are trying to work their way up to the top, and what will it do to the efficiency of the administration of state government? This is a possibility. We don't know what is going to happen in the future, but we do know that this makes them political appointees, and if there are 20 departments which are headed by boards or commissions, whether salaried or nonsalaried, this will mean 20 political appointees which can be changed with every election, and these will be the men who will be actually controlling the real work and administration of these departments.

CHAIRMAN DeVRIES: Are you addressing your question to Mr. Martin, Delegate Wanger?

MR. WANGER: Mr. Martin or Mr. Durst.

CHAIRMAN DeVRIES: Mr. Martin.

MR. MARTIN: Mr. Wanger, these are important policy making men. In spite of the fact that they have a board or commission over them, we all realize that they do make policy, that they are very close to the top of the governmental operation, and that their policy is presumably expected to reflect the views of the administrative branch. At the present time you have this possibility for 120 of these boards and commissions, but that is precisely the idea: that at the very top where you have policy making positions, you do not apply the civil service requirement.

CHAIRMAN DeVRIES: Does this answer the gentleman's inquiry?

MR. WANGER: No. You mentioned policy making positions. Well, the report speaks entirely of administrative officers, administrative aspects of this. It is printed on page 313 of the journal. And my presumption was that it is possible in government to make some distinction, at least a rough one, between policy and administration, and that the people who would now be made political appointees would actually be the chief administrators of this particular department and would require in many cases great expertise in the field.

CHAIRMAN DeVRIES: Dr. Hannah.

MR. J. A. HANNAH: Mr. Chairman, I have noticed that for the past several days when we get into committee of the whole, we go on to extended debate for several hours and other matters that are of considerable importance. It has been my observation by watching the delegates that we get tired and possibly we don't give quite as good attention as we might just because we are tired. I raise the question with the Chair as to whether or not it is possible to get a 5 or a 10 minute recess. They tell me that is not within the rules, but it is appropriate to move that we rise for a period of 10 minutes, and that is what I am proposing now, sir, that we rise for a recess of 10 minutes, then to return to the business before us, and I would hope that this may become a custom. I think we will get much better work done and have much better attention.

CHAIRMAN DeVRIES: Delegate Hannah moves that the committee of the whole rise for a 10 minute recess. The Chair will rule that that motion is in order. All those in favor of a 10 minute recess will say aye. Those opposed, no.

We are recessed for 10 minutes, and we will reconvene at 4:00 o'clock.

MR. HUTCHINSON: Point of order, Mr. Chairman. You have to go back to the president of the convention. Only the convention can recess.

CHAIRMAN DeVRIES: Without objection the committee will rise. It is so ordered.

[Whereupon, the committee of the whole having risen, President Nisbet resumed the Chair.]

PRESIDENT NISBET: Let me have your attention for just a moment, please. This matter was proposed by Dr. Hannah a few days ago. We have a committee now working on a procedure to do the very thing that he is proposing. That committee will report, and we think it can be done in an orderly and a systematic way without having to return to the convention itself, so if you would bear with us, we will have a report on that by Monday night.

Mr. Hutchinson.

MR. HUTCHINSON: Mr. President, I move that the report of the committee of the whole be temporarily dispensed with, and that the convention stand in recess for 10 minutes.

PRESIDENT NISBET: The question is on the motion of Mr. Hutchinson. All in favor say aye. Opposed, no.

The motion prevails and we are recessed until 4.00 o'clock.

[Whereupon, at 3:50 o'clock p.m., the convention recessed; and, at 4:00 o'clock p.m., reconvened.]

The convention will please come to order.

I hope that we will have Dr. Hannah's suggestions smoothed out for you so it will be orderly next week, and I am sure it will.

Mr. DeVries.

MR. DeVRIES: Mr. President, I move that the convention now resolve itself into committee of the whole to consider items on the **general orders** calendar.

PRESIDENT NISBET: The question is on the motion of Mr. DeVries. Those in favor say aye. Those opposed, no.

The motion prevails.

[Whereupon, Mr. DeVries assumed the Chair to preside as chairman of the **committee of the whole.**]

CHAIRMAN DeVRIES: The committee will be in order. We are considering the first paragraph of **Committee Proposal 22.** The Chair will recognize Delegate Balcer from Detroit.

MR. BALCER: Mr. Chairman, this is a question for Mr. Martin. Under the present constitution, is there any provision made for war veterans or widows of war veterans?

CHAIRMAN DeVRIES: Mr. Martin.

MR. MARTIN: Mr. Chairman, there is no special provision for veterans or war veterans in the constitution now, in this section, or in the amendments, Mr. Balcer. The commission, I believe, has certain rules with regard to preferences on examinations but this is a matter of the commission rules and is not in the constitution.

MR. BALCER: It is not in the statute either?

