

STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL



P.O. Box 30212
LANSING, MICHIGAN 48909

BILL SCHUETTE
ATTORNEY GENERAL

May 24, 2012

Honorable Paul E. Opsommer
State Representative
The Capitol
Lansing, MI 48909

Dear Representative Opsommer:

Attorney General Schuette has asked me to respond to your letter asking whether union dues may continue to be deducted from subsidies paid to home help care providers in light of a recent amendment to the Public Employment Relations Act (PERA), MCL 423.201 *et seq.*

2012 PA 76 was signed by the Governor on April 10 and became effective immediately. See Const, art 4, § 27. (See attached). The Act amended PERA's definition of "public employee" to expressly exclude a person employed by an organization or entity who receives a direct or indirect government subsidy:

(e) "Public employee" means a person holding a position by appointment or employment in the government of this state, in the government of 1 or more of the political subdivisions of this state, in the public school service, in a public or special district, in the service of an authority, commission, or board, or in any other branch of the public service, subject to the following exceptions:

(i) A person employed by a private organization or entity who provides services under a time-limited contract with this state or a political subdivision of this state or who receives a direct or indirect government subsidy in his or her private employment is not an employee of this state or that political subdivision, and is not a public employee. This provision shall not be superseded by any interlocal agreement, memorandum of understanding, memorandum of commitment, or other document similar to these. [MCL 423.201(1)(e)(i) (emphasis added).]

The genesis for this amendment is fairly restated in the legislative analysis for the Act. See Senate Legislative Analysis, SB 1018, March 28, 2012. (See attached). But briefly, the Department of Human Services and the Department of Community Health (DCH) administer a program that supports services to individuals who are eligible for Medicaid and need assistance with personal care activities. The services are provided by workers who are selected by the recipients but paid through a subsidy administered by DCH. *Id.*

In 2004, DCH entered into an interlocal agreement with the Tri-County Aging Consortium, which created the Michigan Quality Community Care Council (MQCCC) to coordinate personal assistance services, as well as maintain a registry of home help providers in designated communities. In 2005, and on the premise that the home help providers were “public employees” of the MQCCC, an election was held under PERA allowing the providers to unionize and be represented by the Service Employees International Union (SEIU) Healthcare Michigan. The MQCCC also entered into a collective bargaining agreement with the home help providers that covers wages, benefits, and conditions of employment. *Id.* Pursuant to the interlocal agreement and the collective bargaining agreement, union dues have been routinely deducted from the providers’ subsidy payments. State funding for the MQCCC was later eliminated in fiscal year 2011-2012. *Id.*¹

Subsequently, a dispute arose regarding whether the home help providers were “public employees” entitled to organize under PERA. Ultimately, the Legislature enacted 2012 PA 76, which amended PERA to specifically address this issue by providing that persons employed by private individuals but paid through government subsidies are not public employees. MCL 423.201(1)(e)(i). The Act further provides that an election shall not be directed for a bargaining unit of “a public employer consisting of individuals who are not public employees. A bargaining unit that is formed or recognized in violation of this subsection is invalid and void.” MCL 423.214(2). Finally, the Act expressly provides that it “is curative, reflects the original intent of the legislature, and is retroactive.” 2012 PA 76 (enacting section 1).

It is understood that DCH is continuing to deduct or withhold union dues from the payments it processes for the home help providers under an agreement with the MQCCC. You ask whether the dues withholding must cease under the terms of 2012 PA 76 or for “other legal considerations irrespective of the statutory change.”

“In determining whether a statute should be applied retroactively or prospectively only, [t]he primary and overriding rule is that legislative intent governs. All other rules of construction and operation are subservient to this principle.” *Frank W Lynch v Flex Technologies, Inc*, 463 Mich 578, 583; 624 NW2d 180 (2001) (citation omitted). Statutes are presumed to apply prospectively only unless a contrary intent is clearly manifested. *Id.* And an amendment that affects substantive or vested rights will not be construed to apply retroactively unless the Legislature clearly expressed such an intent. *Hurd v Ford Motor Co*, 423 Mich 531, 535; 377 NW2d 300 (1985); *Franks v White Pine Copper Division*, 422 Mich 636, 671-674; 375 NW2d 715 (1985); *Cipri v Bellingham Frozen Foods, Inc*, 213 Mich App 32, 37; 539 NW2d 526 (1995).

