STATE OF MICHIGAN
IN THE COURT OF APPEALS

SHERRY LOAR and DAWN IVES

Plaintiffs, Court of Appeals No. _____

v

MICHIGAN DEPARTMENT OF HUMAN SERVICES,

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

Defendants
_____/

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_____/

PLAINTIFFS' BRIEF IN SUPPORT OF ORIGINAL ACTION FOR MANDAMUS

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JURISDICTIONAL STATEMENT

The primary issue in deciding jurisdiction is whether home-based day care providers are public employees. *Lansing v Carl Schlegel, Inc*, 257 Mich App 627 (2003); *Prisoners' Labor Union v Dep't of Corrections*, 61 Mich App 328 (1975) ("It is undisputed that [Michigan Employment Relations Commission] has jurisdiction over the inmates' claims if, and only if, those inmates are 'public employees' within in the meaning given that term in [the Public Employment Relations Act]."). Thus, this jurisdictional question goes to the heart of the argument presented here — that home-based day care providers are independent contractors and not public employees under PERA. If Plaintiffs are correct in their legal claim, then MERC does not have jurisdiction of this matter.

MCL 600.4401(1) allows a mandamus action against a state officer to be filed directly at this Court. The "facts" needed to determine whether plaintiffs are independent contractors or public employees are all matters of public record and are undisputed. There are no facts needed to decide the proper construction of constitutional provisions. Because there are no disputed facts, and because "[c]onclusions drawn from undisputed facts are questions of law," *Regents of University of Michigan v Employment Relations Commission*, 389 Mich 96, 103 n 3 (1973), no discovery is necessary. Hence, there would be no benefit to remanding this case to a trial court.

STATEMENT OF QUESTIONS INVOLVED

I. Under PERA, are home-based day care providers public employees of a public employer?

II. Does the state constitution prevent the MHBCCC from engaging in collective bargaining with a public employee union purporting to represent home-based day care providers?

STATEMENT OF FACTS

A. General definitions and facts

In Michigan, parents may hire a home-based child care provider. If parents do hire a home-based provider, they may also remove their child from that provider's care at any time. Parents and providers agree on the providers' compensation. They determine which days and which hours the children will spend in the providers' care.

Some Michigan parents receive a subsidy from the State for child care. Defendant Department of Human Services (DHS) notes: "For most families, DHS pays less than the full cost of child care. Families are expected to pay the difference between the DHS payment and the provider's actual charge." http://www.michigan.gov/dhs/0,1607,7-124-5453_5529_7143-20878--,00.html (last accessed September 15, 2009). Defendant DHS licenses, certifies or enrolls all home-based child care providers. A fundamental issue in this case is whether the Plaintiffs, who are home-based child care providers, are public employees who can be unionized under PERA or any other method, thereby allowing the State to divert a portion of the child-care subsidy payment as purported "union dues" to a supposed "union" that claims to represent the providers.

According to an Auditor General's 2008 performance audit, Defendant DHS classifies "childcare providers into five different service types: day-care centers, group day-care homes, family day-care homes, day-care aides, and relative care

providers." Auditor General Performance Audit, Child Development and Care Program Payments at 41 (July 29, 2008).[1]

Day care centers are defined as "a facility, other than a private residence, receiving 1 or more preschool or school-age children for care for periods less than 24 hours a day, where the parents or guardians are not immediately available to the child." MCL 722.111(1)(g). A "group" home is "a private home in which more than 6 but not more than 12 minor children are given care and supervision for periods of less than 24 hours a day unattended by a parent or legal guardian, except children related to an adult member of the family by blood, marriage, or adoption." MCL 722.111(1)(i)(iv). A "family" home is the same except it has "1 but fewer than 7 minor children." MCL 722.111(1)(i)(iii). The term "day-care aide" is not explicitly defined in either a Michigan statute or regulation. The Auditor General defined it as:

> An individual (including a relative) who provides [Child Development and Care (CDC)] Program childcare in the home of the CDC Program child. A day-care aide may live with the parent or substitute parent and the CDC Program child.

Auditor General Performance Audit, Child Development and Care Program Payments at 80 (July 29, 2008). The term "relative care provider" is not explicitly defined in either a Michigan statute or regulation. The Auditor General defined it as:

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[1] This document is available at http://audgen.michigan.gov/comprpt/docs/r431030005.pdf (last accessed September 15, 2009).

> A child provider that is related to the [Child Development and Care] Program child needing care by blood, marriage, or adoption as a grandparent/step grandparent, great-grandparent/step great-grandparent, aunt/step aunt, uncle/step uncle or sibling/step sibling. The individual must be 18 or older, must not live in the same house as the child, and must provide the childcare services in the relative's home.

Auditor General Performance Audit, Child Development and Care Program Payments at 83-84 (July 29, 2008). Plaintiff Sherry Loar operates a group day care home, while Plaintiff Dawn Ives operates a family day care home. Complaint, Exhibit 1.

Michigan receives a Temporary-Assistance-for-Needy-Families block grant from the federal government. See generally 42 USC §§ 601-19. In the fiscal year 2008-2009 budget, 2008 PA 248, the DHS was allocated $382,629,800 for "Daycare services" in section 112 of the bill, which is titled "public assistance." *Id*. at 6.

The Auditor General audited 30 months of the "Child Development and Care (CDC) Program Payments" from October 5, 2003, through March 4, 2006. Auditor General Performance Audit, Child Development and Care Program Payments at 59 (July 29, 2008). In that time period, the DHS paid $1,115,110,789 in child care subsidies. *Id*. The percentages paid to the various provider types were: (1) enrolled relative care providers — 39.6%; (2) enrolled day care aides — 25.2%; (3) licensed day care centers — 16.5%; (4) licensed group day care homes — 10.4%; (5) registered family day care homes — 8.2%; and (6) unlicensed day care centers and homes[2] — 0.1%. *Id*.

[2] Basically, these are facilities on federal land. The Auditor General defined them as:
(Note continued on next page.)

The gross amount per group over that 30-month period was: (1) enrolled relative care providers — $441,672,006; (2) enrolled day care aides — $280,460,407; (3) licensed day care centers — $183,826,705; (4) licensed group day care homes — $116,348,213; (5) registered family day care homes — $91,835,806; and (6) unlicensed day care centers and homes — $967,652. *Id.*

As will be discussed further below, an organization calling itself Child Care Providers Together Michigan (CCPTM) contends it represents a "bargaining unit" composed of group day care providers, family day care providers, relative care providers, and day care aides. This unit would encompass about 83.4% of the payments made over the 30-month audit period.[3] That works out to around $930,000,000 over the 30-month period, or an annualized amount of roughly $372,000,000.

B. Organized labor's attempts to unionize home-based day care providers in other states

The instant case occurs as part of a major national initiative by organized labor to increase its membership by redefining traditional notions of employer-employee relations when state or local government helps compensate for a service

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> Day-care centers and homes exempt from licensure under Act 116, P.A. 1973 [Child Care Licensing Act, which is codified at MCL 722.111-128], including day-care centers with parents on site and day-care centers, family homes, and group homes on federal land.

Auditor General Performance Audit, Child Development and Care Program Payments at 84 (July 29, 2008).

[3] The full 16.5% of the payments that went to licensed day care centers would be excluded, as would the 0.1% that went to unlicensed day care centers and homes.

rendered. According to the National Women's Law Center, as of 2004 only 3% of day care center workers — as opposed to home-based day care providers — were either in a union or covered by a union contract, despite organizing efforts dating back to the 1960s. Deborah Chalfie, et al, Getting Organized: Unionizing Home-based Child Care Providers 6 (2007).[4] Starting in 2005, organized labor actively began seeking to unionize home-based day care providers.

The National Women's Law Center identifies some obstacles that labor has faced in doing so:

> Child care centers may be difficult to organize, but at least there is a traditional employer-employee relationship between the owners and staff. In contrast, home-based providers do not easily fit into a legal status that permits them to unionize. The federal labor laws that cover the private sector expressly exclude both independent contractors and persons providing domestic services in another person's home from the legal definition of "employee." . . . . [P]roviders are either independent contractors — self-employed business owners — or, in the case of a small number of . . . providers who are providing care in a child's home, [are] otherwise not in an employer-employee relationship under the federal labor relations laws.
>
> In fact, since these individuals are self-employed persons or businesses — and thus competitors — they are subject to either state and/or federal antitrust laws and are actually prohibited from agreeing on matters such as rates, unless their activities are exempt under the "state action" doctrine. . . .
>
> Even if providers were considered employees under federal labor laws, however, the entities with which they would negotiate over key elements of their work — state and local governments — are not considered employers. They are expressly excluded from the definition of "employer" under the federal labor laws, and thus state and local public-sector employees . . . require specific legal authority in order to obtain collective bargaining rights with their government employer. . . .