MR. MARTIN: I don't know whether that is statutory or not, but I believe it is the commission rule or regulation.

CHAIRMAN DeVRIES: Dr. Pollock, did you wish to address yourself to that question?

MR. POLLOCK: Yes. It is a commission regulation.

MR. BALCER: Thank you, Dr. Pollock.

CHAIRMAN DeVRIES: Mr. Hutchinson.

MR. HUTCHINSON: Mr. Chairman, I wanted to raise another question in regard to this. As I put 2 provisions together, one where we have 8 exemptions in the governor's office and another provision where it says that there may be 3 additional exemptions at the will of civil service, I take it then that in practical language that will mean that there will be 11 exempt positions in the governor's office. Am I interpreting it right? And I would say that is perfectly agreeable with me, but I think that really what we have here is a total of 11 instead of a total of 8.

CHAIRMAN DeVRIES: Mr. Martin.

MR. MARTIN: Mr. Chairman, it is not intended so. It is intended to provide only 8 positions in the governor's office. Of course, the governor himself is exempt, but these are not intended to be added together. If it is not clear, we may have to make that clear.

MR. HUTCHINSON: Well, all right. Mr. Chairman, it just seems obvious to me that they would consider the office of the governor as a department, and it says that 3 additional positions of a policy making nature may be exempted within each department as determined to be necessary by the civil service commission. The governor will appoint the civil service commission. I doubt very much that there would be any question about it. If the governor wanted those 3 additional, he would get them. As I say, I think it is all right so far as I am concerned. I am just raising the point on the record to get the chairman's interpretation of it. He says that he thinks it means only 8. All right.

CHAIRMAN DeVRIES: Mr. Higgs.

MR. HIGGS: Mr. Chairman, I have a question for any member of the committee. I am not certain it can be answered at this time in view of the fact that they are contemplating another section reducing the overall number of boards, commissions and agencies, but my question has to do with line 12, "when requested by the department head," and I am wondering whether that request is made by the chief executive officer or the board and commission heading the department, or by the head of the department provided for under line 6.

CHAIRMAN DeVRIES: Mr. Martin.

MR. MARTIN: Mr. Chairman, the intention of the committee is that this should be the head of the department whether it is a single head or whether it is the board or commission which heads the department.

MR. HIGGS: That would not apply, then, to the chief executive officer, is that correct?

MR. MARTIN: No, it would not.

MR. HIGGS: Thank you.

CHAIRMAN DeVRIES: Mr. King.

MR. KING: Mr. Chairman and fellow delegates, I would like to call to your attention what might be construed to be ambiguous in the report and suggest that it be amended. At the bottom of page 313 it says:

> Because of an ambiguity in the constitution, the civil service commission classified the chief administrative officers of 9 boards or commissions at the request of these boards or commissions.

Then it goes on to say what I quoted before, that this language would permanently prevent such classification.

It has been called to my attention that this might be misleading, and I would suggest that before the first sentence on the top of page 314, we add the words: "Should these 9 boards and commissions become principal departments. . . . This language will permanently prevent such classification and reserve these positions for political appointment without tenure." In other words, this would be true only in the event that these 9 boards or commissions became 9 of the 20, if that is what we decide upon as principal departments.

CHAIRMAN DeVRIES: Mr. King, the secretary informs me that a motion to correct the journal is not in order in committee of the whole.

Mr. Sterrett.

MR. STERRETT: Mr. Chairman and delegates, with regard to Mr. Hutchinson's comment of the possibility of 11 exempted positions in the governor's office, I would like to go further than Chairman Martin's statement and point out that in the verbiage of the proposal, we specifically state "the office of governor"; there is the word "and" which separates "the office of governor" and the other departments where we say "within each depart-

ment." If we wanted to specifically point out each department in this — and this is for the intent and for the records — we would name other departments. However, because there are 8 exempt positions and more than other departments, we have specifically pointed out the governor's office.

CHAIRMAN DeVRIES: Mr. Hatch.

MR. HATCH: Mr. Chairman, also in response to Delegate Hutchinson's question as to the possibility of there being 11 exempt positions in the office of the governor, in connection with the proposal which the committee on the executive branch has considered concerning reducing the number of boards, agencies and commissions to 20, there is excepted from the 20 limitation the offices of the governor and the lieutenant governor, so they would not be considered a department. I think this is further indication that the governor's office would be limited to 8.

CHAIRMAN DeVRIES: Are there any further amendments to paragraph 1, lines 5 through 16 in Committee Proposal 22?

SECRETARY CHASE: None on file, Mr. Chairman.

CHAIRMAN DeVRIES: If not, we will move on to paragraph 2. The secretary will read.

SECRETARY CHASE: Second paragraph, line 17 through 22, is as follows:

[Paragraph 2 of Committee Proposal 22 was again read by the secretary. For text, see above, page 637.]

