STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

MICHIGAN QUALITY COMMUNITY CARE COUNCIL,
Public Employer-Respondent in Case Nos. C12 I-183 & C12 I-184,

-and-

SEIU HEALTHCARE MICHIGAN,
Labor Organization-Respondent in Case Nos. CU12 I-042 & CU12 I-043,

-and-

PATRICIA HAYNES,
An Individual-Charging Party in Case Nos. C12 I-183 & CU12 I-042,

-and-

STEVEN GLOSSOP,
An Individual-Charging Party in Case Nos. C12 I-184 & CU12 I-043.
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APPEARANCES:

White, Schneider, Young & Chiodini, P.C., by Jeffrey S. Donahue for Respondent-Public Employer

McKnight, McClow, Canzano, Smith & Radtke, P.C., by John R. Canzano for Respondent-Labor Organization

Mackinac Center Legal Foundation, by Patrick J. Wright and Derk A. Wilcox for Charging Parties

DECISION AND ORDER ON SUMMARY DISPOSITION

Charging Parties Patricia Haynes and Steven Glossop are home help providers who are members of the bargaining unit represented by Respondent SEIU Healthcare Michigan, which was certified in 2005 as the exclusive representative of home help providers employed by Respondent Michigan Quality Community Care Council. On September 20, 2012, Charging Parties filed charges against Respondents, a motion for declaratory relief, a brief, and a request for oral argument.

The Charges

The charges assert that Respondents, Michigan Quality Community Care Council and SEIU Healthcare Michigan, have "engaged in or [are] engaging in unfair labor practices within the meaning of the [Public Employment Relations] Act." Charging Parties seek "a declaratory ruling stating that the Charging Parties/Interested Persons and similarly situated home help providers are not and have never been public employees in their capacity as home help providers." The motion for declaratory ruling also asks the Commission to rule "that the 2005 consent election . . . as well as the subsequent certification . . . naming SEIU Healthcare Michigan as the union representative . . . was improper because MERC lacked jurisdiction over the matter for the reason that . . . Charging Parties/Interested Persons and similarly situated home help providers were not public employees under the Public Employment Relations Act." Additionally, the motion seeks a ruling from the Commission declaring that "subsequent collective bargaining agreements entered into by the parties to this action were void *ab initio* because the parties . . . were never proper parties to contract through collective bargaining." Charging Parties also seek the return of union dues and agency fees paid by them and similarly situated home help providers to SEIU Healthcare Michigan.

The Order to Show Cause

Upon review of the charges, motion, and brief filed by Charging Parties, we observed that they raise a number of issues regarding the Commission's jurisdiction over this matter and our authority to grant the requested relief. In order that we might determine whether this matter should be referred to an administrative law judge for hearing, on November 15, 2012, we directed Charging Parties to provide separate written answers to a list of questions designed to assist us in resolving these issues and to show cause why this matter should not be summarily dismissed. Charging Parties were ordered to answer the following questions:

1. Does the charge state a claim upon which relief can be granted under the Public Employment Relations Act (PERA)? Explain the basis for your answer and provide supporting legal authority.

2. Does the charge allege a violation of § 10 of PERA? Explain the reason(s) for your answer.

    a. If the charge does state a violation of § 10 of PERA, indicate:

        i. The provision(s) of § 10 that Charging Parties allege have been violated?

        ii. For each provision of § 10 allegedly violated, provide:

            1. A clear and complete statement of the facts which allege a violation of PERA, including the date of occurrence of each particular act. Identify the Respondent(s) you believe to be liable and the names of the agents of the Respondent(s) who engaged therein. Provide the specific language of the provision alleged to have been violated and an explanation of

how the alleged actions by Respondents' agents violated the provision.

3. Explain whether the Commission has subject matter jurisdiction over a charge that does not allege a violation of § 10 of PERA. Explain the basis for your answer and provide supporting legal authority, including any case law specifically addressing the issue of the Commission's jurisdiction over unfair labor practice charges that do not allege a violation of § 10 of PERA.

4. If the allegations in the charge do state a violation of § 10, is the charge barred by the statute of limitations? Explain the basis for your answer and provide supporting legal authority.

5. Are Charging Parties currently public employees within the meaning of PERA?

    a. If Charging Parties are not currently public employees, exactly when did that change and what was the circumstance that caused the change.

    b. If Charging Parties are not currently public employees, does the Commission have jurisdiction over a charge brought by them? Explain the basis for your answer and provide supporting legal authority.

