STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

FORTY-FOURTH CIRCUIT COURT,
Public Employer,

Case No. R09 F-065

-and-

INGHAM COUNTY EMPLOYEES ASSOCIATION/PUBLIC EMPLOYEES REPRESENTATIVE ASSOCIATION,
Labor Organization-Petitioner.
_____/

APPEARANCES:

Cohl, Stoker, Toskey & McGlinchey, P.C., by David G. Stoker, Esq., for the Employer

White, Schneider, Young & Chiodini, P.C., by Jeffrey S. Donahue, Esq., and Thomas K. Byerley, Esq., for the Petitioner

DECISION AND DIRECTION OF ELECTION

Pursuant to Section 12 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.212, this case was heard in Howell, Michigan on December 9, 2009, before Administrative Law Judge Julia C. Stern of the State Office of Administrative Hearings and Rules for the Michigan Employment Relations Commission. Based on the entire record, including briefs filed by the parties on or before February 23, 2010, we find as follows:

The Petition and Positions of the Parties:

On June 24, 2009, the Ingham County Employees Association/Public Employees Representative Association filed a petition for a representation election in a unit of unrepresented Friend of the Court attorney referees and juvenile court attorney referees employed by the 44th Circuit Court. The Employer asserts that, consistent with Commission precedent, the referees are not employees covered by PERA because they exercise judicial discretion in a manner that is "central to the administration of justice, bordering on a judicial role," citing *60th Dist Ct*, 1979 MERC Lab Op 558, 561. Petitioner acknowledges that we have held that circuit and probate court referees and district court magistrates are not employees under PERA. However, it argues that we should reconsider these rulings in light of the Supreme Court's decision in *Judicial Attorneys Ass'n v State of Michigan*, 459 Mich 291 (1998). Petitioner also argues that whether a particular position is covered by PERA should be decided on a case-by-case basis and that the

referees here are employees within the meaning of PERA because they do not exercise "independent judicial decision making authority." Petitioner cites *60th Dist Ct* and the Court of Appeals decision affirming it, *Teamsters v 60th Dist Ct,* 102 Mich App 216, 222 (1980), *aff'd* 417 Mich 291 (1983).

Findings of Fact:

The 44th Circuit Court (the Court) has three judges, Chief Judge David Reader, Judge Carol Hackett Garagiola, and Judge Michael Hatty. Judge Reader and Judge Hackett Garagiola hear domestic relations matters as judges assigned to the Family Court Division. The Court employs four full-time Friend of the Court referees to hear domestic relations matters. Two are assigned to Reader and two are assigned to Hackett Garagiola. The Court also employs one juvenile court referee who handles juvenile matters. The Friend of the Court referees are directly supervised by the Livingston County Friend of the Court, while the juvenile court referee is directly supervised by the court administrator. However, all referees are selected and hired by the chief judge and serve at his pleasure. Per arrangement between the Employer and its funding unit, Livingston County, the County sets the salaries of the referees. The referees are members of the Municipal Employees Retirement System (MERS).

The Friend of the Court referees are required by court rule to be attorneys licensed within the State of Michigan. Courts are authorized to employ non-attorney juvenile court referees, but non-attorneys are limited to hearing certain types of cases. The Court's full-time juvenile court referee position requires an attorney license. Both types of referees are required to take a constitutional oath of office upon employment. The Michigan Supreme Court recognizes both types of referees as subject to the authority of the Michigan Judicial Tenure Commission and bound by the Michigan Code of Judicial Conduct.

Under the terms of a Supreme Court administrative order issued on September 9, 2009, each court employing referees is now required to submit to the State Court Administrative Office a local administrative order for each referee it employs. The local administrative order must identify the referee, provide contact information, and describe the scope of the authority conferred by the court on the referee, including the specific types of hearings and proceedings to be heard by the referee.

MCR 3.215 and the Friend of the Court Act, MCL 552.507, set out the types of cases Friend of the Court referees are authorized to hear as well as their duties and powers. Per the statute and rule, the chief judge of a circuit court may, by administrative order, direct that specified types of cases be assigned initially to a referee. The chief judge also has the authority to refer a specific matter to a referee. Chief Judge Reader has issued administrative orders delegating responsibility for hearing certain matters to the Friend of the Court referees.