[4] This document is available at http://www.nwlc.org/pdf/gettingorganized2007.pdf (last accessed September 15, 2009).

> In other words, without additional, specific legal authority, home-based child care providers have no right to organize for the purpose of collective bargaining, and the state has no right to recognize or negotiate with the providers' representative.

Id. at 6-7 (emphasis added).

Organized labor first ran into the problem of seeking to organize employees who were not in a traditional employer-employee relationship when it sought to organize "home care workers" — i.e., those who provide domestic services in the homes of the elderly or the disabled. Organizing the workers under the National Labor Relations Act was not an option since the NLRA defined "employee" to exclude both those "in the domestic service of any family or person at his home" and "any individual having the status of an independent contractor." 29 USC § 152(3). Further complicating matters for organized labor was the NLRA definition of "employer," which excludes "any State or political subdivision thereof." 29 USC § 152(2).

With federal options thereby foreclosed, the Service Employees International Union (SEIU) sought to organize all the home care workers in Los Angeles County against that county, using California's Meyers-Milias-Brown Act ("MMBA"), Cal Gov't Code §§ 3500-11, which covers collective bargaining for employees of local units of government. The workers in question were paid the entirety of their salary by the state, but were hired and fired by the recipients of the care. When the county refused to meet and confer with the SEIU as the bargaining agent, the SEIU brought suit. The trial court held that the home care workers were not employees of the county under the MMBA, and this holding was affirmed on appeal. *Service*

Employees International Union, Local 434 v Los Angeles Co, 275 Cal Rptr 508 (Cal Ct App 1991). Subsequently, the California Legislature enacted a statute allowing counties to establish "by ordinance, a public authority to provide for the delivery of in-home supportive services." Cal Welf & Inst Code § 12301.6(a)(2).[5] This public authority would be deemed "the employer of in-home supportive services personnel [who were] referred to recipients," although the "recipients" would "retain the right to hire, fire, and supervise the work of any in-home supportive services personnel providing services to them." Cal Welf & Inst Code § 12301.6(c)(1).

Los Angeles County eventually created one of these entities, and in 1999, the SEIU successfully organized against it. This one drive netted organized labor 74,000 additional members and was described as "one of the most significant gains in union membership in fifty years." David L Gregory, Labor Organizing by Executive Order: Governor Spitzer and the Unionization of Home-Based Child Day-Care Providers, 35 Fordham Urb LJ 277, 280 (2008).

Oregon was the next state to allow the organization of home care workers, doing so in 2000 through a ballot initiative to amend the state constitution. See Ore Const art XV, § 11(f). In 2002, Washington passed a similar law through the initiative process, which, in pertinent part, is codified at Wash Rev Code § 74.39A.270. In 2006, the state of Massachusetts also created an entity that acted as the employer of publicly financed home care workers. Mass Gen Laws ch 118G § 31.

[5] Creation of an entity to be an employer eventually became mandatory. Cal Welf & Inst Code § 12302.25.

The governors of Illinois and Iowa used executive orders to create an employer that the unions could organize against. Ill Exec Order 2003-8 (March 4, 2003); Iowa Exec Order 43 (July 4, 2005).[6] In 2007, Ohio's governor issued an executive order that did not create a new employer, but rather allowed the governor to enter directly into mandatory collective bargaining with home care providers who are paid via Medicare reimbursements and who are not employed by a private agency. Ohio Exec Order 2007-23S (July 17, 2007).

Michigan and Wisconsin both used "interlocal agreements" between state and local government entities to create an employer for home care employees to bargain against. In Michigan in 2004, the Department of Community Health entered into an interlocal agreement with the Tri-County Consortium on Aging to create the Michigan Quality Community Care Council.

This model of union organization was subsequently applied to home-based day care providers. In 2005, Illinois' governor allowed unionization of these workers via an executive order. Ill Exec Order 2005-1 (February 18, 2005). In 2005, Washington's governor issued an executive directive. Deborah Chalfie, et al, Getting Organized: Unionizing Home-based Child Care Providers 26 n 28 (2007). Unionization in Oregon was effected by two gubernatorial executive orders. Ore Exec Order 05-10 (September 23, 2005); Ore Exec Order 06-04 (February 13, 2006). In each of these three states, the executive orders were later replaced by state legislation. 5 Ill Comp Stat 315/3(f), (n), (o); 5 Ill Comp Stat 315/7(4); Wash Rev

[6] In 2005, the Illinois Legislature codified the arrangement. 5 Ill Comp Stat 315/3(f), (n), (o); 5 Ill Comp Stat 315/7(4).

Code § 41.56.028; Ore Rev Stat § 657A.430(3). Between 2005 and 2007, governors in Iowa, New Jersey, Wisconsin, New York, Pennsylvania, Kansas and Maryland issued executive orders. Iowa Exec Orders 45, 46 (January 16, 2006); NJ Exec Order 23 (August 2, 2006); Wis Exec Order 172 (October 6, 2006); NY Exec Order No 12 (May 8, 2007); Pa Exec Order No 2007-06 (June 14, 2007); Kan Exec Order No 07-21 (July 18, 2007); MD Exec Order No 01.01.2007.14 (August 6, 2007). In 2009, the state of New Mexico enacted legislation. NM Stat § 50-14-17.

Some attempts to implement this model of union organization failed. Governors in New York, Massachusetts, and California vetoed legislation to permit unionization of home-based day care providers. NY Veto No 215 (June 7, 2006); Mass Veto HB 5257 (August 10, 2006); Cal Veto of Assembly Bill 1164 (October 14, 2007).[7] Also, the voters of Massachusetts rejected a ballot initiative to allow unionization of home-based day care providers. http://www.sec.state.ma.us/ele/elepdf/rov06.pdf at 57-58 (last accessed September 11, 2009).

C. Michigan-specific facts

The foregoing provides context to understand the unionization effort in Michigan. In 1973, Michigan enacted the Child Care Licensing Act, which is codified at MCL 722.111-128. All family child care homes and group child care homes must be "licensed" (group child care homes) or "registered" (family child care

[7] A subsequent New York governor eventually issued the executive order mentioned above to allow unionization of home-based day care providers.

homes). MCL 722.115(1). New and renewing licensees[8] undergo a criminal history check. MCL 722.115f. Annual inspections are required. MCL 722.118a. The legislation denotes that the "department of human services . . . is responsible for the development of rules for the care and protection of children in organizations covered by this act." MCL 722.112(1). The permissible scope of the rules is set out in MCL 722.112(4) and covers a range of activities and subjects.

The DHS' licensing rules for family and group day care homes are set forth in R 400.1901-52. Topics covered include, but are not limited to, the number of vacations days a caregiver[9] can take (no more than 20 days), R 400.1903(1)(a); training requirements for caregivers, R 400.1905; daily activities, R 400.1914; permissible bedding for the children, R 400.1916; food preparation requirements, R 400.1931; and various safety issues, R 400.1941-44. Caregivers can hire "assistant caregivers" who must be at least 14, "of responsible character," and within 90 days of being hired, trained in CPR, first aid, and blood-borne pathogens. R 400.1904.

There do not appear to be any statutes or regulations that specifically govern the conduct of relative care providers or day care aides.[10] The DHS has a Web page titled "Relative Care Provider Requirements" that contains a list of prerequisites for participating in the program. http://www.michigan.gov/dhs/0,1607,7-124-5453_5529_7148-15293--,00.html (last accessed September 15, 2009). The DHS'

[8] Licenses need to be renewed every two years, MCL 722.118, while certificates of registration need to be renewed every three years. MCL 722.119a.

[9] The "caregiver" is the licensee/registrant in whose home the children are being cared for.

[10] Administrative rules R 400.5001-15 concern relative care providers and day care aides, but primarily discuss eligibility and reimbursement.