6. Does the Commission have the authority to retroactively set aside findings made in 2005 with respect to the status of home help providers as public employees? Explain the basis for your answer and provide supporting legal authority.

7. Does the Commission have the authority to overturn a representation election? If so, does the Commission have the authority now to overturn an election that occurred in 2005? Explain the basis for your answers and provide supporting legal authority.

8. Does the Commission have the authority to rescind collective bargaining agreements? Explain the basis for your answer and provide supporting legal authority.

9. In the absence of specific Commission rules setting forth procedures for declaratory rulings, does the Commission have the authority to issue a declaratory ruling? Explain the basis for your answer and provide supporting legal authority.

10. Do Charging Parties' filings in this case comply with 2001 AACS R 338.81? Explain their compliance or lack of compliance and the effect thereof on the Commission's authority to issue a declaratory ruling in this matter.

11. In *SEIU Healthcare v Snyder*, No. 12-12332, (E.D. Mich. June 21, 2012) (opinion and order granting preliminary injunction) the Court enjoined the defendants, the Governor of Michigan, the Director of the Michigan

Department of Community Health, and the Michigan Treasurer from failing to comply with certain terms of the contract between Respondent SEIU Healthcare and Respondent MQCCC until February 28, 2013. Inasmuch as Governor Snyder is the head of the executive branch of the government of the State of Michigan, and the Commission is part of that branch of State government, isn't the Commission bound by the federal court ruling ordering the Governor to take or refrain from taking specific action contrary to the collective bargaining agreement between Respondents? Explain the basis for your answer and provide supporting legal authority.

12. Does comity obligate the Commission to honor the Court's ruling in *SEIU Healthcare v Snyder*, No. 12-12332, (E.D. Mich. June 21, 2012) (opinion and order granting preliminary injunction)? Explain the basis for your answer and provide supporting legal authority.

13. Charging Parties seek the return of union dues and agency fees paid by them and similarly situated home help providers to SEIU Healthcare Michigan.

    a. In an action that was not brought by a labor organization, does the Commission have jurisdiction to grant relief to persons who were not named parties in the action, essentially treating the matter as a class action? Explain the basis for your answer and provide supporting legal authority.

    b. Do Charging Parties have the authority to represent similarly situated home help providers in this matter? If so, provide the basis for that authority?

14. Why isn't a petition for decertification the appropriate means to resolve Charging Parties' complaint? Explain the reason for your answer.

Charging Parties filed their responses to the order to show cause on November 29, 2012. After requesting and receiving an extension of time, Respondents filed their replies to Charging Parties' responses to our order on January 11, 2013. Subsequently, we granted Charging Parties' request for oral argument and gave the parties the opportunity to argue on this matter on March 12, 2013.

Charging Parties' Allegations that Respondents Violated PERA

Commission Rule 151 governs the filing of charges before this Commission and provides, in part (2), as follows:

(2) A charge shall include, insofar as known, all of the following information:

. . . .

(c) A clear and complete statement of the facts which allege a violation of LMA or PERA, including the date of occurrence of each particular act,

the names of the agents of the charged party who engaged therein and *the sections of LMA or PERA alleged to have been violated*.

(d) Any *other information requested on the form* furnished by the commission.

(Emphasis added.)

The charge form requires the charging party to attach an additional sheet to the charge form on which the charging party must "provide a clear and concise statement of the facts which allege a violation of the LMA or PERA, including the date of occurrence of each particular act and the names of the agents of the charged party who engaged in the complained of conduct. The charge should describe who did what and when they did it and briefly explain why such actions constitute a violation of the LMA or PERA."

Instead of attaching to their respective charge forms a few additional sheets of paper containing a clear and concise statement of the facts, Charging Parties attached a fifty page brief. Given the length of the attachment, any allegations of a PERA violation as well as any supporting factual allegations should have been included therein. We have carefully reviewed the brief, the charge forms, and the accompanying motion for declaratory relief but find no assertion therein that Respondents violated any section of PERA or the LMA. In particular, none of those documents allege a violation of § 10 of PERA. Where a charge fails to allege a violation of § 10 of PERA, the charge fails to state a claim upon which relief can be granted by the Commission. Accordingly, the charges may be dismissed on that basis.