Here, the Legislature’s intent that the Act be applied retroactively is “clear, direct, and unequivocal.” *Davis v State Employees Retirement Board*, 272 Mich App 151, 155-156; 725 NW2d 56 (2006). Again, the Act expressly provides that it is “retroactive.” 2012 PA 76 (enacting section 1). And under a retroactive application of the Act, the prior election and creation of the bargaining unit for home help providers is invalid and void because the providers are not public employees, regardless of the terms of the existing interlocal agreement, the collective bargaining agreement, or any other agreement. MCL 423.201(1)(e)(i) and 423.214(2). As a result, there is no legitimate or legal basis upon which DCH may continue to withhold union dues from providers’ payments.

¹ DCH has taken steps to terminate the interlocal agreement, which will occur under its terms on or about April 12, 2013. The collective bargaining agreement is set to expire November 15, 2012.

Furthermore, the 2005 election resulting in the organization of home help providers and their representation by the SEIU was likely unlawful. That is because even under the pre-amendment version of PERA, home help providers could not be considered “public employees” eligible to organize since they are employed by the private individuals they serve, not a public entity. See MCL 423.201 (“Public employee’ means a person holding a position by . . . employment in the government of this state, in the government of 1 or more of the political subdivisions of this state . . . in the service of an authority, commission, or board, or in any other branch of the public service.”); Mich Admin Code, R 400.1104.

As a result, the election and events that flowed from it, including the negotiation of the collective bargaining agreement, were void *ab initio*. See *Bloomfield Estates Improvement Ass'n, Inc v City of Birmingham*, 479 Mich 206, 212; 737 NW2d 670 (2007) (Contracts must be enforced as written, “unless a contractual provision would violate law or public policy.”) (internal italics, ellipses, quotation marks, citations and brackets omitted; emphasis added); *Morris & Doherty, PC v Lockwood*, 259 Mich App 38, 54-58; 672 NW2d 884 (2003) (Holding contract for referral fee void *ab initio* because it violated public policy.)

Notably, this result does not present an impairment of contract issue, at least with respect to terminating the dues withholding. See Const 1963, art 1, § 10.² This is because halting the dues withholding does not substantially burden the contractual relationship between the home help providers and their purported employer, MQCCC. *Health Care Ass'n Workers Comp Fund v Dir of Bureau of Workers Comp*, 265 Mich App 236, 243; 694 NW2d 761 (2005) (“[I]f the impairment of a contract is only minimal, there is no unconstitutional impairment of contract.”) Moreover, even a statute that substantially impairs a contractual provision does not violate the Constitution if there is a significant and legitimate public purpose for the regulation and the means adopted to implement the legislation are reasonably related to the public purpose. *Wayne Co Bd of Comm'rs v Wayne Co Airport Auth*, 253 Mich App 144, 163-164; 658 NW2d 804 (2002), citing *Blue Cross & Blue Shield of Michigan v Governor*, 422 Mich 1, 23; 367 NW2d 1 (1985).

Thank you for forwarding this matter to our attention. If you have any questions, please do not hesitate to contact this office.

Sincerely yours,



Richard A. Bandstra
Chief Legal Counsel

Att.

² Since your request only inquired as to the dues withholding requirement, this letter does not address other provisions of the collective bargaining agreement.

Act No. 76
Public Acts of 2012
Approved by the Governor
April 9, 2012
Filed with the Secretary of State
April 10, 2012
EFFECTIVE DATE: April 10, 2012

**STATE OF MICHIGAN
96TH LEGISLATURE
REGULAR SESSION OF 2012**

Introduced by Senators Hildenbrand, Pavlov, Booher, Colbeck, Kowall, Robertson, Emmons, Proos, Brandenburg, Walker, Caswell, Casperson, Jones, Hansen, Meekhof, Moolenaar, Pappageorge, Green, Marleau, Jansen, Schuitmaker, Hune, Nofs and Richardville

ENROLLED SENATE BILL No. 1018

AN ACT to amend 1947 PA 336, entitled "An act to prohibit strikes by certain public employees; to provide review from disciplinary action with respect thereto; to provide for the mediation of grievances and the holding of elections; to declare and protect the rights and privileges of public employees; to require certain provisions in collective bargaining agreements; to prescribe means of enforcement and penalties for the violation of the provisions of this act; and to make appropriations," by amending sections 1 and 14 (MCL 423.201 and 423.214), section 1 as amended by 2012 PA 45.

The People of the State of Michigan enact:

Sec. 1. (1) As used in this act:

(a) "Bargaining representative" means a labor organization recognized by an employer or certified by the commission as the sole and exclusive bargaining representative of certain employees of the employer.

