

**STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION**

In the Matter of:

MOSAICA ACADEMY OF SAGINAW,
Employer,

-and-

Case No. R00 C-42

MICHIGAN EDUCATION ASSOCIATION,
Petitioner.

APPEARANCES:

Braun, Kendrick, Finkbeiner, PLC, by Robert A. Kendrick, Esq, for the Employer

White, Przybylowicz, Schneider and Baird, P.C., by William Young, Esq., for the Petitioner

DECISION AND DIRECTION OF ELECTION

Pursuant to the provisions of Section 12 of the Public Employment Relations Act (hereafter "PERA"), 1947 PA 336, as amended by 1965 PA 379 and 1973 PA 25, MCL 423.212; MSA 17.455(12), this matter came on for hearing before Nora Lynch, Administrative Law Judge for the Michigan Employment Relations Commission, on May 19, 2000, at Detroit, Michigan. Based upon the entire record in this matter, including briefs filed by the parties on or before July 17, 2000, the Commission finds as follows:

The Petition:

In the petition, filed on March 29, 2000, the Michigan Education Association seeks an election in a bargaining unit of all certified teachers employed by Mosaica Academy of Saginaw. The Employer takes the position that the teachers are not public employees for purposes of PERA because they are employed by Mosaica Education Inc., a private, for-profit corporation. According to the Employer, the Commission's jurisdiction is therefore preempted by, or arguably preempted by, the National Labor Relations Act, 29 USC 150 *et seq.*, and the petition should be dismissed. The Employer also maintains that the provisions of Section 1(e)(i) of PERA support its argument that Academy teachers and staff are not public employees. At hearing, the parties agreed that should the Commission exercise jurisdiction, the appropriate unit would be: all full-time and regular part-time certified teachers, regularly assigned substitute teachers and regular non-administrative professionals, but excluding other substitute teachers and all other employees.

Statutory Background:

Consideration of the employer status of public school academies involves an examination of both the School Code and PERA. Part 6A of the Revised School Code, as amended, MCL 380.501 *et seq.*; MSA 15.4501 *et seq.*, provides for the establishment of public school academies. Section 501 reads, in pertinent part:

(1) A public school academy is a public school under section 2 of article VIII of the state constitution of 1963, is a school district for the purposes of section 11 of article IX of the state constitution of 1963 and for the purposes of section 1225, and is subject to the leadership and general supervision of the state board over all public education under section 3 of article VIII of the state constitution of 1963. A public school academy is a body corporate and is a governmental agency. The powers granted to a public school academy under this part constitute the performance of essential public purposes and governmental functions of this state.

Under Section 502, a public school academy shall be organized and administered under the direction of a board of directors which will establish bylaws. A public school academy must enter into a contract with an authorizing body which may be one of the following: (1) the board of a school district that operates grades K to 12;

(2) an
interme
diate
school
board;
(3) the
board
of a
commu
nity
college;
or (4)
the
governi
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of a
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Section

5 0 1
(2)(d)
defines
“contra
ct” as:

the executive act taken by an authorizing body that evidences the authorization of a public school academy and that establishes, subject to the constitutional powers of the state board and applicable law, the written instrument executed by an authorizing body conferring certain rights, franchises, privileges, and obligations on a public school academy, as provided by this part, and confirming the status of a public school academy as a public school in this state.

To obtain a contract, an individual or entity must make application to an authorizing body. Sec. 502(3) sets forth the requisite components of the application, including: a list of the proposed members of the board of directors and method for appointment; the proposed articles of incorporation and bylaws; the governance structure of the academy; a copy of the educational goals, the curricula to be offered, and the methods of pupil assessment; the admissions policy and criteria in compliance with section 504; the school calendar and school day schedule; the age range of pupils to be enrolled; and descriptions of staff responsibilities and the academy’s governance structure.

Under Section 502(4), the authorizing body is to engage in appropriate continuing oversight of the academy, which will be sufficient to ensure that the authorizing body can certify that the public school academy is in compliance with statute, rules, and the terms of the contract. The contract must contain all of the matters set forth in the application, as well as the educational goals to be achieved and the methods by which the authorizing body will be held accountable.

Section 503(6) of the Revised School Code provides that public school academies shall “comply with all applicable law,” including the Public Employment Relations Act, Act No. 336 of the Public Acts of 1947, being sections 423.201 to 423.217 of the Michigan Compiled Laws. Conversely, PERA makes explicit reference to public school academies. Section 1 of PERA, MCL 423.201; MSA 17.455(1), provides, in pertinent part:

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

(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.