CHAIRMAN DeVRIES: Are there any amendments to this paragraph? Mr. Yeager.

MR. YEAGER: Mr. Chairman, the secretary has an amendment to be read.

SECRETARY CHASE: Mr. Yeager offers the following amendment to this paragraph:

1. Amend page 1, line 19, after "governor" by inserting a comma and "upon recommendation of the respective political parties,"; so the language will read:

> There is hereby created a nonsalaried civil service commission to consist of 4 persons, not more than 2 of whom shall be members of the same political party, appointed by the governor, upon recommendation of the respective political parties, for 8 year, overlapping terms.

CHAIRMAN DeVRIES: Mr. Yeager.

MR. YEAGER: Mr. Chairman, the committee report indicates, I think fairly clearly, that this is a bipartisan commission. Now, I believe a bipartisan commission is certainly the right approach to this, and it has been quite effective for quite a long time, but in the state of Michigan we do not have a closed primary and we do not have a good way of identifying political parties, and I don't feel that it is right that a Republican governor, for example, should be able to choose accurately a Democrat for this position or vice versa. I think if we are going to maintain the bipartisan idea, that we should permit the political parties to at least have some recommendation relating to this particular department or commission.

CHAIRMAN DeVRIES: Mr. Durst.

MR. DURST: Mr. Chairman, I would say that the committee on the executive branch did consider, in regard to this proposal, requiring that there be 2 Republicans and 2 Democrats, which I take it is impliedly meant by the language. We rejected this type of a specific provision because it is obvious that what has been intended in the civil service commission is a high quality type of administration as far removed from politics as possible, although it does not necessarily completely approach the problem from a nonpolitical point of view, but to make this a political appointment, as Mr. Yeager's amendment suggests, I think would lower the quality and the type of commission that we have had in the past which has worked so well, and I think the committee on executive branch would oppose the amendment as Mr. Yeager has suggested.

CHAIRMAN DeVRIES: Mr. Hodges.

MR. HODGES: In opposition to the amendment, we have had Republican governors and Democratic governors under this provision making appointments. We have had no trouble. The system has worked very well since 1939. I move that we support the committee report.

CHAIRMAN DeVRIES: Mr. Wanger.

MR. WANGER: Mr. Chairman, members of the committee, with respect to Mr. Yeager, I think his intention was, of course, merely to assure that it would be real Democrats and real Republicans who would be chosen so it would be very clear that it was the person of the particular political party, but I am afraid the effect of that amendment would go much farther and actually make the state central committees really a clearing house for the state civil service commission, and I suggest that this in the future could very well be the tendency, and therefore I also respectfully oppose the amendment.

CHAIRMAN DeVRIES: Mr. Martin.

MR. MARTIN: Mr. Chairman, I think that the committee would feel, if asked in regard to this amendment, that this was moving in the direction of putting the selection of these commissioners who have this very tough and difficult responsibility — really essentially taking the appointment away from the governor entirely, and I don't think that, partisan though I am, the committee would be agreeable to this kind of change.

CHAIRMAN DeVRIES: The question before the committee is the Yeager amendment. Is there any further discussion on this amendment? Dr. Pollock.

MR. POLLOCK: I merely would like to add that the method proposed by Mr. Yeager is the system used in the selection of the members of the board of state canvassers, and I just ask you to make the comparison between the civil service commission and the board of state canvassers. (laughter)

CHAIRMAN DeVRIES: Mr. Habermehl.

MR. HABERMEHL: I think the amendment posed, Mr. Chairman, by Mr. Yeager points up a real problem in this section. He states that the governor shall appoint the commission, and not more than 2 shall be members of the same political party. Since there is no way in the state of Michigan of exactly identifying people in regard to political parties, just what basis does the governor use to make that determination?

CHAIRMAN DeVRIES: Is there any further discussion on the Yeager amendment? Mr. Brake.

MR. BRAKE: Why do we talk in abstract things? For Mr. Hodges' benefit and anybody else who doesn't know it — if there is anybody else — don't you know that at one time we had a commission consisting of 2 Democrats, 1 Republican and 1 who denied that he was a member of the Republican party or any other party? And what I would like to ask of the chairman of the commitee is, why do you not make these subject to confirmation or advice and consent of the senate?

CHAIRMAN DeVRIES: Does the delegate care to answer? Mr. Martin.

MR. MARTIN: Mr. Chairman, as far as I know, there was no discussion in the committee of the question of advice and consent on the appointment of civil service commissioners. I can't tell you what the view of the committee would be because there was no discussion of the use of advice and consent. There was, however, discussion, as Mr. Durst has said, of the matter of specifically stating there should be 2 Democrats and 2 Republicans. Mr. Brake appeared before our committee and did discuss this problem of making sure that they were good Republicans and good Democrats, but we did not discuss the question of advice and consent.