Web site also contains a "Relative Care Application," a form that was modified in February 2009. http://www.michigan.gov/documents/dhs/DHS-0220-R_194100_7.pdf (last accessed September 15, 2009). Applicants must agree to a list of conditions, including one that states "I understand that I am considered to be self employed and not an employee of DHS." *Id*. There is also a "Day Care Aide Requirements" Web page, which lists conditions for participation in that program. http://www.michigan.gov/dhs/0,1607,7-124-5453_5529_7148-15175--,00.html (last accessed September 15, 2009). The DHS' online application for day care aides indicates that it was last modified in February 2009. http://www.michigan.gov/documents/dhs/DHS-0220-A_194099_7.pdf (last accessed September 15, 2009). Applicants must agree to a list of conditions, including one that states:

> I understand the parent/substitute parent is my employer (not DHS) and is responsible for the employer's share of any employer's taxes that must be paid, such as Federal Insurance Contributions Act (FICA) and Federal Unemployment Tax (FUTA) taxes. My employer (parent/substitute parent) is also required to provide me with a W-2 at the end of the year for tax purposes.

Id.

In April 2006, the CCPTM attempted to organize against the DHS. Complaint, Exhibit 7. The proposed bargaining unit was "all providers receiving reimbursements from the CDC Program under the following job classifications: (1) group day care providers; (2) family day care providers; (3) relative care providers; and (4) day care aides." *Id*.

On July 27, 2006, pursuant to Const 1963, art 7, § 28 and the Urban Cooperation Act, MCL 124.501-512, the DHS and Mott Community College entered into a interlocal agreement, creating the Michigan Home Based Child Care Council (MHBCCC).[11] Complaint, Exhibit 8. The DHS claimed that "entering into this Agreement is necessary or appropriate to assist the Department in carrying out its duties and functions, including licensing, regulating, assisting, providing training for, and administering the subsidy payments to eligible home based child care providers." *Id*. at § 1.06. That agreement defined a "provider" as one who supplies home-based child care services and is "licensed or registered" by the DHS or "who receives payments for providing home-based child care services through the Department." *Id*. at § 1.15. The parties clarified that "[i]t is not the purpose of this Agreement to limit the selection process of child care providers by families; families will continue to select and retain the provider who best suits their needs." *Id*. at § 2.01.

The agreement also professed to give the MHBCCC the "right to bargain collectively and enter into agreements with labor organizations. [MHBCCC] shall fulfill its responsibilities as a public employer subject to 1947 PA 336, MCL 423.201 to 423.217 [PERA]." *Id*. at § 6.10.

Sometime after its creation, the MHBCCC entered an undated document titled "Resolution 2006-1." Complaint, Exhibit 9. This document attempted to

[11] Mott Community College had signed the document on May 23, 2006. It is unknown why the DHS did not sign the document for a little over two months after that.

Plaintiffs discuss the propriety of this "interlocal agreement" below.

transfer the signatures from the CCPTM's organization drive against the DHS to an organization drive against the MHBCCC. *Id*.

Despite this resolution, the CCPTM soon filed a petition for representation elections with MERC.[12] Complaint, Exhibit 10. In its September 2006 petition for representation proceedings, the CCPTM formally sought to unionize against the MHBCCC and claimed the bargaining unit included:

> All home-based child care providers including: group day care providers, family day care providers, relative care providers, and day care aides, who provide child care services under the Michigan Child Development and Care Program and other programs and child care services undertaken by MHBCCC.

Complaint, Exhibit 11.[13] The claimed unit size was 40,532 individuals. Complaint, Exhibit 10.[14]

MERC ran a certification election by mail in October and November of 2006. Of the 6,396 individuals who voted, 5921 voted in favor of unionization, and 475

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[12] MERC Case R 06I-106.

[13] This petition was actually amended from its original form. The original petition to MERC based membership in the proposed union on the receipt of state CDC subsidies. Complaint, Exhibit 10. The amended petition removed the reference to the subsidies. Complaint, Exhibit 11.

[14] According to the Notice of Election from MERC case R06I-106, this group was constituted of those "who were employed during the payroll period ending June 30, 2006." Complaint, Exhibit 12. "Employed" presumably means "received a subsidy check from the state." This inference is based on some basic arithmetic. A 2008 Auditor General's performance audit of the CDC program defines "active" as a "child day-care provider that is either currently authorized by DHS to care for CDC children or eligible to be authorized by DHS to care for CDC children." Auditor General Performance Audit, Suitability of Child Development and Care Program Providers (July 22, 2008) at 58; document available at http://audgen.michigan.gov/comprpt/docs/r431029905.pdf (last accessed September 15, 2009). The audit breaks down the "approximate number of active providers" as of September 30, 2006, by provider type: (1) relative care — 32,950; (2) day-care aide — 26,900; (3) family day-care home — 8,350; and (4) group day-care home — 3,600. *Id*. at 49. These figures sum to 71,800. The approximately 30,000 person difference between the purported bargaining unit and the active employees found just three months later is likely due to the first group's being limited to only those who received a benefit check.

Regardless, the difference is legally irrelevant to Plaintiffs' argument, although it does demonstrate the highly fluid nature of the purported bargaining unit.

opposed unionization. Complaint, Exhibit 13. On November 27, 2006, MERC certified the results. *Id.*

The MHBCCC and the CCPTM entered into what they contend was a collective bargaining agreement, and this document became effective on January 1, 2008. Complaint, Exhibit 14. The preamble to the agreement recognizes its distinctive nature:

> This agreement formalizes the unique relationship between the MHBCCC and the CCPTM. . . .
>
> CCPTM and MHBCCC recognize that the implementation of various provisions in this Agreement will necessarily require the assistance and cooperation of entities that are not a party to this Agreement, primarily the Department of Human Services. CCPTM and MHBCCC agree to work together in good faith in order to secure the assistance and cooperation of the appropriate entities when required by the provisions of this Agreement.

Id. at 3. Further, they acknowledged "the right to Department of Human Services to create and implement policies that may affect the professional standing and services provided by child care Providers." *Id*. at 23.

The parties recognized that "parents have the sole and undisputed authority to: 1) hire Providers of their choice; and 2) remove Providers from their service at will for any reason." *Id*. at 14. The parties agreed that any action taken by a parent "concerning termination of services of a Provider shall not be subject to the grievance procedure." *Id*. at 16.

Another set of provisions recognized that the parties were dependent upon the Legislature to fund any agreement reached:

> Although the parties understand that economic increases are largely contingent upon necessary legislative funding, MHBCCC agree

to work jointly with CCPTM to find creative solutions to fund economic increases when new funds are insufficient.

The MHBCCC, in agreement with the Union, will recommend to the Governor to make the necessary budget recommendations to the Legislature for Home Based Child Care Providers as outlined in Appendix B — Rates. And in addition, will provide the necessary political support to make effective the economic increases in this agreement.

In the event that the Legislature fails to provide adequate funding for any scheduled economic increases,

> 1. During the first year of the agreement, assuming a lesser amount is approved, the Council and the Union will recommend how the available funds for rate increases as stated in Appendix B of this Agreement should be applied.
>
> 2. The MHBCCC, in agreement with the Union, will recommend to the Governor to include sufficient funds in any subsequent supplemental appropriations and/or budget recommendations such that any postponed economic increases become effective not later than the beginning of the following fiscal year.
>
> 3. During subsequent years of this agreement, should the Legislature approve less than full funding for economic increases, the parties shall meet and determine recommendations for rate increases and training incentives.

Id. at 26.

The MHBCCC and the CCPTM agreed "union dues" are to come from the child care subsidy payments:

> Deductions of Union dues shall begin no later than thirty (30) days from the first date for which a provider received subsidized payment.
>
> . . .
>
> Union dues and initiation fees shall be deducted from the Provider's payments and remitted to the Union. . . . The warrant stub will state "Union Dues" and the amount of the deduction. If the Provider has requested to pay only "Fair Share" fees, the warrant stub will state "non member fees" and the amount of the deduction.

Id. at 9, 15. No dues were to be collected until a method of garnishing them was worked out:

> No dues will be deducted until the technical capability has been secured to allow for the deduction of dues. Such changes shall be completed as expeditiously as possible, but no later than three (3) months from the date of ratification unless mutually agreed to by the parties. The Union will not assert that the Council has violated the Agreement based on the technical inability to secure dues deductions.

Id. at 10.

In January 2009, the DHS sent Plaintiffs notification that "dues" would now be collected:

> Consistent with the 2006 election of the Child Care Providers Together Michigan union, and in compliance with its contract, beginning January 2009, a 1.15% dues/fair share fee deduction will be made from all in-home child day care providers' CDC State payments.