* * *

(f) “Public school academy” means a public school academy organized under part 6a of Act No. 451 of the Public Acts of 1976, being sections 380.501 to 380.507 of the Michigan Compiled Laws.

* * *

(h) “Public school employer” means a public employer that is the board of a school district, intermediate school district, or public school academy, 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.

Facts:

Mosaica Academy of Saginaw is a Michigan non-profit corporation which was granted a contract by Saginaw Valley State University to organize and operate a public school academy under part 6A of the Revised School Code. Pursuant to that statute, a five member board of directors oversees the operation of the Academy. In August of 1997, Mosaica Academy entered into a management agreement with Mosaica Education, Inc. (hereafter “MEI”), a private, for-profit, school management company, incorporated in the state of Delaware. The term of the management agreement is five years, from August 13, 1997 to June 4, 2004. MEI also has contracts with other public school academies both within and outside of Michigan. Pursuant to the management agreement, the Academy’s board of directors may not include any director, officer or employee of MEI, and none of the voting power of the governing body of the Academy is vested in MEI.

The Academy is housed in a facility located at 5173 Lodge, Saginaw, Michigan, which it owns. There are approximately 75 employees at the facility, including a principal, an assistant principal, curriculum directors, a speech pathologist, 28 regular teachers, 2 rotating substitute teachers, social workers, academic, supervisory, and lunch room aides, and custodians. The principal of the Academy is Dolores Howe. She was hired by MEI in June of 1998 and reports to Michael Holmes, MEI Vice President for Curriculum and Operations. Howe is responsible for managing the day to day operation of the Academy, including all matters involving students, teachers, and parents in the building. Howe interviews and hires teachers according to the needs of the Academy. Teachers

at the Academy are certified through the State of Michigan and must be assigned in accordance with that certification. If a parent has a complaint about a teacher, they would first discuss it with the principal. If the matter remained unresolved, it would then be referred to the Academy board. The board is also involved should there be a permanent expulsion of a student from the Academy.

Employees seeking a position at the Academy fill out an application on an MEI form. Employees are given an Employee Manual prepared by MEI which covers employment practices and guidelines. Teachers and other individuals employed at the Academy receive their paychecks from MEI. All school supplies are purchased by MEI. MEI is responsible for worker's compensation insurance and unemployment compensation coverage. The Academy reimburses MEI for all costs incurred and paid by MEI in providing goods, services, and salaries.

Operating conditions for the Academy are set forth in detail in the management agreement between the Academy and MEI. Section 1.01, entitled General Services, provides that MEI, to the extent permitted by law, will provide all labor, materials, and supervision necessary for the provision of educational services to students of the Academy. It further indicates that its services will be provided in accordance with the educational program adopted by the board of directors of the Academy, which includes educational goals, curriculum, methods of pupil assessment, admissions policy and criteria, school calendar and school day schedule, age and grade range of pupils to be enrolled, and assessment methods. As indicated in Section 1.02 of the agreement, any substantial modification of this educational program is subject to the prior approval of the Academy board. Under Section 1.03, MEI is responsible and accountable to the board for the administration, operation and performance of the Academy. Section 1.08 provides that MEI shall recommend reasonable rules, regulations and procedures to the Academy and will enforce those adopted by the Academy.

MEI is compensated for its services by the Academy in the amount of 10% of the combined State school aid funds and federal aid received by the Academy. As indicated above, the Academy reimburses MEI for all costs incurred and paid by MEI in providing its services. Section 4.02 of the agreement indicates that this includes rent and/or lease payments, salaries of MEI employees, curriculum and instructional materials, textbooks, library books, computer and other equipment, software, supplies, food service, transportation, special education, psychological services and medical services.

The agreement between MEI and the Academy has several provisions describing the relationship of the parties. Section 3.01 provides that MEI is not a division or any part of the Academy, and the Academy is a governmental entity authorized under the Code and is not a division or a part of MEI. It further provides that "Nothing herein will be construed to create a partnership or joint venture by or between the Academy and MEI or to make one the agent of the other." Section 3.02 provides that MEI will not have any role or relationship with the Academy that, in effect, substantially limits the Academy's ability to exercise its rights, including cancellation rights, under this Agreement.

Article V of the agreement, entitled Personnel and Training, includes the following provisions:

5.01 Personnel Responsibility. Subject to the Contract, state and federal law, and the Educational Program, MEI shall have the sole responsibility and authority to determine staffing levels, and to elect, evaluate, assign, discipline and transfer personnel.

5.02 Principal. The principal of the school (“Principal”) will be an employee of MEI and MEI will have the authority, consistent with state law, to select and supervise the Principal and to hold him or her accountable for the success of the Academy. The employment contract with the Principal, and the duties and Compensation of the Principal shall be determined by MEI. Subject to Section 5.01, the Principal and MEI, in turn, will have similar authority to select and hold accountable the teachers in the Academy.