The Court's Friend of the Court referees do not hear some matters that they are statutorily authorized to hear. These include requests for bench warrants and arraignments in domestic relations matters and proceedings involving the emancipation of minors. The Court's Friend of the Court referees also do not take final proofs in divorce cases, although they are statutorily authorized to do so. Referees do not conduct trials in divorce cases. They do not hold show

cause hearings in child support cases, i.e., cases in which a party has failed to comply with a support order and the Friend of the Court is seeking a contempt order. In recent years, however, increasing court caseloads have caused the Court to greatly expand its use of Friend of the Court referees. The Court's Friend of the Court referees now routinely hear most types of domestic relations motions. The exceptions are emergency motions and motions to increase or decrease spousal support, which referees are statutorily prohibited from hearing. The bulk of the Friend of the Court referees' caseloads involve motions regarding child support. They hear motions to establish child support after the parties have filed for divorce or in a paternity action. They hear motions to increase or decrease the level of support both before and after a divorce judgment. They also hear motions concerning childcare and medical support, motions regarding parenting time, and requests to change a child's domicile. They hear custody motions, including motions to establish custody after a divorce action is filed and motions to change custody. Even though referees cannot hear motions to increase or decrease spousal support, they hear motions to establish spousal support at the start of a divorce action. Referees are also assigned to all motions regarding property in domestic actions, e.g., they hear disputes over whether a party has complied with the property provisions in a divorce order.

At any stage in the progress of a domestic relations motion, a party may obtain a hearing in front of a judge instead of a referee merely by requesting one. However, this occurs relatively infrequently, and most domestic relations motions before the Court are heard by referees. In 2008, when the Court had only three instead of four Friend of the Court referees, the referees handled 1,706 domestic relations cases.

Proceedings on all petitions filed with the Court in domestic relations matters, including divorce actions, begin with a settlement conference. For petitions assigned to Judge Reader, the settlement conference is conducted by a referee. At the time of the hearing, Judge Hackett Garagiola was conducting her own settlement conferences, but this was to change effective around the beginning of 2010. In a settlement conference, the referee or judge meets with the parties or their attorneys to evaluate the issues and determine if there are issues in dispute. If the parties in a divorce action reach a settlement in the conference, arrangements are made during the conference for them to present their proofs before a judge and have their divorce finalized. If the parties have reached agreement on the issues in a motion, the referee prepares a consent order for the judge's signature. If there is no agreement, the referee or judge handling the settlement conference prepares an order for the judge's signature setting a trial date, sending the case to mediation, or sending it to Friend of the Court for investigation of the issues. Referees assigned to Judge Reader are authorized by him to finalize orders of this type and also consent orders by stamping his name.

If the issues in a domestic relations motion are not resolved, the motion is set for hearing before a Friend of the Court referee. The next step in the hearing process is the status conference. The referees assigned to both judges have some discretion over whether and when to hold a status conference before the hearing. During the status conference, the referee meets again with the attorneys to determine if there are remaining disputes and to attempt to obtain stipulations of fact or law and to obtain the parties' agreement on exhibits for the hearing. If no disputes remain, the settlement is placed on the record before the referee and the referee prepares the consent order for the judge's signature. As noted above, referees assigned to Judge Reader

are authorized to stamp his signature on consent orders. Judge Hackett Garagiola prefers to review her orders before finalizing them.