(b) "Commission" means the employment relations commission created in section 3 of 1939 PA 176, MCL 423.3.

(c) "Intermediate school district" means that term as defined in section 4 of the revised school code, 1976 PA 451, MCL 380.4.

(d) "Lockout" means the temporary withholding of work from a group of employees by means of shutting down the operation of the employer in order to bring pressure upon the affected employees or the bargaining representative, or both, to accept the employer's terms of settlement of a labor dispute.

(e) "Public employee" means a person holding a position by appointment or employment in the government of this state, in the government of 1 or more of the political subdivisions of this state, in the public school service, in a public or special district, in the service of an authority, commission, or board, or in any other branch of the public service, subject to the following exceptions:

(i) A person employed by a private organization or entity who provides services under a time-limited contract with this state or a political subdivision of this state or who receives a direct or indirect government subsidy in his or her private employment is not an employee of this state or that political subdivision, and is not a public employee. This provision shall not be superseded by any interlocal agreement, memorandum of understanding, memorandum of commitment, or other document similar to these.

(ii) If, by April 9, 2000, a public school employer that is the chief executive officer serving in a school district of the first class under part 5A of the revised school code, 1976 PA 451, MCL 380.371 to 380.376, issues an order determining that it is in the best interests of the school district, then a public school administrator employed by that school district is not a public employee for purposes of this act. The exception under this subparagraph applies to public school administrators employed by that school district after the date of the order described in this subparagraph whether or not the chief executive officer remains in place in the school district. This exception does not prohibit the chief executive officer or board of a school district of the first class or its designee from having informal meetings with public school administrators to discuss wages and working conditions.

(iii) An individual serving as a graduate student research assistant or in an equivalent position and any individual whose position does not have sufficient indicia of an employer-employee relationship using the 20-factor test announced by the internal revenue service of the United States department of treasury in revenue ruling 87-41, 1987-1 C.B. 296 is not a public employee entitled to representation or collective bargaining rights under this act.

(f) "Public school academy" means a public school academy or strict discipline academy organized under the revised school code, 1976 PA 451, MCL 380.1 to 380.1852.

(g) "Public school administrator" means a superintendent, assistant superintendent, chief business official, principal, or assistant principal employed by a school district, intermediate school district, or public school academy.

(h) "Public school employer" means a public employer that is the board of a school district, intermediate school district, or public school academy; is the chief executive officer of a school district in which a school reform board is in place under part 5A of the revised school code, 1976 PA 451, MCL 380.371 to 380.376; or is the governing board of a joint endeavor or consortium consisting of any combination of school districts, intermediate school districts, or public school academies.

(i) "School district" means that term as defined in section 6 of the revised school code, 1976 PA 451, MCL 380.6, or a local act school district as defined in section 5 of the revised school code, 1976 PA 451, MCL 380.5.

(j) "Strike" means the concerted failure to report for duty, the willful absence from one's position, the stoppage of work, or the abstinence in whole or in part from the full, faithful, and proper performance of the duties of employment for the purpose of inducing, influencing, or coercing a change in employment conditions, compensation, or the rights, privileges, or obligations of employment. For employees of a public school employer, strike also includes an action described in this subdivision that is taken for the purpose of protesting or responding to an act alleged or determined to be an unfair labor practice committed by the public school employer.

(2) This act does not limit, impair, or affect the right of a public employee to the expression or communication of a view, grievance, complaint, or opinion on any matter related to the conditions or compensation of public employment or their betterment as long as the expression or communication does not interfere with the full, faithful, and proper performance of the duties of employment.

Sec. 14. (1) An election shall not be directed in any bargaining unit or any subdivision within which, in the preceding 12-month period, a valid election was held. The commission shall determine who is eligible to vote in the election and shall promulgate rules governing the election. In an election involving more than 2 choices, if none of the choices on the ballot receives a majority vote, a runoff election shall be conducted between the 2 choices receiving the 2 largest numbers of valid votes cast in the election. An election shall not be directed in any bargaining unit or subdivision thereof where there is in force and effect a valid collective bargaining agreement that was not prematurely extended and that is of fixed duration. A collective bargaining agreement does not bar an election upon the petition of persons not parties thereto if more than 3 years have elapsed since the agreement's execution or last timely renewal, whichever was later.