CHAIRMAN DeVRIES: Mr. Hutchinson.

MR. HUTCHINSON: Mr. Chairman, I would like to just report as a matter of history, for whatever it is worth, that when Governor Williams first appointed Mr. Higgins a member of the civil service commission, he sent his nomination in to the senate. It became my duty to respectfully return the nomination to the governor with the advice that the senate didn't have that power, much as we would have liked to exercise it.

I would like to say that I had it in mind to bring up this question of advice and consent, but I am apprehensive that it would be very controversial and that perhaps it could be more reasonably argued on another section of the constitution than on this. (laughter) If the convention finally decides that the senate is going to have its proper historical function of advice and consent, and if we can figure out some way so that people will be reasonably sure that the senate will live up to its re-

# EXHIBIT 15

# EXHIBIT 15

# EXHIBIT 15

[ADDRESS TO THE PEOPLE]

# *What the Proposed New State Constitution Means to You*

● **A report to the people of Michigan by their elected delegates to the Constitutional Convention of 1961-62.**

Lansing, Michigan

August 1, 1962

# *Article XI*

## PUBLIC OFFICERS AND EMPLOYMENT

**Oath of office.**

Sec. 1. *All officers, legislative, executive and judicial,* before *entering upon* the duties of their respective offices, *shall* take and subscribe the following oath or affirmation: I do solemnly swear (or affirm) that I will support the constitution of the United States and the constitution of this state, and that I will faithfully discharge the duties of the office of ..... according to the best of my ability. No other oath, affirmation, or any religious test shall be required as a qualification for any office or public trust.

No change from Sec. 2, Article XVI, of the present constitution except for improvement in phraseology.

**Terms of office.**

Sec. 2. The terms of office of * elective state officers, *members of the legislature* and *justices and* judges of courts of record shall begin *at twelve o'clock noon* on the first day of January next succeeding their election, except as otherwise *provided* in this constitution. The terms of office of * county officers shall begin on the first day of January next succeeding their election, except as otherwise *provided* by law.

This is a revision of Sec. 1, Article XVI, of the present constitution specifying "twelve o'clock noon" as the time of day on January 1 when newly-elected state officers, legislators, justices and judges begin their terms. There is no present provision for time of day in the constitution. Other language changes in the section are made only for improvement in phraseology.

**Extra compensation.**

Sec. 3. Neither the legislature nor any *political subdivision of this state* shall grant or authorize extra compensation to any public officer, agent * or contractor after the service has been rendered or the contract entered into. ****

No change from the first sentence of Sec. 3, Article XVI, of the present constitution except for deletion of the word "employee" after "agent". Eliminated from the present section is language relating to the salaries of public officers. This is covered in another section of this document.

**Custodian of funds; accounting.**

Sec. 4. *No person having custody or control of* public moneys shall *be a member of* the legislature, or be eligible to any office of trust or profit under this state, until he shall have *made an accounting,* *** as provided by law, *of* all sums for which he may be liable.

No change from Sec. 19, Article X, of the present constitution except for improvement in phraseology.



**Classified state civil service.**

Sec. 5. The *classified* state civil service shall consist of all positions in the state service except those filled by popular election, heads of *principal* departments, members of boards and commissions, *the principal executive officer of boards and commissions heading principal departments,* employees of courts of record, *employees* of the legislature, *employees* of the *state* institutions of *higher education,* all persons in the *armed* forces of the state, *** *eight exempt positions in the office of the governor, and within* each *principal* department, *when requested by the department head,* two other exempt positions, *one of which shall be policy-making. The civil service commission may exempt three additional positions of a policy-making nature within each principal department.*

**** *The* civil service commission *shall* be non-salaried *and shall* consist of four persons, not more than two of whom shall be members of the same political party, appointed by the governor *for terms of eight years, no two of which shall expire in the same year.*

The administration of the commission's powers shall be vested in a state personnel director who shall be a member of the *classified* service and who shall be responsible to and selected by the commission after open competitive examination.

The commission shall classify all positions in the *classified* service according to their respective duties and responsibilities, fix rates of compensation for all classes of positions, approve or disapprove disbursements for all personal services, determine by competitive *examination and* performance exclusively on the basis of merit, efficiency and fitness the qualifications of all candidates for positions in the *classified* service, make rules and regulations covering all personnel transactions, and regulate all conditions of employment in the *classified* service.

No person shall be appointed to or promoted in the *classified* service who has not been certified by the commission as * qualified for such appointment or promotion. No *appointments, promotions,* demotions or removals in the *classified* service shall be made for religious, racial or partisan considerations.