The referees conduct their hearings in referee hearing rooms and wear judicial robes. Per court rule, an electronic or stenographic record is kept of all referee hearings. The Court makes video and audio recordings of referee hearings in the same manner as it records hearings held by its judges. Friend of the Court referees are authorized by statute and court rule to adjourn hearings without an order from a judge, although, if a party objects to the adjournment, the referee prepares a written recommendation for the judge's signature. Referees may issue subpoenas for witnesses and documents. As noted above, a party has the right to request that his or her case be heard by a judge instead of a referee, and the referee is required to reiterate this right on the record at the hearing. At the hearing, the referees swear in witnesses, take proofs, make rulings on evidentiary issues based on the Michigan Rules of Evidence, and listen to arguments. In some cases, attorneys submit written briefs to the referee. Often, particularly in child support matters, the referee will indicate to the parties on the record what he or she intends to recommend to the judge. If the parties agree with the recommendation, an order will be prepared incorporating these findings for the judge's signature. Judge Reader's referees are authorized by him to finalize these orders by stamping his name. If the parties do not agree, the referee prepares a report including recommended findings of fact and conclusions of law and a proposed order for the judge's signature. Alternatively, the referee may state his or her findings on the record and prepare an order with a summary of findings and a recommendation for the judge's signature. MCR 3.215 specifies that the referee's report must contain a summary of testimony and a statement of findings and requires the referee to find facts specifically and state separately the law applied.

The Friend of the Court referees do not discuss individual cases with their judges before preparing their recommended findings and conclusions and proposed order. Judge Reader however, characterized the referees as "extensions of the judge." He testified that the judges and attorneys appearing before the court expect the referees to draft decisions that reflect the judges' judicial philosophies. Both Judge Reader and Judge Hackett Garagiola meet periodically with their referees to discuss their philosophies with respect to specific types of cases. For example, the judge may describe the circumstances under which the judge believes a custodial parent should be allowed to move a child out of the state, or whether the judge believes that the analysis of a custody dispute should begin with a presumption of joint custody.

Copies of a referee's written report and recommendations are provided to the judge and at the same time to the parties or their attorneys. The referee's report includes a statement of the parties' right to request a hearing before a judge. The parties have twenty-one days to file written objections to the proposed order. The written objections must specify the alleged errors in the referee's decision. If no written objections are filed, the judge normally executes the order and it becomes final. However, a judge has the discretion to modify any order before he or she signs it. Judge Hackett Garagiola has, on rare occasions, modified or rejected a referee's proposed order on her own initiative. Judge Reader, as a matter of personal policy, never modifies a proposed order presented to him unless written objections have been filed.

Written objections are filed in about ten percent of all cases in which referees prepare recommended findings and conclusions. Any party who files an objection is automatically scheduled for a hearing in front of a judge. Under MCL 55.507, such hearings are de novo. Accordingly, the judge has discretion to take any action he or she deems advisable, including conducting a new evidentiary hearing, sending the case back to the Friend of the Court for investigation or to the referee for additional findings, making new findings based on the existing record, or modifying the referee's recommendation. However, the Court is permitted by the court rules to impose reasonable restrictions on the evidence presented at the hearing before the judge, including prohibiting a party from presenting evidence on findings of fact as to which no objection was filed or admitting new evidence unless it was not available at the time of the referee hearing. Judge Reader testified that he essentially treats objections as an appeal from the referee's decision because he wants attorneys to take the referee hearing seriously and present their cases in that forum. He does not address issues not raised in the objections, reviews the transcript of the referee's hearing before the hearing on objections, and does not generally consider evidence not presented to the referee unless it involves new evidence. Instead of routinely ordering a transcript of the referee's hearing, Judge Hackett Garagiola requires the referee to attend the objections hearing and may question the referee during that hearing. Unlike Judge Reader, Judge Hackett Garagiola sometimes conducts her own evidentiary hearing after the objections hearing.

On certain matters, including child support and parenting time but excluding custody, the Friend of the Court referee may prepare an interim order. In that case, the referee's proposed order is submitted directly to the judge for signature and, if the judge signs it, the order takes immediate effect pending a hearing before the referee or judge.

The Friend of the Court referees spend about half their time actually conducting hearings and conferences and the rest of their time preparing for hearing, performing legal research, and preparing orders and recommendations. At different times in the past, both the Friend of the Court referees and the juvenile court referees have had other incidental responsibilities. However, since an ethics opinion was issued by the Supreme Court prohibiting full-time referees from also acting as advocates, the Court has limited the referees to disposition of the cases assigned to them.