(2) An election shall not be directed for, and the commission or a public employer shall not recognize, a bargaining unit of a public employer consisting of individuals who are not public employees. A bargaining unit that is formed or recognized in violation of this subsection is invalid and void.

Enacting section 1. This amendatory act is curative, reflects the original intent of the legislature, and is retroactive.

This act is ordered to take immediate effect.

Carol Morey Viventi

Secretary of the Senate

Ray E. Randall

Clerk of the House of Representatives

Approved

.....
Governor



Senate Fiscal Agency
P. O. Box 30036
Lansing, Michigan 48909-7636



BILL ANALYSIS

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Senate Bill 1018 (Substitute S-1 as passed by the Senate)
Sponsor: Senator Dave Hildenbrand
Committee: Reforms, Restructuring and Reinventing

(as enrolled)

Date Completed: 3-28-12

RATIONALE

A program called Home Help Services is administered by the Department of Human Services (DHS) and the Department of Community Health (DCH), and funded through the DCH. The program supports services to individuals who are eligible for Medicaid and need assistance with personal care activities, such as eating, bathing, and dressing, as well as household chores. The services are provided by workers who are selected by the recipients and paid by the State. In 2004, the DCH entered into an Interlocal agreement with the Tri-County Aging Consortium (the Area Agency on Aging that serves Clinton, Eaton, and Ingham Counties) under the Urban Cooperation Act. The agreement created the Michigan Quality Community Care Council (MQCCC) to coordinate personal assistance services, as well as maintain a registry of providers in designated communities. As the result of an election held in 2005 under Michigan's public employment relations Act (PERA), the MQCCC recognized a labor organization, Service Employees International Union (SEIU) Healthcare Michigan, as the bargaining representative of these Home Help workers. Many people do not consider these workers to be public employees, however, and believe that SEIU Healthcare Michigan should not be recognized as their bargaining representative.

The public employment relations Act authorizes public employees to form labor unions, and governs collective bargaining between public employers and representatives of their employees. A public employer may voluntarily recognize a

bargaining representative of its employees but, if it does not, the employees or a labor organization may submit cards or file a petition for an election with the Michigan Employment Relations Commission (MERC). This took place with respect to the Home Help workers in 2005. Evidently, some 43,000 ballots were sent to the workers, who returned 6,949 "yes" votes and 1,007 "no" votes (and 589 spoiled ballots), and a contract was ratified in 2006.

Although State funding for the MQCCC was eliminated in fiscal year 2011-12, the agency receives support from other sources and continues to serve as the public employer of the workers for purposes of PERA, and the DCH continues to deduct union dues from their payments.

CONTENT

The bill would amend the public employment relations Act to do the following:

- Exclude from the definition of "public employee" a person who receives a government subsidy in his or her private employment.
- Provide that the exclusion could not be superseded by an interlocal agreement, memorandum of understanding or commitment, or similar document.
- Prohibit the recognition of a bargaining unit consisting of individuals who are not public employees.

-- **Invalidate a bargaining unit formed or recognized in violation of that prohibition.**

The Act's definition of "public employee" includes a person holding a position by appointment or employment in State or local government, in the public school service, and in any other branch of the public service, subject to exceptions. One of the exceptions applies to a person employed by a private organization or entity who provides services under a time-limited contract with the State or a political subdivision of the State.

Under the bill, the term "public employee" also would exclude a person employed by a private organization or entity who receives a direct or indirect government subsidy in his or her private employment. This provision could not be superseded by any interlocal agreement, memorandum of understanding, memorandum of commitment, or other similar document.

The Act provides for an election to be held when public employees submit a petition alleging that 30% or more of the public employees in a unit wish to be represented for collective bargaining. The Michigan Employment Relations Commission (MERC) must promulgate rules governing the election.

The bill would prohibit an election from being directed for, and would prohibit MERC or a public employer from recognizing, a bargaining unit of a public employer consisting of individuals who are not public employees. A bargaining unit that was formed or recognized in violation of this prohibition would be invalid and void.

The bill states, "This amendatory act is curative, reflects the original intent of the legislature, and is retroactive."

MCL 423.201 & 423.214

ARGUMENTS

(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)

Supporting Argument

Workers in the Home Help Services program essentially are independent contractors who

are hired by the clients they serve. According to the DHS brochure describing the program, "Home Help clients employ their own providers. Providers are not employed by the DHS or the state of Michigan." The interlocal agreement that created the MQCCC describes a provider as an individual "employed by" a consumer receiving the services. The agreement also defines "Home Help Program" as programs through which payments are made *on behalf of* eligible individuals to personal assistance services providers. In addition, responsibilities of the MQCCC under the agreement include, "Supporting the direct employment by Consumers of Providers selected by Consumers", and "Assisting Consumers in making their decision on whom to employ...".