* * *

5.05 Employer of Personnel. Except as specified in this Agreement, the Principal, teachers, support staff, and other non-instructional personnel performing functions on behalf of the Academy shall be employees of MEI.

Discussion and Conclusions:

Petitioner maintains that the Academy is, by definition, a public employer subject to PERA. In support of its position, Petitioner cites governing provisions of PERA and the School Code, as well as the Michigan Supreme Court’s decision in *Council of Organizations and Others for Education about Parochial, Inc. v Governor*, 455 Mich 557 (1997). Mosaica Academy claims that MEI performs all essential functions of an independent employer, with minimal oversight by the Academy board. The Academy argues that MEI exercises sole control over wages, benefits, and all essential terms and conditions of employment of employees at the Saginaw facility and, as a private entity, it is subject to, or arguably subject to, the jurisdiction of the National Labor Relations Board (hereafter “NLRB”). The Academy also asserts that its teachers and staff are not public employees pursuant to section 1(e)(i) of PERA, which provides that employees of a private entity performing services for a state agency pursuant to a time-limited contract are not public employees under PERA.

Since PERA does not define public employer, it is a matter which must be determined by the Commission on a case-by-case basis. *Wayne County Dept of Health*, 1978 MERC Lab Op 507, 514. As we stated in *Wayne County Federated Library System*, 1976 MERC Lab Op 413, 419, the determination of who is the public employer is a fundamental factual and legal issue in any case arising under PERA, and it is the primary responsibility of the Commission to make this determination based on the particular facts of the case as well as constitutional and statutory provisions. The provisions of a contract between the parties involved are not controlling in a determination of employer status.

State Judicial Council (Third Judicial Circuit Court), 1984 MERC Lab Op 545, 552; *Sanilac County, Community Mental Health Services*, 1984 MERC Lab Op 1180, 1183.

We have carefully reviewed the pertinent sections of the School Code set forth above. As stated in Section 501(1), a public school academy is a public school and is subject to the leadership and general supervision of the state board over all public education pursuant to the state constitution. Section 503(6) specifically refers to PERA and mandates that public school academies comply with its provisions. These and many other references within the statute make it clear that the Legislature intended public school academies to be part of the state public school system and to function as public employers. If there was any question as to the status of academies as public schools, it was resolved by the Michigan Supreme Court in *Council of Organizations and Others for Education About Parochialism, Inc, supra*, in which the Court found that public school academies are under the immediate control of the state and its agents and, therefore, are public schools.¹ That the legislature intended public school academies to be public employers is also evidenced by several provisions of PERA. In addition to Section 503(6) of the school code specifically making public school academies subject to PERA, PERA itself defines and makes reference to public school academies. Public school academy is defined at Section 1(f) of PERA, and Section 1(h) of the Act includes the board of a public school academy in its definition of public employer.

The Academy argues that its employees fall within the exception created by Section 1(e)(i) of PERA, which provides that those individuals employed by a private entity providing services under a time-limited contract with the state or a political subdivision of the state are not public employees. We disagree. Statutory exceptions operate to restrict the general applicability of legislative language, and are strictly construed. *Huggett v Dept of Natural Resources*, 232 Mich App 188, 194 (1998), lv pending; *Rzepka v. Farm Estates, Inc*, 83 Mich App 702, 706-707 (1978). Section 1(e) of PERA defines “public employee” as any person holding a position “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.” MCL 423.201(e); MSA 17.455(1)(e). Section 1(e)(i), however, exempts only those individuals working for a private organization under contract with “the state or a political subdivision of the state.” Michigan courts recognize the maxim, “*expressio unius est exclusio alterius*,” which means that the express mention of one thing in a statute implies the exclusion of another. *Alcona County v Wolverine Environmental Products, Inc*, 233 Mich App 238, 247 (1998); *Huggett, supra* at 752. While the Legislature could have made reference to other entities within Section 1(e), the absence of such language implies that the exemption provision was not intended to have had as broad a reach as the Employer suggests. Based upon the plain language of Section 1(e) of PERA, we find that the exemption provision is inapplicable to teachers employed at public school academies such as Mosaica.

¹ “Because the Legislature declared that public school academies are public schools, subsection 501(1), they are necessarily subject to the leadership and general supervision of the State Board of Education to the same extent as all other public schools.” *Id.* at 583-584.