Like the Friend of the Court referees, the juvenile court referee wears a robe, has a designated hearing room, and can administer oaths and question witnesses. Matters coming before the juvenile court referee fall into two categories, delinquency, and abuse and neglect. As with domestic relations matters, the chief judge determines what types of juvenile cases will be heard by the referee. As with domestic relations matters, a party may elect at any stage of the proceeding to have the case be handled by a judge instead of a referee. However, at the time of the hearing on this representation petition, the referee was handling the majority of the juvenile cases coming before the Court, especially delinquency matters.

Delinquency proceedings are analogous to criminal proceedings except that they involve minors. The prosecutor or an assistant prosecutor usually represents the State. The juvenile court referee holds preliminary hearings and pretrial hearings in delinquency proceedings. He also conducts dispositional hearings when juveniles plead guilty. The juvenile court referee

cannot hold jury trials. Although the juvenile court referee can and has held non-jury trials, most actual trials occur before a judge. The referee also cannot legally conduct proceedings where a juvenile is being tried as an adult or a hearing to determine whether the juvenile will be tried as an adult. In addition, the referee cannot issue, modify, or terminate a personal protective order.

Preliminary hearings determine whether probable cause exists for the charge against the juvenile and may also involve issues as to the placement of the juvenile pending trial. Both the Livingston County juvenile officer and the Court's probation officers, as part-time non-attorney referees, are authorized to hold preliminary hearings if necessary to ensure that the hearing is held within twenty-four hours of detention. However, the juvenile court referee conducts the majority of preliminary hearings. At the pretrial hearing, the parties determine whether there will be a plea bargain and, if not, whether a request will be made for a jury trial and what issues will be presented at the trial. The dispositional hearing is analogous to a sentencing hearing. The referee analyzes the juvenile's individual situation and selects from a variety of different sentencing options recommended by a probation officer. These include substance abuse evaluation and/or treatment, psychiatric evaluation or counseling, a tether program, or detention in a juvenile facility. After all these types of hearings, the juvenile court referee prepares an order for the signature of the judge assigned to the case.

The second category of cases heard by juvenile court referees are abuse and neglect cases. These generally arise from petitions filed with the Court by the Michigan Department of Human Services. The County prosecutor or assistant prosecutor usually appears before the referee in abuse and neglect cases. As with delinquency matters, abuse and neglect cases involve a preliminary hearing, at which the juvenile court referee may be required to make a decision regarding the interim placement of the child to assure its safety and well being. The referee may also conduct the pretrial hearing, trial, and dispositional hearing, including recommending to the judge that parental rights be terminated. Again, however, most trials in abuse and neglect cases are conducted by the judge. The referee also holds post-termination review permanency planning hearings to review the current placement of the child and progress made on permanently placing a child after parental rights have been terminated.

In juvenile proceedings, orders at all stages are drafted by the juvenile court referee, submitted to the judge for signature, and then made available to the parties. Many of these orders are form orders. The judge reviews the order and may discuss the case with the referee before he or she signs the order. The procedure for review of referee recommendations in juvenile matters is set out in MCR 3.991. A party has seven days after the hearing or issuance of the referee's written recommendations, whichever is later, to file a request for review of the referee's recommendations. As in domestic relations cases, the judge has broad discretion in determining how to handle a juvenile matter when it comes before her or him. Per the court rules, the judge may adopt, modify, or reject the referee's recommendation and may conduct a separate evidentiary hearing if the judge decides this is appropriate. However, in juvenile matters, the judge is not required to grant the request for review and a hearing is not automatically scheduled before the judge when a request is made.

Discussion and Conclusions of Law:

We have decided a handful of cases involving magistrates or referees over the years. *Houghton Co & Keweenaw Co Bds of Supervisors and 99th Dist Ct,* 1970 MERC Lab Op 652, involved a petition for representation election in a unit of district court magistrates. We dismissed the petition on the grounds that the magistrates, as part of the judicial branch of government, were not subject to our jurisdiction. Our decision, at 653, referred to the magistrates as "judicial officers" and stated that they were "part of the judiciary of the State of Michigan."