While the interlocal agreement makes it clear that the recipients of Home Help Services are supposed to be the employers of the workers, the agreement does not appear to establish an employment relationship between the MQCCC and the workers. The agreement makes the Council responsible for "providing certain employer-related services" and "functioning as an employer of record", and requires the Council to "fulfill its responsibilities as a public employer subject to [PERA]". The agreement does not indicate, however, that these requirements pertain to the MQCCC's relationship with Home Help workers, rather than its own personnel, whom the agreement authorizes the Council to employ. Ultimately, there appears to be nothing in the agreement that expressly authorized the MQCCC to recognize SEUI Healthcare Michigan as the workers' bargaining representative. Furthermore, even if the MQCCC is a public employer, the workers are not public employees simply because the money that is used to pay them is provided by the government.

Senate Bill 1018 (S-1) would address this situation, and others like it that might arise, by making it clear in PERA that a privately employed individual who directly or indirectly receives a governmental subsidy in that employment is not a public employee for purposes of the Act. In this case, the Home Help workers are privately employed by the program recipients, and the source of their wages is the government subsidy that supports the Home Help Services program. Since these workers could not be considered

public employees under the bill, SEUI Healthcare Michigan could not be recognized as their bargaining representative, notwithstanding the Interlocal agreement that created the MQCCC.

Opposing Argument

The bill would invalidate what was a legitimate election under PERA. The Bureau of Employment Relations, which provides staff for MERC, would not have conducted the election if it had not received cards or petitions signed by at least 30% of the members of the bargaining unit, as required by law. A clear majority of the votes were in favor of joining the union and, according to the Bureau director, it is not unusual for a low percentage of ballots to be returned. The Bureau had no reason to question the authority of the MQCCC to certify the bargaining unit. As pointed out above, the Interlocal agreement clearly identifies the Council as a "public employer". While the Home Help workers are employed by the recipients, the MQCCC is a co-employer for purposes of PERA. Retroactively invalidating the election and the collective bargaining agreement would violate Article I, Section 10 of the U.S. and State Constitutions, which prohibit the enactment of a law impairing the obligation of contracts. The affected workers negotiated in good faith and have vested rights in the contract that governs their wages, benefits, and conditions of employment.

Furthermore, while the discussion about this bill involves Home Help workers and their membership in SEIU Healthcare Michigan, the proposed language is not limited to this situation. The bill would apply to *any* privately employed individual receiving a direct or indirect government subsidy in his or her employment.

Opposing Argument

Before the MQCCC's State funding was eliminated, the Council performed many valuable functions that benefited both the recipients and the providers who participate in the Home Help Services program. One of the MQCCC's principal responsibilities is maintaining a registry of qualified and reliable providers, which connects recipients with workers who will meet their needs and protects them from unscrupulous or incompetent individuals. The registry also helps the providers find stable employment. Although the Council still maintains a

registry, the number of listed providers is about half of what it used to be.

The interlocal agreement that created the MQCCC also made it responsible for assisting recipients in selecting a provider, developing recruitment and retention programs to expand the pool of providers, facilitating and coordinating advanced training for providers, and coordinating mentoring for consumers and providers. These and other activities helped make it possible for seniors and disabled individuals to stay in their own homes, resulting in considerable cost savings for the State. This conclusion is supported by a March 2011 report of the Anderson Economic Group, LLC, which studied the role of the MQCCC and the Home Help Services program. According to the report, the State saves \$47,000 annually for each person who is diverted from nursing facility care and into home care. The report also found that, over the past four years, the MQCCC had saved the State over \$1.1 million in unemployment payments, by monitoring the claims of providers.

Although the Home Help Services program remains in operation, it is not possible for the MQCCC to continue performing as it once did. Before it was defunded by the State, the Council had 13 full-time and two part-time employees; now, there are three part-time people on its payroll, according to the MQCCC director. This situation is unfortunate for the ill, elderly, and disabled recipients, as well as the underpaid workers, who benefited from the services provided by the Council, regardless of whether the Home Help workers were or were not in a union.

Legislative Analyst: Suzanne Lowe

FISCAL IMPACT

The bill would have no fiscal impact on State or local government.

Fiscal Analyst: Josh Sefton

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.