*Increases in rates of compensation authorized by the commission may be effective only at the start of a fiscal year and shall require prior notice to the governor, who shall transmit such increases to the legislature as part of his budget. The legislature may, by a majority vote of the members elected to and serving in each house, waive the notice and permit increases in rates of compensation to be effective at a time other than the start of a fiscal year. Within 60 calendar days following such transmission, the legislature may, by a two-thirds vote of the members elected to and serving in each house, reject or reduce increases in rates of compensation authorized by the commission. Any reduction ordered by the legislature shall apply uniformly to all classes of employees affected by the increases and shall not adjust pay differentials already established by the civil service commission. The legislature may not re-*

*duce rates of compensation below those in effect at the time of the transmission of increases authorized by the commission.*

*The appointing authorities may create or abolish positions for reasons of administrative efficiency without the approval of the commission. Positions shall not be created nor abolished except for reasons of administrative efficiency. Any employee considering himself aggrieved by the abolition or creation of a position shall have a right of appeal to the commission through established grievance procedures.*

*The civil service commission shall recommend to the governor and to the legislature rates of compensation for all appointed positions within the executive department not a part of the classified service.*

To enable the commission to *exercise its* powers, the legislature shall appropriate *** *to the commission for the ensuing* fiscal year a sum not less than ** one percent of the aggregate * payroll of the *classified* service for the preceding fiscal year, as certified by the commission. *Within six months after the conclusion of each fiscal year the commission shall return to the state treasury all moneys unexpended for that fiscal year.*

*The commission shall furnish reports of expenditures, at least annually, to the governor and the legislature and shall be subject to annual audit as provided by law.*

No payment for personal services shall be made or authorized until the provisions of this *constitution pertaining to civil service* have been complied with in every particular. Violation of any of the provisions hereof may be restrained or observance compelled by injunctive or mandamus proceedings brought by any citizen of the state. ***

This is a revision of Sec. 22, Article VI, of the present constitution designed to continue Michigan's national leadership among states in public personnel practice, and to foster and encourage a career service in state government. It continues rigid limitations on political patronage, yet strengthens the role of the chief executive and the administrator and provides for limited legislative control of wage increases under specified circumstances.

New language in the first paragraph prevents the classification of the the chief executive officer of boards and commissions and reserves these positions for political appointment without tenure. Eight exempt positions among policy personnel are provided in the office of the governor. This simply gives constitutional sanction to a practice which has become customary. The revision also provides for additional exempt positions in other principal departments.

The bipartisan civil service commission continues as at present. The word "examination" is inserted in the fourth paragraph to recognize common practice of the commission in determining qualifications.

Increases in compensation can be authorized by the commission only at the start of a fiscal year and after prior notice to the governor so he can accommodate the increases in the budget he submits to the legislature. Power



is given to the legislature, however, to waive such notice and permit increases at a time other than the beginning of the fiscal year.

Power is also given to the legislature, within 60 days after transmission of notice of compensation increases, to reject or reduce the rates recommended – but their action must be by two-thirds vote of the members elected to and serving in each house. In no case may the legislature reduce rates of compensation below those in effect at the time nor may the legislature change pay differentials established by the commission.

Appointing authorities may create or abolish positions for reasons of administrative efficiency. Any employee who considers himself aggrieved by the abolition or creation of a position has the right of appeal to the commission for determination as to whether such position was abolished or created for reasons other than administrative efficiency.

The eighth paragraph authorizes the commission to recommend to the governor and to the legislature rates of compensation for appointees within the executive department who are not a part of the classified service.

The present legislative appropriation to the commission of one per cent of the aggregate payroll of the classified service for the past year is continued. It is provided, however, that within six months after the end of each fiscal year the commission must return to the state treasury funds not spent during that year.

The commission is directed to report on its expenditures at least annually to the governor and legislature and will be subject to audit procedures prescribed by the legislature.

Retained in the final paragraph is language requiring compliance with constitutional provisions pertaining to civil service and authorization for citizens to resort to legal proceedings to compel such compliance.

Of special interest to civil service personnel is the provision in Sec. 24, Article IX, of the proposed constitution which specifies that pension plans and retirement systems of the state shall be contractual obligations "which shall not be diminished or impaired." Sec. 53, Article IV, providing for the appointment of the auditor general by the legislature, requires that members of his staff, except for two persons, shall have civil service status.

**Civil service; local government; county.**

*Sec. 6. By ordinance or resolution of its governing body which shall not take effect until approved by a majority of the electors voting thereon, unless otherwise provided by charter, each county, township, city, village, school district and other governmental unit or authority may establish, modify or discontinue a merit system for its employees other than teachers under contract or tenure. The state civil service commission may on request furnish technical services to any such unit on a reimbursable basis.*

This is a new section permitting the establishment, modification or discontinuance of civil service merit systems in political subdivisions of the

# EXHIBIT 16

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# Chapter 7

# Disbursements for Personal Services outside the Classified Service

## 7-1 Disbursements for Personal Services outside the Classified Service

### 7-1.1 Requirements

An appointing authority shall not make or authorize disbursements for personal services outside the classified service until the provisions of article 11, section 5, of the constitution and the civil service rules and regulations have been complied with in every particular.