Shortly thereafter, in *Monroe Co*, 1970 MERC Lab Op 928, we were called upon to resolve challenged ballots from an election where the parties had consented to a unit which included both county employees and district court magistrates. Two magistrates had voted in the election without challenge. Citing *Houghton Co,* we concluded that the circumstances compelled us to order a rerun election with the magistrates excluded from the unit.

In *Judges of 74th Judicial Dist v Bay Co*, 385 Mich 710 (1971), the Michigan Supreme Court affirmed that the separation of powers doctrine did not preclude the application of PERA to employees of a district court. This case, however, did not involve or address the status of district court magistrates.

As discussed above, both parties in this case cite language from *60th Dist Ct*, 1979 MERC Lab Op 558, a case that did not directly involve magistrates or referees. In *60th District Court,* a union brought an unfair labor practice charge alleging that a district court had violated PERA by discharging an assignment clerk because of her union activities. In our decision finding the district court committed an unfair labor practice, we rejected the district court's claim that our assertion of jurisdiction was inappropriate because the assignment clerk performed "a judicial role." We stated, at 561:

> *While recognizing that some employees of a court may perform duties particularly central to the administration of criminal justice, bordering on a judicial role,* we are of the opinion, and the evidence in this case is persuasive, that the role of an assignment clerk . . . is administrative and/or clerical in its essential character. Nothing in the duties performed by the assignment clerk/case assignment coordinator here showed *independent judicial decision-making authority*, such as might give rise to a separation of powers problem. [Emphasis added.]

On appeal of our order, the district court argued to the Court of Appeals that PERA could not constitutionally apply to an assignment clerk whose work responsibilities were essential to the judicial process. Rejecting this argument, the Court of Appeals, in *Teamsters v 60th Dist Ct,* 102 Mich App 216 (1980), noted that the determination of whether a position was subject to collective bargaining was to be made on a case-by-case basis. It held that the record supported the Commission's conclusion that the duties of the assignment clerk did not involve any independent judicial decision-making authority, and that, therefore, there was no unconstitutional

interference with the autonomy of the district court in our finding that the assignment clerk was covered by PERA.

In *State Judicial Council*, 1987 MERC Lab Op 924, we held that domestic relations/Friend of the Court referees were not employees covered by PERA. The State Judicial Council, the employer of Friend of the Court referees in the 3rd Circuit Court at that time, filed a unit clarification petition to remove these referees from a bargaining unit of attorneys performing other duties in the Court's Friend of the Court division. The Friend of the Court referees heard motions and other domestic relations matters on assignment from a circuit court judge. The referees attempted to negotiate settlements and, if this was not possible, conducted hearings. The referees administered oaths to witnesses, made evidentiary rulings, and, where necessary, questioned the witnesses to develop a complete record. On motions, the referees issued bench decisions. On other matters, they prepared written findings of fact and recommended orders for the judges. The evidence indicated that if the parties did not take issue with the written recommendations of the referee, the referee's report became the order of the judge. However, a party had the right to a de novo hearing before the judge on any matter. After reviewing the facts and the cases discussed above, we concluded that the referees were not subject to PERA because they had "judicial decision-making functions."

We have also issued two decisions addressing the status of juvenile court referees. When those decisions were issued, juvenile court responsibilities were handled by the probate courts. In *St Clair Co Probate Ct,* 1986 MERC Lab Op 350, a union proposed to include a juvenile court referee in a unit of "supervisory and administrative" employees of a probate court. We found that the attorney referee performed legal research for the judges, sometimes prepared drafts of legal opinions, and conducted certain types of hearings for the judges. We excluded the referee from the proposed unit, stating that she functioned in a "quasi-judicial capacity" and had no community of interest with the rest of the unit. In *Monroe Co Probate Ct,* 1990 MERC Lab Op 880, the court argued that a juvenile court referee should not be included in a proposed unit of probate court employees because the position was not covered by PERA. Agreeing with the court, we held that the referee had "quasi-judicial duties," including ruling on motions, objections, and procedural questions during a hearing, making determinations and findings, and preparing written reports with findings.