Complaint, Exhibit 15.[15] The "State of Michigan Remittance Advice" sent to Plaintiffs at the top of their CDC subsidy checks indicated that the checks were "DHS-funded payments." Complaint, Exhibits 16, 17. Plaintiffs also received 1099 forms listing DHS as the payer and categorizing the subsidy payments as "nonemployee compensation." Complaint, Exhibits 18, 19. Enclosed with the check, Plaintiffs received a document titled "Department of Human Services Child Development and Care Statement of Payments" indicating that "dues" were being deducted from each payment and specifying the amount of dues being removed from the check. Complaint, Exhibits 16, 17.

[15] Given the rough figure from above that the "bargaining unit" receives $372,000,000 in subsidy payments annually, during the period of the audit, CCPTM would have received around $4.3 million in "dues" annually. But based on the current appropriation for all child care subsidies, this amount would be lower. Presuming that the bargaining unit would still garner 83.4% of the appropriation, the annual dues amount would be $382,629,800 x 83.4% x 1.15%, or $3.7 million.

Plaintiffs seek a writ of mandamus to stop the DHS from removing these "dues" from their checks.

DISCUSSION

I. Under PERA, home-based day care providers are not public employees of a public employer.

A. Standard of review

This is an original action for mandamus, and thus there is no lower decision to review. In order to obtain a writ of mandamus, a plaintiff must show: "(1) the plaintiff has a clear legal right to the performance of the duty sought to be compelled, (2) the defendant has a clear legal duty to perform, (3) the act is ministerial in nature, and (4) the plaintiff has no other adequate legal or equitable remedy." *Citizens for Protection of Marriage v State Bd of Canvassers*, 263 Mich App 487, 492 (2004). A plaintiff bears the burden of showing entitlement to such a writ. *Id*.

B. Argument

Michigan began allowing public-sector bargaining in 1965, with the enactment of PERA.[16] Soon thereafter, the courts created a four-factored test to distinguish government contractors from government employees. That test has been applied even as the Legislature has altered the definition of "employee" in PERA. An application of that test will show that Plaintiffs are not government employees.

[16] Michigan's public-sector bargaining history prior to PERA will be discussed below in Argument II.

Moreover, the last amendment to the definition of "employee" under PERA shows that the Legislature meant to prevent novel organizing theories from enlarging the pool of potential government employees. Further, in the context of worker's compensation, this Court has already held that day care providers are independent contractors and not government employees. Finally, Rhode Island faced the same issue presented here — whether home-based day care providers can be transformed from independent contractors into government employees by the mere receipt of a subsidy check meant to allow low-income parents to attend work or school. A Rhode Island court held that the providers were independent contractors.

1. Plaintiffs are not public employees under statutory definitions or case law.

MCL 423.201(1)(e) currently states:

> "Public employee" means a person holding a position by appointment or employment in the government of this state, in the government of 1 or more of the political subdivisions of this state, in the public school service, in a public or special district, in the service of an authority, commission, or board, or in any other branch of the public service, subject to the following exceptions:
>
> > (i) Beginning March 31, 1997, a person employed by a private organization or entity that provides services under a time-limited contract with the state or a political subdivision of the state is not an employee of the state or that political subdivision, and is not a public employee.

Id. "Public employer" is not defined in the act, although "public school employer" is defined at MCL 423.201(1)(h).

As originally implemented in 1947 PA 336, state law concerning public employees merely mentioned "employee" in the prohibition of strikes provision:[17]

> No person holding a position by appointment or employment in the government of the state of Michigan, or in the government of any 1 or more of the political subdivisions thereof, or in the public school service, or in any public or special district, or in the service of any authority, commission, or board, or in any other branch of the public service, hereinafter called a "public employee," shall strike.

1947 PA 336, § 2 (originally codified at MCL 423.202); see *Grandville Muni Exec Ass'n v Grandville*, 453 Mich 428, 432-33 (1996).

The enactment of PERA, which significantly altered state law concerning public employees, did not alter the definition of "employee" found in MCL 423.202. PERA was amended six times between its creation and 1994. None of the amendments altered the original definition in MCL 423.202.[18]

As part of 1994 PA 112, the employee definition was relocated to MCL 423.201(1)(e) and modified to state:

> "Public employee" means a person holding a position by appointment or employment in the government of this state, in the government of 1 or more of the political subdivisions of this state, in the public school service, in a public or special district, in the service of an authority, commission, or board, or in any other branch of the public service.

See *Grandville*, 453 Mich at 433; *id.* n. 9. The current version of MCL 423.201(1)(e)(i) was originally enacted as part of 1996 PA 543.[19]

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[17] This original state law was known as the Hutchinson Act. It will be discussed below.

[18] 1965 PA 397; 1973 PA 25; 1976 PA 18; 1976 PA 99; 1977 PA 266; 1978 PA 441.

[19] There has been one further amendment to MCL 423.201(1)(e) since that time, 1999 PA 204, but it did not affect the relevant language as it by and large just added MCL 423.201(1)(e)(ii), which is not relevant here.

Case law between the creation of the original definition of "employee" and the 1996 amendment to the definition of "employee" will provide guidance about the meaning of public employee under PERA. Case law regarding what constitutes a "public employer" will also be discussed. This case law will show that this Court has relied on a four-factored test to determine whether there is a public employer-employee relationship.[20] Under this test, Plaintiffs are not employees of the MHBCCC or any other putative public employer; rather, they are independent contractors.

In *Wayne County Civil Service Commission v Board of Supervisors*, 22 Mich App 287 (1970), this Court dealt with potential conflicts between PERA and a state law that allowed Wayne County to create its own civil service. In that case, three county entities disagreed over which of them acted as the employer of the county's road workers. The Wayne County Civil Service Commission claimed that the Wayne County Board of Supervisors was the employer for all county employees and that the County Civil Service Commission had the sole power to represent the county in determining wages and benefits. The Wayne County Road Commission contended

[20] Much of the case law surrounding MCL 423.202 is not relevant to the instant case. For instance, many of the "public employee" cases involved supervisory or executive workers. Typically, the disputes in these cases concerned which bargaining unit the workers belonged to, not whether they were in fact public employees under PERA. *Dearborn School Dist v Labor Mediation Bd*, 22 Mich App 222 (1970); *Hillsdale Community Schools v Labor Mediation Bd*, 24 Mich App 36 (1970); *UAW v Sterling Heights*, 176 Mich App 123 (1989); *Muskegon Co Professional Command Ass'n v Co of Muskegon (Sheriff's Department)*, 186 Mich App 365 (1991). Another case dealt with whether teachers without a valid contract were still public employees under PERA. *Holland School Dist v Holland Ed Ass'n*, 380 Mich 314 (1968). Yet another concerned the extent to which constitutionally created state universities were public employers subject to the requirements of PERA. *Bd of Control of Eastern Michigan Univ v Labor Mediation Bd*, 384 Mich 561 (1971).

that it was the employer of all of its employees. Finally, the Wayne County Board of Supervisors contended that there were joint employers in the county, but that the board had the duty and responsibility to engage in collective bargaining under PERA.

This Court set forth a four-factored test for identifying the employer:

> (1) that they select and engage the employee; (2) that they pay the employee; (3) that they have the power of dismissal; and (4) that the have the power and control over the employee's conduct.

Id. at 294. This Court took note of a stipulation that the Road Commission could "hire, fire, demote, promote, discipline, and pay its employees performing road work." *Id*. at 298. That led to a holding that the Road Commission — not the Civil Service Commission, and not the Board of Supervisors — was the public employer of the road workers, since it supervised them in this way.

The Michigan Supreme Court reviewed and affirmed the holding that the Road Commission was the public employer "of its employees, and that such employees shall be employees of that same board." *Wayne Co Civil Service Comm v Bd of Supervisors*, 384 Mich 363, 375-76 (1971).

In *Regents of University of Michigan v Employment Relations Comm*, 389 Mich 96 (1973), the Michigan Supreme Court faced the question of whether interns, residents and post-doctoral fellows who were "connected" with the University of Michigan Hospital were public employees under PERA. The university claimed that the purported bargaining unit was comprised of students, not employees.

The Michigan Supreme Court disagreed. Without applying the four-factored test, it held that the personnel were both students and employees, and it noted that PERA did not contain an exclusion for people in this situation.