### 7-1.2 Disapproval by State Personnel Director

If an appointing authority makes or authorizes disbursements for personal services outside the classified service in violation of article 11, section 5, of the constitution or an applicable civil service rule or regulation, the state personnel director may disapprove any further disbursements by written order. If an appointing authority fails or refuses to comply with an order of the director, the director is authorized to take all appropriate action, including filing a civil action, to compel compliance with the disapproval order.

[Rule 7-1 last amended effective October 1, 2001]

## 7-2 Jurisdiction

### 7-2.1 Civil Service Review or Approval not Required

An appointing authority is not required to seek or obtain civil service approval for any of the following disbursements outside the classified service:

**(a) Not personal services.** Disbursements that are not for personal services.

**(b) Exempt and excepted employees.** Disbursements to persons occupying positions excepted from the classified service by article 11, section 5, of the constitution, or exempted by the state personnel director under rule 1-9.2 [Exempt Positions].

**(c) Mixed disbursements.** Disbursements for personal services that are included with other disbursements if (1) the predominant purpose of the mixed disbursements is not for personal

services and (2) the personal services are logically or practically related to the predominant purpose of the mixed disbursements.

**(d) Grants.** Disbursements of grants.

**(e) Federal law.** Disbursements under federal law if the use of the classified service is not an option.

**(f) Intergovernmental disbursements.** Disbursements to any of the following governments or their political subdivisions:

**(1)** One or more of the states of the United States.

**(2)** The United States.

**(3)** Canada.

**(g) Intragovernmental disbursements.** Disbursements to any of the following public bodies:

**(1)** An agency of the executive, judicial, or legislative branch of the state of Michigan.

**(2)** A political subdivision of the state of Michigan, including, but not limited to, a county, township, city, village, or district.

**(3)** Any governmental body created by agreement of any two or more counties, townships, cities, villages, or districts, as authorized by law.

**(4)** A nonprofit community board, agency, or corporation created under local, state, or federal law to exercise a governmental function.

**(5)** A public university, public college, public community college, or other public school.

**(h) Court ordered disbursements.** Disbursements made pursuant to a court order requiring disbursements for personal services, if the court retains jurisdiction of the matter or the matter is subject to further court review.

### 7-2.2 Complaints

A complaint that an appointing authority has made or authorized disbursements for personal services in violation of article 11, section 5, of the constitution or a civil service rule or regulation must be filed with the state personnel director under the procedures authorized in rule 7-9 [Complaints and Investigations].

[Rule 7-2 last amended effective October 1, 2001]

## 7-3 Standards for Disbursements for Personal Services

Except as provided in rule 7-2 [Jurisdiction], an appointing authority may make or authorize disbursements for personal services outside the classified service only if the personal services meet one or more of the following standards:

**(a) Standard A.** The personal services are temporary, intermittent, or irregular.

**(b) Standard B.** The personal services are (1) so specialized, technical, peculiar, or unique that they are not recognized as normal to the classified service or (2) the appointing authority is unable to recruit enough qualified candidates willing to accept a classified position.

**(c)** **Standard C.** The personal services involve (1) the use of equipment, materials, or facilities not reasonably available to the agency at the time and place required and (2) the estimated cost to the agency in procuring such equipment or materials and establishing the needed positions would be disproportionate to the contract cost.

**(d)** **Standard D.** The personal services would be obtained at substantial savings over the proposed period of disbursements when compared with having the same personal services performed by the classified work force. The personal services do not meet this standard if, despite the savings over the proposed period of disbursements, substantial savings would not likely be realized over the long term. Savings are "substantial" if the average annual savings over the proposed period of disbursements are equal to or greater than the minimum required savings computed using the table below:

| Col. 1 Projected Average Annual Disbursements: | | Col. 2 Minimum Required Average Annual Savings |
|---|---|---|
| From: | To: | Must Equal: |
| $ 1 | $ 25,000 | 25% of average annual cost |
| 25,001 | 50,000 | 20% (minimum $6,250) |
| 50,001 | 100,000 | 15% (minimum $10,000) |
| 100,001 | 200,000 | 12.5% (minimum $15,000) |
| 200,001 | 500,000 | 10% (minimum $25,000) |
| 500,001 | 1,000,000 | Minimum $50,000 |
| 1,000,001 | and above | 5% of average annual cost |

[Rule 7-3 last amended effective October 1, 2001]

## 7-4 Disbursements to Special Personal Services Employees

An appointing authority may make disbursements for personal services to a special personal services employee under the following conditions:

**(a)** **Standards.** The personal services meet Standard A or Standard B in rule 7-3.

**(b)** **Procedures.** The disbursements for personal services have been approved under the request procedures in rule 7-6 or preauthorized under rule 7-7.