Our interpretation of Section 1(e)(i) is further supported by the analysis of the Commission to the House Legislative Analysis Section in the Legislature’s consideration of Senate Bill 1015, the 1996 amendments to PERA which included the provision at issue here. Senate Bill 1015 was in direct response to the jurisdictional problems created by private companies contracting with the state to run community mental health homes. See *Michigan Council 25, AFSCME v Louisiana Homes, Inc (On Remand)*, 203 Mich App 213 (1993), lv den 445 Mich 938 (1994), cert den sub nom *Michigan Dept of Mental Health v Louisiana Homes, Inc*, 513 US 1077; 115 SCt 724; 130 L Ed2d 629 (1995). Despite the fact that other amendments to PERA were being considered at the time, including those involving teacher strikes and public schools employees, no reference to public school districts or employees was included in the legislative analysis of Section 1(e)(i). For these reasons, we conclude that public school academies are public schools for purposes of PERA, and that teachers employed at such academies are public employees subject to all of the Act’s provisions – including the prohibition against strikes.

Even if the Employer’s interpretation of the exemption provision was correct, a review of the operation of the public school academy supports a finding that Mosaica, and not MEI, is the actual employer for purposes of PERA. Critical indicia of the employer-employee relationship include: selection and engagement of employees, payment of wages, power of dismissal, and power of control, both with respect to the end to be achieved, and the means of achievement. Power of control is the most important factor. *Wayne County Civil Service Comm v Wayne County*, 23 Mich App 287 (1970), aff’d 384 Mich 363 (1971). In the instant case, MEI argues that it has sole responsibility for all personnel matters. We recognize that MEI does play a managing role in the employment of the teachers and support staff of the Academy, particularly in the day-to-day functioning of the Academy. However, the record makes clear that actual authority over educational standards and programs, school calendar, the budget, and all vital terms and conditions of employment rests solely with the Academy board. Virtually every factor in the operation of the Academy is subject to board review and approval. In *Grand Rapids Public Schools*, 1989 MERC Lab Op 436, we considered a similar situation. In that case, the Grand Rapids Public Schools operated an educational and vocational training program, or job corps, for disadvantaged youth pursuant to a contract with the U.S. Department of Labor (hereafter “DOL”). The DOL provided the funding, established the goals of the program, dictated the curriculum and educational materials utilized, and required compliance with its standards and rules. Because of the pervasiveness of the DOL’s control, we found that the Grand Rapids Public Schools was not the employer of job corps employees, but rather that it functioned as an agent or conduit of the federal government in offering a service to the community. We reach the same conclusion here. MEI’s role is to relay and enforce the decisions and educational policies of the Academy board.

MEI also contends that pursuant to the decision of the Court of Appeals in *AFSCME v Michigan Dept of Mental Health and Quality Living Systems*, 215 Mich App 1 (1996), where federal jurisdiction is “arguable,” and an insufficient showing has been made that the NLRB would decline to assert its jurisdiction, the Commission must defer to the NLRB. MEI asserts that there is no evidence that the NLRB would decline jurisdiction in the present matter, and cites cases in which the NLRB exercised jurisdiction over private schools which received a significant amount of state funding and

were subject to state regulations. See *Wordsworth Academy*, 262 NLRB 438, 110 LRRM 1296 (1982); *The Krebs School Foundation, Inc.*, 243 NLRB 514, 101 LRRM 1491 (1979). In each of these cases, however, there was no question that the entities involved were private schools; the issue was whether they qualified as an adjunct of an exempt public school system and, thus, were outside the jurisdiction of the NLRB. The NLRB found that other than meeting certain minimal requirements dictated by the state, the schools retained complete authority over their operation of the schools and, therefore, it was appropriate for the Board to exercise jurisdiction. As discussed above, this is not the situation here. By statute, the Academy is a public school and, therefore, is an exempt institution under the NLRA. Furthermore, it exercises ultimate control over all terms and conditions of employment. State requirements are not minimal, but all-pervasive; academies are part of the state's public school system. For these reasons, we find that the NLRB's jurisdiction is not arguable and we need not defer to that agency in this case.

Bargaining Unit and Election Order:

Based on the above discussion, we conclude that a question concerning representation exists under Section 12 of PERA, and that the following employees constitute a unit appropriate for purposes of collective bargaining under Section 13 of PERA:

All full-time and regular part-time certified teachers, regularly assigned substitute teachers and regular non-administrative professionals employed by Mosaica Academy of Saginaw; but excluding other substitute teachers and all other employees.

Pursuant to the attached Direction of Election, the aforesaid employees will vote whether or not they wish to be represented for purposes of collective bargaining by the Michigan Education Association.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Maris Stella Swift, Chair

Harry W. Bishop, Member

C. Barry Ott, Member

DATED: _____