Specifically, the court examined whether this group constituted employees. It noted that the university provided them with W-2 forms and withheld a portion of their compensation for "the purposes of federal income tax, state income tax, and social security coverage." *Id.* at 110-11. The university provided them with fringe benefits, including medical coverage. They performed many tasks for which their employer, the university, was compensated, and they were entrusted with important decisions, such as writing prescriptions, admitting and discharging patients, and performing surgeries with little or no supervision. *Id.* at 112.

The university had argued that the group's compensation had no relation to the hours they worked, that not all interns have a medical license, and that the important functions performed by the students was part of their education and not a means of generating revenue for the university. These arguments were rejected.

In *Prisoners' Labor Union at Marquette v Department of Corrections*, 61 Mich App 328 (1975), this Court faced the question of whether state prisoners who provided labor under the Correctional Industries Act were public employees for purposes of PERA. This Court noted that: "An all-inclusive operational definition of the term 'public employee' is not included in PERA. Instead, we [have the] language in M.C.L.A. § 423.202." *Id.* at 330. It noted the definition neither included nor excluded prisoners specifically. *Id.*

This Court then examined the details of the Correctional Industries Act. While this Court recognized that the act set up "trappings of conventional employment," it held the act's primary purpose was corrections, not employment. *Id*. at 332-33. Specifically, this Court noted "education, counseling, treatment and recreation are viewed as the primary end served by providing work experience for inmates." *Id*. at 336. Thus, although it did not apply the four-factored test, this Court determined that the prisoners were not public employees under PERA.

Michigan courts have recognized doctrines involving multiple public-sector employers. *St Clair Prosecutor v AFSCME*, 425 Mich 204 (1986). In *St Clair Prosecutor*, the Michigan Supreme Court adjudicated the question of who should serve as the public employer during collective bargaining with the county's assistant prosecutors. In rendering its decision, the court recognized the concept of "coemployers." *Id.* at 227.

The Michigan Supreme Court held that the coemployer concept can be helpful where day-to-day control and budgetary control of public employees are split. *Id*. at 233. The court noted that, by statute, the St. Clair prosecutor had the ability to "appoint supervise, and terminate" assistant prosecutors, while St. Clair County, through its board of supervisors, has the power "to control the number and remuneration" of the assistant prosecutors. *Id*. at 226. The court therefore held that

the county prosecutor and the county board were coemployers that both had a right to sit at the collective bargaining table. *Id.* at 227.[21]

In *Saginaw Stage Employees, Local 35, IASTE v Saginaw*, 150 Mich App 132 (1986), this Court sought to determine whether the city of Saginaw was a public employer under PERA in the case of stagehands at the Saginaw Civic Center. The stagehands performed work for the city, but the Saginaw Stage Employees union was responsible for hiring and firing them, distributing their hourly pay, and deciding which of them worked when the city needed extra help. The union filed a claim with MERC contending that its workers were city employees. MERC agreed.

This Court applied the four-factored test from *Wayne County Civil Service Commission* to determine whether there was an employer-employee relationship. *Saginaw Stage Employees*, 150 Mich App at 134-35. This court reversed MERC's finding and held that the union members were not city employees because the union, not the city, controlled the activity of the workers.

In *Holland-West Ottawa-Saugatuck Consortium v Holland Education Association*, 199 Mich App 245 (1993), three school districts formed a consortium for adult education pursuant to the Urban Cooperation Act. The Consortium later sought a determination that it, and not the individual school districts, which each

[21] In *Genessee County Social Services Workers Union v Genessee County*, 199 Mich App 717 (1993), this Court held that a county prosecutor was not a coemployer, along with the county commissioners, of the "victim-witness assistants" who acted as liaisons between the assistant prosecutors and the crime victim. *Id.* at 719. This Court accepted a MERC gloss on *St. Clair Prosecutor* that limited coemployer status to those who could hire and fire a worker and noted that the prosecutor did not have this power over the disputed workers.

had contracts with their local teachers unions, was the employer of the adult education teachers.

This Court set forth the following facts:

> The administrator of the consortium reports to a council composed of the superintendents of the participating school districts. The consortium is responsible for its own budget and financial affairs. The consortium also has contracts with community education employees and leases or rents facilities for its programs.
>
> The collective bargaining agreements between the school districts and [each] union do not include the wages, hours, and working conditions of the consortium employees. The consortium employees do not have union dues deducted from their wages. The consortium never entered into a collective bargaining agreement with the unions, which stated their preference of negotiating only with the individual school districts on behalf of the consortium adult education teachers.

Id. at 248. The local education unions claimed that under the state school code, a consortium could not be an employer. This Court noted that under the code, each school district could hire employees, and that the Urban Cooperation Act "allows school districts to exercise jointly with other school districts any power, privilege, or authority it shares in common and which each might exercise separately." *Id*. at 250. Having determined that a consortium could have employees, this Court affirmed MERC's determination that the consortium, rather than the individual school districts, was the proper employer. The four-factored test was not used to make this determination.

Two court cases led directly to the 1996 amendment of MCL 423.201(1)(e): *AFSCME v Louisiana Homes, Inc*, 203 Mich App 213 (1994), and *AFSCME v Department of Mental Health*, 215 Mich App 1 (1996). Both cases involved "joint employers," a multiple-employer doctrine that "treats two separate employers [of

the same employees] as a single unit for collective bargaining purposes." *St Clair Prosecutor*, 425 Mich at 225 n. 2.

The first case, *Louisiana Homes,* was before this Court twice. The first time it was titled *Michigan Council 25, AFSCME v Louisiana Homes, Inc*, 192 Mich App 187 (1991).

In the first decision, this Court was asked to decide whether the Michigan Department of Mental Health (DMH) was a joint employer of residential care workers at a private facility operating under an agreement with contractors to the state of Michigan. This court began by noting, "The State of Michigan is responsible for providing mental health care services." *Id*. at 188. The DMH contracted with Detroit-County Community Mental Health (CMH) to provide "residential facilities for mentally ill and mentally retarded persons" in Wayne County. *Id*. CMH, in turn, subcontracted these same services to Michigan Residential Care Alternatives (MCRA), which itself subcontracted to Louisiana Homes. This Court explained: "MCRA is a private, nonprofit organization whose membership includes residential care providers. MCRA does not operate residential facilities, but instead is primarily a lobbying organization." *Id*.

AFSCME petitioned MERC to be named the collective bargaining agent for employees at three locations operated by Louisiana Homes.[22] AFSCME designated Louisiana Homes and the DMH as joint employers, and MERC upheld this view.[23]

[22] As will be discussed below, the union initially sought to organize under the NLRA, but that request was denied because of the close ties between Louisiana Homes and the DMH. See *Michigan Community Services Inc v NLRB*, 309 F3d 348 (2002).

This Court affirmed. It noted that the DMH set "mandatory guidelines for operating a residential care facility" and that any subcontractor would be bound by those. *Id*. at 190. The CMH operated "in effect, under budget guidelines, personnel decisions and requirements, training requirements, minimum staff qualifications, and contract provisions set by DMH." *Id*. Further, any residential care facility is state-funded. *Id*. The DMH gives an allotment for personnel costs, and the facility cannot provide extra money for that expense. *Id*. at 191. Louisiana Homes hired its own workers, but those decisions were subject to approval by the Michigan Department of Social Services (DSS) as the licensing agency and the CMH as the contract agency. *Id*. at 190-91. Likewise, Louisiana Homes had the power to dismiss its employees, but this Court noted that the DMH could place a contract "in jeopardy" if an employee it wanted fired was not. *Id*. at 192. Further, the DMH mandated 120 hours of training for the workers annually, and it even had control over some day-to-day activities of Louisiana Homes' employees due to its mandates concerning their daily schedule. *Id*.

This Court applied the four-factored employer test and held that the DMH was a joint employer because more than mere licensing and the provision of grant money were present:

> Department [DMH] has extensive control over the hiring requirements of Louisiana [Homes] although it does not physically hire its employees. It also exerts extensive control, through its rules and regulations, over the day-to-day operations of the home, including the type of work that is done, how it is done, and the conditions under

[23] The Attorney General did not participate in the MERC proceedings, asserting that MERC lacked jurisdiction.