[Rule 7-4 last amended effective October 1, 2001]

## 7-5 Disbursements to Independent Contractors

An appointing authority may make disbursements for personal services to an independent contractor under the following conditions:

**(a)** **Standards.** The personal services meet one or more of the standards in rule 7-3.

**(b)** **Procedures.** The disbursements for personal services have been approved under the request procedures in rule 7-6 or preauthorized under rule 7-7.

[Rule 7-5 last amended effective October 1, 2001]

# 7-6 Prior Written Approval by Civil Service Staff

## 7-6.1 Procedure

An appointing authority may submit to civil service staff a request for approval to make disbursements for personal services outside the classified service. Civil service staff shall (1) receive and evaluate the request, (2) receive and evaluate information submitted by other interested parties, and (3) issue a written technical decision. The staff shall approve the request, with or without conditions, or shall deny the request.

## 7-6.2 Approval

Civil service staff approval of a request to make disbursements for personal services outside the classified service must include the following:

**(a)** The maximum aggregate dollar amount the appointing authority is authorized to disburse for the requested personal services during the approved period.

**(b)** The specific personal services that the appointing authority is authorized to purchase outside the classified service with approved disbursements.

**(c)** The period during which the appointing authority is authorized to make approved disbursements.

**(d)** Any other requirement, condition, or restriction on the disbursements necessary to ensure that the appointing authority complies with article 11, section 5, of the constitution and the civil service rules and regulations.

## 7-6.3 Effective Date of Staff Decision

**(a)** **One interested party.** If the appointing authority is the only interested party participating in the civil service staff review, the technical decision is effective upon its issuance, unless a later date is specified in the technical decision.

**(b)** **Two or more interested parties.**

**(1)** **Effective date.** If more than one interested party participates in the staff review, the technical decision is effective 14 calendar days after the date the technical decision is issued, unless a different date is specified in the technical decision or the state personnel director issues a stay.

**(2)** **Request for stay.** An interested party intending to appeal the technical decision may file a request that the state personnel director stay the effective date of the decision pending appeal. The request for a stay must be received by the director within 10 calendar days after the date the technical decision is issued. The director may stay the effective date of the technical decision pending a technical appeal if the director determines that (1) it is unlikely that the request meets any of the standards for approval and (2) a stay is in the best interest of the classified service.

### 7-6.4 Complaint Regarding Technical Decision

An interested party who participated at the civil service staff review may file a technical disbursement complaint as provided in rule 8-3 [Technical Complaints]. The technical complaint must be received by the civil service technical review staff and all other interested parties within 14 calendar days after the date the technical disbursement decision is issued.

### 7-6.5 Compliance

An appointing authority shall comply with all requirements, conditions, and restrictions established in the civil service approval of a request to make or authorize disbursements for personal services outside the classified service. By way of example only, an appointing authority is prohibited from doing any of the following:

**(a)** Disbursing funds in excess of the approved maximum aggregate dollar amount.

**(b)** Disbursing funds for personal services other than approved personal services.

**(c)** Disbursing funds for personal services performed outside the period approved for the disbursements.

**(d)** Failing to comply with any requirement, condition, or restriction established in the civil service approval.

[Rule 7-6 last amended effective August 26, 2007]

## 7-7 Preauthorized Approval

### 7-7.1 Publication of List

Civil service staff shall establish and publish a list of personal services deemed to meet one or more of the standards of rule 7-3 without further review.

### 7-7.2 Use of Preauthorized Approval

An appointing authority may make or authorize disbursements for any preauthorized personal services without submitting a request or obtaining prior written approval of civil service staff under rule 7-6. When making or authorizing disbursements for preauthorized personal services, the appointing authority shall comply with all requirements, conditions, and restrictions established by civil service staff for the use of the list of preauthorized personal services.

### 7-7.3 Reporting

As a condition of using the preauthorized list, the appointing authority shall report all disbursements for preauthorized personal services as required by statute and the civil service regulations.

### 7-7.4 Additions to Preauthorized List

An appointing authority seeking to add personal services to the list of preauthorized personal services may file a request with civil service staff under the procedures authorized in rule 7-6. Civil service staff approval of a request to add personal services to the list of preauthorized personal services must include the following:

**(a)** A description of the particular type of personal services being added to the list of preauthorized personal services.

**(b)** The standard in rule 7-3 that the added personal services is deemed to satisfy.

**(c)** Any other requirement, condition, or restriction on the use of the preauthorization necessary to ensure that the appointing authority complies with article 11, section 5, of the constitution and the civil service rules and regulations.