In *Judicial Attorneys Ass'n v State of Michigan,* 459 Mich 291, 586 NW2d 894 (1998), the Michigan Supreme Court held that legislation making a local judicial council an employer of the individuals working for the 3rd Circuit Court and dividing authority over these employees between Wayne County and the chief judge was unconstitutional as it impermissibly interfered with the Court's inherent authority to manage its operations. The Court wrote, at 299-300:

> The judiciary is an independent department of the State, deriving none of its judicial powers from either of the other 2 departments. This is true although the legislature may create courts under provisions of the Constitution. The judicial powers are conferred by the Constitution and not by the act creating the court. The rule is well settled that under our form of government the Constitution confers on the judicial department all the authority necessary to exercise its powers as a co-ordinate branch of

> the government. It is only in such a manner that the independence of the judiciary can be preserved. The courts cannot be hampered or limited in the discharge of their functions by either of the other 2 branches of government. To remove bailiffs and other court personnel for cause is an inherent power of the judiciary. [*Gray v Clerk of Common Pleas Court, 366 Mich 588, 595*, 115 NW2d 411 (1962).]
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> See also *Judges of the 74th Judicial Dist v Bay Co,* 385 Mich 710, 727, 190 NW2d 219 (1971), in which this Court found the authority of the district court to set the salaries of its employees to be "wholly consonant with the constitutionally prescribed functioning of the courts under inherent powers;" *Livingston Co v Livingston Circuit Judge*, 393 Mich 265, 225 NW2d 352 (1975), in which this Court relied on the inherent powers of the judiciary in holding that the circuit court was the employer of court personnel for purposes of salary negotiations; and *Ottawa Co Controller v Ottawa Probate Judge*, 156 MichApp 594, 401 NW2d 869 (1986), which affirmed the authority of the probate court to set the salaries of its employees as long as the court's total budget remains within the total budget appropriation set by the county board.

However, the Court also extended to the 3rd Circuit Court the terms of a 1997 Supreme Court administrative order establishing procedures to be followed by trial court chief judges in dealing with their local funding units over matters pertaining to the trial courts' employees, including collective bargaining. That order was rescinded and replaced by Administrative Order No. 1998-5 which expressly provides:

> VIII. COLLECTIVE BARGAINING
> For purposes of collective bargaining pursuant to 1947 PA 336, a chief judge or a designee of the chief judge shall bargain and sign contracts with employees of the court. Notwithstanding the primary role of the chief judge concerning court personnel pursuant to MCR 8.110, to the extent that such action is consistent with the effective and efficient operation of the court, a chief judge of a trial court may designate a representative of a local funding unit or a local court management council to act on the court's behalf for purposes of collective bargaining pursuant to 1947 PA 336 only, and, as a member of a local court management council, may vote in the affirmative to designate a local court management council to act on the court's behalf for purposes of collective bargaining only.

Notwithstanding our earlier decisions withholding the right to bargain collectively from court employees with quasi judicial responsibility, Administrative Order No. 1998-5 contains no exceptions or exclusions applicable to any category of court employees. We are not empowered to impose limitations upon that which has been ordered by the Supreme Court. Consequently, we decline to follow the rulings of our previous decisions. Because the Friend of the Court and juvenile court referees are not excluded from the collective bargaining process authorized by Administrative Order No. 1998-5, we issue the following order:

ORDER DIRECTING ELECTION

We find that a question concerning representation exists under Section 12 of PERA. We direct an election in the following unit, which we find appropriate under Section 13 of PERA:

> All Friend of the Court attorney referees and juvenile court attorney referees employed by the 44th Circuit Court.

Pursuant to the attached Direction of Election, the aforesaid employees will vote on whether or not they wish to be represented for purposes of collective bargaining by the Ingham County Employees Association/Public Employees Representative Association.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Christine A. Derdarian, Commission Chair

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Nino E. Green, Commission Member

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Eugene Lumberg, Commission Member

Dated: _____