> which it is done. . . . [T]he Department's control over Louisiana [Homes'] operations **extends far beyond mere licensing requirements or the provision of funds through a grant arrangement**. Since the Department and Louisiana [Homes] share authority over Louisiana [Homes]' employees and their terms and conditions of employment, we conclude that Louisiana [Homes] and the Department are joint employers of these employees.

Id. at 192 (emphasis added).

The second *Louisiana Homes* case concerned the interplay between the NLRA and PERA. AFSCME had sought collective bargaining under PERA because the National Labor Relations Board had denied the union the ability to organize under the NLRA, specifically because "an employer health-care institution like Louisiana Homes" was too closely affiliated with an arm of the state, i.e. Michigan's DMH. *Louisiana Homes*, 203 Mich App at 216. After this Court's first decision, the Michigan Supreme Court remanded the case for a determination of whether federal pre-emption prevented entities like Louisiana Homes from being unionized under PERA. *Louisiana Homes*, 203 Mich App at 216. This Court held that pre-emption was not a concern given that the NLRB had consistently refused to allow organization in arm-of-state cases. *Id.* at 221.

After the second *Louisiana Homes* decision, the NLRB reversed itself on the arm-of-the-state doctrine and held that entities like Louisiana Homes could be organized under the NLRA. The implications of this decision were discussed in *AFSCME v Department of Mental Health*, 215 Mich App 1 (1996), the second case that led to the amendment of MCL 423.201(1)(e). This Court noted that the NLRB's action meant that there was an "insufficient showing" that "the NLRB would decline to assert its jurisdiction" and thus held that the disputed employees could

not be organized under PERA. *AFSCME v Dep't of Mental Health*, 215 Mich App at 15.

According to the Senate Fiscal Agency's Bill Analysis for 1996 PA 543, *Louisiana Homes* and *AFSCME v Dep't of Mental Health* triggered an amendment to PERA. This amendment added MCL 423.201(1)(e)(i), which states:

> Beginning March 31, 1997, a person employed by a private organization or entity that provides services under a time-limited contract with the state or a political subdivision of the state is not an employee of the state or that political subdivision, and is not a public employee.

The bill analysis indicates that the Legislature sought to prevent those who contract with the state from being employees of the state:

> This bill is needed so that the State will not be drawn into a collective bargaining relationship with thousands of private sector employees who work for contractors doing business with the State. The bill makes it clear that when the State or a political subdivision contracts with a private sector organization to provide services, the employees of that organization are not public employees simply by virtue of that contract nor is the State or political subdivision an employer of those employees by virtue of that contract.

Senate Fiscal Agency Bill Analysis, SB 1015, January 30, 1997.

In the time since the 1996 amendment, this Court has issued one decision that dealt with a public-employee question. *St Clair Co Intermediate School Dist v St Clair Co Ed Ass'n*, 245 Mich App 498 (2001). That case concerned an attempt to unionize a charter school authorized by an intermediate school district.

This Court applied the four-factored test and held that the ISD was not an employer:

> Under the relevant part of the Revised School Code and the contract between the ISD and the academy, the academy had the ultimate

> authority to hire, fire, and discipline its employees. The academy also determined the wages, benefits, and work schedule of its employees. The ISD, on the other hand, certainly had extensive oversight responsibilities required by law. However, the ISD did not exercise independent control over the academy's employees on a daily basis and to such a pervasive extent that it could reasonably be considered their employer, whether independent of or jointly with the academy. The MERC therefore did not err in dismissing the union's claim that the ISD unlawfully refused to bargain with regard to the academy's employees. Moreover, because the ISD did not employ the academy's instructional staff, the MERC also correctly dismissed the union's petition for unit clarification.

Id. at 516.

The statutory language and the body of case law concerning public employees under PERA are clear. Both show that Plaintiffs are not employees of the MHBCCC or any other public employer, such as the DHS; rather, they are independent contractors.

The statutory language, MCL 423.201(1)(e)(i), envisions that only those with long-term continual employment with a public employer will be considered public employees. Home-based day care providers do not meet that criterion. Assuming arguendo that there is a contractual relationship between a public employer and the provider, it is at best indirect, through the parent, and it is time-limited — the length of time a subsidized child is cared for, which may be only a matter of hours. A periodic, partial payment for services to benefit a third party does not represent a long-term relationship under PERA.

It is also telling that the Legislature's most recent revision of MCL 423.201(1)(e) was an attempt to reduce the opportunities for workers to be

organized into public employee unions. In effect, the Legislature was attempting to foreclose avenues to new labor concepts, not to open up novel ones.

A review of the four-factored test likewise shows that no public employment relationship is involved in the instant case. As mentioned above, there are four factors for determining whether a government entity is a public employer:

> (1) that they select and engage the employee; (2) that they pay the employee; (3) that they have the power of dismissal; and (4) that the have the power and control over the employee's conduct.

Wayne Co Civil Service Comm, 22 Mich App 294.

The parents are the ones who select and engage a particular provider, a point that is explicitly acknowledged by the "collective bargaining agreement" between the MHBCCC and the CCPTM. The parents pay for any fee not covered by the subsidy. The parents have the power of dismissal over the provider. The parents and the provider, not the MHBCCC, control the hours that care will be provided. The MHBCCC does not exercise any control over the providers' work conduct through inspections or oversight; rather, this power is exercised by Defendant DHS (and informally, by the parents). Hence, the MHBCCC in no way qualifies as a public employer of home-based day care providers under the four-factored test, and there is nothing to substantiate the claim that home-based day care providers are public employees.

Indeed, it is telling that Defendant DHS essentially insists on Plaintiffs' point of view in this case. DHS, by diverting the "union dues" from the child care subsidies, has effectively accepted the claim that Plaintiffs are members of a bargaining unit that includes both day care aides and relative care providers. Yet

DHS requires both day care aides and relative care providers to affirm as a condition of participation in CDC payment programs that they are not employees of the DHS. Specifically, a relative care provider must affirm that he or she is "considered to be self employed and not an employee of DHS." No mention is made of MHBCCC. Meanwhile, a day care aide must affirm that "the parent/substitute parent is my employer (not DHS)." Again, no mention is made of the MHBCCC. Yet both of the applications that require these affirmations indicate that they were last modified in February 2009, long after the creation of the MHBCCC.

In this Court's first *Louisiana Homes* ruling, it held that licensing requirements and grant money alone are not sufficient to create an employment relationship. In the instant case, the MHBCCC does not even reach that threshhold. Here, Defendant DHS and the parents, not the MHBCCC, are the entities that provide the payments (at least in regard to subsidized children). Here, Defendant DHS, not the MHBCCC, performs licensing, while Defendant DHS (and informally, the parents), not the MHBCCC, performs inspections.

Unlike the situation regarding *Regents of University of Michigan*, day care providers do not have a portion of their compensation withheld for "the purposes of federal income tax, state income tax, and social security coverage." Indeed, Plaintiffs receive a 1099 federal tax form from Defendant DHS — a form appropriate to an independent contractor. This 1099 form lists the compensation provided to Plaintiffs under the heading "nonemployee compensation." Also unlike

Regents of University of Michigan, no governmental unit charges or collects fees for the providers' services.

Once again, it is clear that Plaintiffs, as home-based day care providers, are not public employees of the putative public employer MHBCCC.

2. Non-PERA Michigan cases

Michigan cases outside of the field of PERA provide further support that Plaintiffs are not employees of a public employer.

In *Terrien v Zwit*, 467 Mich 56 (2002), the Michigan Supreme Court determined whether family day care homes violated a restrictive covenant prohibiting "commercial, industrial, or business uses." The four-member majority upheld the covenant that the day care activity was clearly "commercial," since it was done for a profit. Therefore, the court upheld the covenant. The dissenting justices did not dispute that family day care homes sought to make a profit; instead, the dissents questioned whether the operation of the day care activity was sufficiently intrusive to alter the character of the neighborhood. Believing it not to be, the dissents would have held that either the activity was not "commercial" as meant by the covenant or that the covenant violated public policy. *Terrien* thus shows that being a day care provider is a commercial activity, although there is debate about whether that activity is sufficiently intrusive to fall under a restrictive covenant.

Morin v Department of Social Services, 134 Mich App 834 (1984)[24] involved the question of whether a day care aide was an employee of the Department of Social Services for the purposes of workers' compensation. In *Morin*, the plaintiff was a certified day care aide hired by a parent who was eligible to have all her child care costs paid by the state due to her participation in a work-training program that predated the federal Temporary-Assistance-for-Needy-Families block grant. *Id*. at 836-37.