### 7-7.5 Complaints or Appeals

Any complaint regarding the use of the preauthorized approval process or any disbursements for personal services made or authorized under the preauthorized approval process must be brought under the procedures authorized in rule 7-9. Any complaint regarding a technical decision to add personal services to the preauthorized list must be brought by an interested party under the technical appeal procedures in rule 8-3 [Technical Complaints].

[Rule 7-7 last amended effective August 26, 2007]

## 7-8 Emergency Disbursements

An appointing authority may authorize or make disbursements for personal services outside the classified service without prior civil service approval when an emergency occurs. The emergency personal services must not continue beyond 28 calendar days without approval of civil service staff. Civil service staff may approve continuation of emergency services for an additional period not to exceed 28 calendar days.

[Rule 7-8 last amended effective August 26, 2007]

## 7-9 Complaints and Investigations

### 7-9.1 Investigation by State Personnel Director

**(a)** **Complaint required.** Any person who alleges that an appointing authority has made or authorized disbursements for personal services outside the classified service in violation of article 11, section 5, of the constitution or a civil service rule or regulation must file a complaint with the state personnel director and serve a copy on the appointing authority and the state employer.

**(b)** **Examples of violations.** Alleged violations for which a complaint must be filed include, but are not limited to, the following:

**(1)** The appointing authority has made or authorized disbursements for personal services outside the classified service in violation of article 11, section 5, of the constitution.

**(2)** The appointing authority has made or authorized disbursements for personal services outside the classified service without obtaining approval required by the civil service rules or regulations.

**(3)** The appointing authority has made or authorized any of the following disbursements for personal services outside the classified service:

**(A)** Disbursements in excess of the maximum aggregate dollar amount approved by civil service.

**(B)** Disbursements for personal services other than those approved by civil service.

**(C)** Disbursements for personal services performed outside the period approved by civil service.

**(D)** Disbursements that do not comply with a requirement, condition, or restriction established in the civil service approval.

**(4)** The appointing authority obtained civil service approval by fraud, material misrepresentation, or failure to disclose material facts.

**(5)** The appointing authority made or authorized improper preauthorized disbursements for personal services.

**(6)** The appointing authority failed to report disbursements for personal services as required by law, including the civil service rules and regulations.

**(7)** The appointing authority failed to document adequately its compliance with the civil service rules and regulations.

### 7-9.2 Action by State Personnel Director

After reviewing the complaint, the state personnel director may act on the complaint or may appoint a person to conduct an inquiry and make a recommendation for action to the director. If the director finds that an appointing authority has made or authorized disbursements for personal services outside the classified service contrary to article 11, section 5, of the constitution or a civil service rule or regulation, the director may disapprove disbursements for personal services or take other appropriate action to ensure compliance with the constitution and the civil service rules and regulations.

### 7-9.3 Appeal of Director's Determination

A determination of the state personnel director under this rule 7-9 is final unless a party to the inquiry files an application for leave to appeal to the civil service commission under rule 8-7 [Appeal to Civil Service Commission] within 28 calendar days after the date the director's determination is issued.

[Rule 7-9 last amended effective October 1, 2001]

## 7-10 Audit and Enforcement

Civil service staff shall periodically audit appointing authorities to ensure that they are complying with article 11, section 5, of the constitution and the civil service rules and regulations governing disbursements for personal services outside the classified service. If the state personnel director determines that an appointing authority has not substantially complied with article 11, section 5, of the constitution or the rules and regulations, the state personnel director may (1) require the appointing authority to file a written request and obtain prior written approval from civil service staff for all disbursements for personal services outside the classified service and (2) take such other action as will reasonably ensure that the appointing authority complies with article 11, section 5, of the constitution and the rules and regulations in the future.

[Rule 7-10 last amended effective August 26, 2007]

## 7-11 Contract Requirements

Every contract by a state agency that authorizes disbursements for personal services outside the classified service must contain a provision that the state is obligated to comply with article 11, section 5, of the constitution and applicable civil service rules and regulations. The provision must also give notice that, notwithstanding any other provision of the contract to the contrary, the state personnel director is authorized to disapprove contractual disbursements for personal services if the director determines that the contract or the disbursements violate article 11, section 5, of the constitution or applicable civil service rules and regulations. The failure of an appointing authority to require such a provision in a contract does not limit or restrict the authority of the civil service commission and the director to disapprove disbursements for personal services outside the classified service.

[Rule 7-11 last amended effective October 1, 2001]

## 7-12 Limitations

Approval by civil service staff under this chapter does not relieve an appointing authority of an obligation under any other law or non-civil service rule or regulation that may apply to a contract. Approval by civil service staff under this chapter does not constitute approval of any contract or agreement by the state of Michigan under which an appointing authority makes or authorizes approved disbursements for personal services outside the classified service.

[Rule 7-12 last amended effective August 26, 2007]

[End of Chapter 7]

# EXHIBIT 17

# EXHIBIT 17

# EXHIBIT 17

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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