The day care aide, who was 16, was injured in a car accident while driving to drop the children off with the parent. The aide's father filed a worker's compensation claim and contended that the Department of Social Services was the employer.

The Worker's Compensation Appellate Board observed that the aide was hired by the parent and that together, they were the ones who arranged the work hours and duties. *Id*. at 840-41. Applying the "economic realities" test,[25] the board

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[24] A rehearing was granted in *Morin* related to issues that are not relevant here. *Morin v Dep't of Social Services*, 138 Mich App 482 (1985).

[25] In *Clark v United Technologies Automotive Inc,* 459 Mich 681 (1999), the Michigan Supreme court indicated that the "economic realities" test applied in the field of workers' compensation. That test is a four-factored test:

> (1) [the] control of worker's duties, (2) the payment of wages, (3) the right to hire and fire and the right to discipline, (4) the performance of the duties as an integral part of the employer's business towards the accomplishment of a common goal.

Id. at 688. No single factor controls. *Id.* at 689. The court further noted that "whether a business entity is a particular worker's 'employer,' as that term is used in the [Worker's Disability Compensation Act], is a question of law for the courts to decide if the evidence on the matter is reasonably susceptible of but a single reference. *Id.* at 693.

held that the aide was an independent contractor, not a department employee. *Id*. at 837-38. The board noted:

> As between [the department] and [the aide], the bargain was that the State would review [the aide]'s qualifications and, if qualified, certify her. If certified, the State would place her name on a list and would pay her if she was selected to sit by an eligible person. Until [the aide] was selected, the State had no obligation to [her] except, possibly, to give out her name when her kind of service was requested. If [the aide] was selected, the State had no obligation to pay unless she was selected by a person meeting certain criteria set by the government. Until selected, the only thing offered by [the aide] was presumably to be available and, if selected, to render adequate child care. The State derived no benefit from [the aide] being available. Only when [she] sat for an eligible person and thereby assisted in getting that person back into the work force did the State derive a benefit from [the aide].

Id. at 841.

This Court indicated that the board reached the correct legal conclusion:

> [T]he relationship between DSS and [the aide] was more akin to that of employer-contractor than employer-employee. DSS exerted no control over [the aide]'s duties nor did DSS have the right to hire or fire [the aide]. While DSS was responsible for plaintiff's compensation, it is also clear that DSS intended payment to be made to [the aide] through [the parent] since the draft was made payable to both. Materials or equipment were supplied by [the aide] or [the parent] and not by DSS. [The aide] held herself out to the public as a babysitter, a job customarily performed in the capacity of a contractor, and [the aide] could and did perform the same service for others.

Id. at 841-42.

The Michigan Supreme Court adopted the *Morin* ruling as a baseline in *Walker v Department of Social Services*, 428 Mich 389 (1987). The court held that unlike the day care aide in *Morin*, the home-care worker in *Walker* was an employee of the DSS for purposes of a worker's compensation claim. The court noted some key differences between *Walker* and *Morin*: In *Walker*, the provider was hired directly

by the agency; the agency set forth the duties of the job; and the agency visited the home on a monthly basis to check on the provider. *Id*. at 393-94.

The facts in *Morin* are nearly identical to those in the instant case. A subsidy payment is sent directly to the child care provider, bypassing the parent. But as noted above, the subsidy payments usually do not cover the full amount of child care costs agreed on by the parent and the provider. Unlike the home care providers in *Walker*, the day care providers are hired by the parents; the times and compensation are set between the parent and the provider; and the DHS does not do monthly checks on day care providers.

It appears that the economic-realities test does not materially differ from the four-factored PERA test. As shown above, Plaintiffs are not employees of the MHBCCC under the PERA test. And *Morin* and *Walker* indicate that home-based day care providers are independent contractors, not public employees under the economic-realities test. Hence, to the extent that there is any difference between the two tests, the results would be the same: Plaintiffs are clearly not employees of the MHBCCC.

3. Other states' cases

In *Rhode Island v State Labor Relations Board*, 2005 WL 3059297, No CA 04-1899 (November 14, 2005),[26] the Rhode Island Superior Court rejected an attempt to unionize 1300 certified home-based day care workers. There was no law creating

[26] An online copy of this decision can be found at http://www.courts.ri.gov/superior/pdf/04-1899.pdf (last accessed September 15, 2009).

an employer, nor was there an executive order purporting to create one. The union was seeking to organize against the state, while the state claimed it was not an employer and therefore could not be organized against.

The court looked at various factors to determine whether the providers were public employees. The court rejected the idea that a criminal background check is "indicative of state employment" since the state requires such checks of many professions, such as nurses, prospective attorneys, private school teachers, and camp counselors, all of whom are not state employees. *Id.* at * 6. The court also rejected a claim that the state had control of the work environment. It noted that whatever health, safety, and fire prevention requirements applied were universal to "all child care facilities, regardless of whether or not they involve state funding through DHS." *Id.* The court emphasized, "These are basic regulations that exist to ensure the safety of children." *Id.*

The provider's freedom in hiring assistants was also emphasized: The court observed that providers could decide whom to hire, how much to pay them, and their work hours. The state had only limited criteria regarding the hiring of assistants. *Id.* at * 7.

The court set forth a number of other factors tending to show a provider's independence:

> A provider's work is done at the provider's home with the provider's furnishings. The provider furnishes its own instrumentalities and tools. All of the work is performed at the provider's private residence, and the State does not have the right to assign any children to the provider. The provider unilaterally controls the hours and days of operation and may unilaterally change them at any time. The provider

> unilaterally decides when to take vacation, how much vacation time to take, and how often to take vacation. The provider decides whom to hire and how to pay assistants. . . . Finally, the State is not in business with home day care providers, and there is no tax involvement by the State other than its duty to report to the IRS any funding forwarded to a provider through DHS.

Id. at * 7.

The court concluded that regulation does not equal control:

> Although the Court recognizes that home day care is a highly regulated industry, substantial regulation does not necessarily equate to the control required to create an employer/employee relationship between the State and anyone who chooses to become a provider.

Id.

Rhode Island v State Labor Relations Board strongly supports a holding that Plaintiffs are not employees of any public employer. The situation clearly differs from Michigan's only in that Michigan regulations limit providers to 20 vacation or personal days annually when children are being cared for in the providers' homes. R 400.1903(1)(a)(i). Regardless, the provider has unlimited discretion in how to use those days, and this slight regulatory difference, is not sufficient to distinguish the case.

Hence, PERA, the case law interpreting it, Michigan law from other fields, all clearly show that home-based day care providers are not employees of a public employer and thus cannot be organized as public employees. That the Rhode Island court reached the same conclusion is further evidence of the clarity of the proposition that home-based day care providers are not public employees.

II. Due to state constitutional impediments, the MHBCCC does not have the right to engage in collective bargaining with a public employee union purporting to represent home-based day care providers.

A. Standard of Review

As noted above, Plaintiffs have the burden of showing their entitlement to the issuance of a writ of mandamus.

B. Argument

1. The "interlocal agreement" between the DHS and Mott Community College was improper.

The interlocal agreement reached between the DHS and Mott Community College is ineffective under the express terms of Const 1963 art 7 § 28. That provision states in pertinent part:

> The legislature by general law shall authorize two or more counties, townships, cities, villages or districts, or any combination thereof among other things to: enter into contractual undertakings or agreements with one another or with the state or with any combination thereof for the joint administration of any of the functions or powers which each would have the power to perform separately; share the costs and responsibilities of functions and services with one another or with the state or with any combination thereof which each would have the power to perform separately; transfer functions or responsibilities to one another or any combination thereof upon the consent of each unit involved; cooperate with one another and with state government; lend their credit to one another or any combination thereof as provided by law in connection with any authorized publicly owned undertaking.

Id. (emphasis added). An interlocal agreement requires at least two local governmental entities. The interlocal agreement that sought to create the Michigan Home Based Child Care Council was between "the DEPARTMENT OF HUMAN SERVICES, a principal department of the State of Michigan, and MOTT

COMMUNITY COLLEGE, a Michigan public body corporate established under the Community College Act." Complaint, Exhibit 7 at 2. Thus, that document just involves one local government entity — Mott Community College — and the agreement does not meet the conditions of Const 1963, art 7, § 28.

The Address to the People regarding Const 1963, art 7, § 28 refers to local governments only, not state government, and explains the section's purpose is to solve metropolitan problems:

> This is a new section designed to encourage the solution of metropolitan problems through existing units of government rather than creating a fourth layer of local government. Local governments are allowed to join in a variety of ways to work out together the solutions to their joint problems.
>
> This is to be done by agreement of the units of government involved and no unit will be compelled to enter into any agreement. Possible abuses are prevented by providing overall control by general acts of the legislature.
>
> Because this work is to be carried on by local governments, officials (except members of the Legislature) are allowed to serve on the boards. The last sentence provides that such service is not in conflict with other provisions of this constitution.

2 Official Record, Constitutional Convention 1961, p 3394. Even assuming that an interlocal agreement is valid with only one local government participating, it is unclear how the creation of the MHBCCC accords with the peoples' intent in enacting art 7, § 28 — i.e., finding local solutions to metropolitan problems.

2. Interlocal agreements do not confer legislative powers upon the contracting parties.

The Urban Cooperation Act indicated that "a public agency . . . may exercise jointly with any other public agency . . . any power, privilege, or authority that the

agencies share in common and that each might exercise separately." MCL 124.504. The act requires interlocal agreements to be contracts, and it allows the parties to stipulate in the agreement:

> (g) The manner of employing, engaging, compensating, transferring, or discharging necessary personnel, subject both to the provisions of applicable civil service and merit systems, and the following restrictions:
>
> > (i) The employees who are necessary for the operation of an undertaking created by an interlocal agreement, shall be transferred to and appointed as employees subject to all rights and benefits. These employees shall be given seniority credits and sick leave, vacation, insurance, and pension credits in accordance with the records or labor agreements from the acquired system. . . . If the employees of an acquired system were not guaranteed sick leave, health and welfare, and pension or retirement pay based on seniority, the political subdivision shall not be required to provide these benefits retroactively.
> >
> > (ii) An employee who is transferred to a position with the political subdivision shall not, by reason of the transfer, be placed in any worse position with respect to worker's compensation, pension, seniority, wages, sick leave, vacation, health and welfare insurance, or any other benefits that the employee enjoyed as an employee of the acquired system.

MCL 124.505(g). The contract may also include a provision on the "manner in which purchases shall be made and contracts entered into." MCL 124.505(i).

Not surprisingly, the Urban Cooperation Act is entirely silent about the concept of collective bargaining, since that subject is exhaustively covered by PERA. But under PERA, as noted above in Argument I, neither Plaintiff can be considered an employee of the MHBCCC, nor can that entity be considered the employer of either Plaintiff.

Furthermore, Const 1963, art 3, § 7 requires that: "The common law and the statute laws now in force, not repugnant to this constitution, shall remain in force until they expire by their own limitations, or are changed, amended or repealed." A review of the common law shows that public-sector bargaining was improper prior to the enactment of the 1963 Michigan Constitution.

On July 25, 1941, for instance, the Attorney General entered an opinion that would "apply with equal force to all departments, boards, commissions, and other agencies of state government, counties, municipalities, boards of education; in fact any and all branches of the government while engaged in the performance of a governmental function." OAG, 1941-1942, p 247 (July 25, 1941).[27] In this opinion, the Attorney General stated:

> In the industrial field collective bargaining has been adopted as a method of solving private labor disputes. However, because of fundamental concepts and principles of government, it is obvious that collective bargaining cannot apply to public employment and public labor which involves the expenditures of public funds.

Id.

The Michigan Supreme Court has described the 1941 state of thought regarding public-sector collective bargaining: "The thought of strikes by public employees was unheard of. The right of collective bargaining, applicable at the time to private employment, was then in its comparative infancy and portended no suggestion that it ever might enter the realm of Public employment." *Wayne Co Civil Service Comm,* 384 Mich at 372.

[27] The Attorney General did not assign numbers to opinions at that time.

In 1943, in *Fraternal Order of Police v Harris*, 306 Mich 68 (1943), the Michigan Supreme Court upheld the firing of a police officer for joining the Fraternal Order of Police. The majority stated that "those who enforce the law, must necessarily surrender, while acting in such capacity, some of their presumed private rights," such as the right to join an association. *Id.* at 79. In May 1947, the Michigan Supreme Court upheld the firing of a police officer on identical grounds in *State Lodge of Michigan, Fraternal Order of Police v Detroit*, 318 Mich 182 (1947).

In June 1947, the Attorney General entered an opinion indicating that a road commission could not engage in collective bargaining with a union. OAG 1947-1948, No 29, p 170 (June 6, 1947).

On July 3, 1947, the Hutchinson Act was passed. It allowed "a majority of any given group of public employees evidenced by a petition signed by said majority and delivered to the labor mediation board" to have their grievances mediated by that board. 1947 PA 116 § 7. This act also stipulated that striking public employees could be dismissed from their jobs and stripped of their pension and retirement benefits. *Id.* at §§ 2, 4.

In August 1947, the Attorney General entered a third opinion indicating that public-sector collective bargaining was improper. OAG 1947-1948, No 496, p 380 (August 12, 1947). In March 1951, the Attorney General entered a fourth opinion indicating that public entities could not engage in collective bargaining with a union. OAG 1951-1952, No 1368, p 205 (March 21, 1951).

In 1952, the Michigan Supreme Court upheld the Hutchinson Act against a constitutional attack. *Detroit v Street Electric Ry & Motor Coach Employees Union*, 332 Mich 237 (1952). The court held that under common law, there was no right for public employees to strike. *Id*. at 248. Thus, prior to the Michigan Constitutional Convention of 1961, the common law regarding public-employee collective bargaining was that public entities could not engage in collective bargaining, that at least some employees (police) could be fired for joining unions,[28] and that public employees did not have a right to strike. Nothing in the language of either Const 1963, art 7, § 28 or the Urban Cooperation Act allows a state department through a contract with a local agency to change the common-law presumption against collective bargaining.

PERA was a significant change from the common law, and it allowed many workers to be classified as public employees who could engage in collective bargaining. Nevertheless, any expansion of the people covered by PERA would be a further change, amendment, or repeal of the common law, and it would necessarily require Legislative action. This is so because all Legislative power of the State is vested in the Legislature. Const 1963, art 4, § 1.

Indeed, the necessity of legislative action is doubly emphasized in the case of public-sector bargaining, since the topic is addressed by Const 1963, art 4, § 48, which states: "The legislature may enact laws providing for the resolution of

[28] In *Escanaba v Labor Mediation Board*, 19 Mich App 273 (1969), following the enactment of PERA, this Court stated that police officers were entitled to join the labor union of their choice since they were public employees under MCL 423.202 as it stood at the time.

disputes concerning public employees, except those in the classified civil service." The Address to the People stated in pertinent part that this provision was meant "to make it clear that the legislature has the power to establish procedures for settling disputes in public employment. The section does not specify what the procedure shall be, but leaves the decision to future legislatures." 2 Official Record, Constitutional Convention 1961, Address to the People, p 3377 (emphasis added).

In fact, in 1965, shortly after the new constitution was adopted, the Legislature exercised this power in order to change much of the law related to public-sector collective bargaining with the enactment of PERA, which principally authorized public-sector collective bargaining while retaining some portions of the Hutchinson Act, such as the prohibition on strikes by public employees.

If the state of Michigan wishes to permit the creation of a public-employee union of all private-sector day care providers who receive a state subsidy, it must accomplish this dramatic shift from the traditional employer-employee model through the passage of legislation. This is due to specific requirements of Michigan's Constitution. Note that in some states legislative action is not required. In Maryland, for example, the Maryland Court of Appeals held that under its constitution, an executive order could properly allow a union to become a collective bargaining agent for home-based day care providers in bargaining with the governor's designee. *Maryland v Maryland State Family Child Care Ass'n*, 966 A2d 939 (Md App 2009).

But in Michigan, such a sweeping change in public-sector labor law cannot be accomplished by the executive department either on its own or in conjunction with local government. This renders improper and illegal the DHS' garnishing of purported "union dues" from the CDC subsidies legally owed to home-based day care providers who look after children from qualified needy families.

RELIEF REQUESTED

For the reasons set forth above, Plaintiffs request that this Court enter a writ of mandamus against the DHS to prevent further improper diversions of the home-based day care providers' subsidy checks to purported "union dues."

Respectfully Submitted,

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Dated: September 16, 2009