In their response to the question in the show cause order asking Charging Parties to explain whether the charges allege a violation of § 10 of PERA, Charging Parties assert that Respondent Michigan Quality Community Care Council violated § 10(1)(b) by "assisting in the creation of a mandatory public sector bargaining unit when none was appropriate" and in agreeing to the April 9, 2012 extension of the collective bargaining agreement between Respondents. Charging Parties allege that Respondent SEIU Healthcare Michigan violated § 10(3)(a)(i) of PERA by also agreeing to the April 9, 2012 contract extension.

Section 10(1)(b) provides:

(1) It shall be unlawful for a public employer or an officer or agent of a public employer . . .

(b) to initiate, create, dominate, contribute to, or interfere with the formation or administration of any labor organization.

An employer's agreement to the composition of an appropriate bargaining unit is not within the kinds of activities prohibited by § 10(1)(b). Similarly, an employer's decision to agree to extend a collective bargaining agreement with the bargaining unit's certified representative, is not within the scope of activities prohibited by § 10(1)(b).[1] These are both activities commonly engaged in

[1] See *Local 1814, Int'l Longshoreman's Ass'n, AFL-CIO* v NLRB, 735 F2d 1384 (1984), for an example of the type of activity by an employer that would constitute a violation of § 10(1)(b). In that case, the employer believed that its business would increase if its employees were unionized. The employer then approached the union to get the union to organize the employees. A union officer offered to help the employer increase its business if the employer agreed to unionization of its workforce and paid the union officer a ten percent kickback on the increased business.

lawfully by public employers. A violation of § 10(1)(b) involves circumstances where the employer's actions "dominate . . . or interfere with the . . . formation or administration of a union" and are thereby likely to abridge public employees § 9 rights to "bargain collectively with their public employers through representatives of their own free choice." See *Detroit Pub Sch*, 22 MPER 89 (2009) (no exceptions); *Madison Pub Sch*, 19 MPER 38 (2006) (no exceptions). See also *Int'l Ladies' Garment Workers' Union, AFL-CIO v NLRB*, 366 US 731, 737; 81 SCt 1603, (1961), where the employer recognized the union as the exclusive bargaining representative of a group of employees when only a minority of those employees had authorized the union to represent them. There the Court explained that the employer's recognition of a union lacking majority support interfered with the employees "freedom of choice and majority rule."

Further, Charging Parties have offered no legal authority in support of their apparent contention that either an employer's agreement with a union on the bargaining unit composition of an appropriate unit or an employer's agreement to extend a collective bargaining agreement, where the union was elected by a majority of the voting bargaining unit members, is a violation of § 10(1)(b). Inasmuch as § 10(1)(b) applies only to public employment, there can be no violation of § 10(1)(b) if Charging Parties are not public employees. Moreover, other than their assertion that home help providers are not public employees, Charging Parties have alleged no facts to support a finding that the bargaining unit of home help providers is not an appropriate unit. If the home help providers are not public employees and, for that reason, the bargaining unit is not appropriate, we have no jurisdiction over this matter and there is no claim under § 10(1)(b). See *City of Lansing v Carl Schlegel, Inc*, 257 Mich App 627 (2003). Accordingly, the facts alleged by Charging Parties do not support a finding that Respondent Michigan Quality Community Care Council violated § 10(1)(b).

Section 10(3)(a)(i) provides:

> (3) It shall be unlawful for a labor organization or its agents (a) to restrain or coerce: (i) public employees in the exercise of the rights guaranteed in section 9: Provided, that this subdivision shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein.

Charging Parties contend that by agreeing to the contract extension, Respondent SEIU Healthcare Michigan violated § 10(3)(a)(i) by "failing to let the public employees 'negotiate or bargain collectively with their public employers through representative [sic] of their own free will.'" However, Charging Parties fail to explain how Respondent's agreement to a contract extension on behalf of the bargaining unit that elected SEIU Healthcare Michigan as its representative keeps the members of that bargaining unit from collectively bargaining through a representative of their choice. Charging Parties have not alleged that a petition was filed by a competing union seeking to replace SEIU Healthcare Michigan as bargaining representative. They have not alleged that a petition has been filed to decertify SEIU Healthcare Michigan as bargaining representative. Nor have they alleged that Respondents have somehow acted to prevent a fair election on such a petition. Assuming that home help providers are public employees, Charging Parties have alleged no facts to indicate that the members of the bargaining unit have been denied their rights under § 9 of PERA "to negotiate or bargain collectively with their public employers through representatives of their own free choice."

We note that the allegation that Respondent SEIU Healthcare Michigan failed "to let the

public employees 'negotiate or bargain collectively with their public employers through representative [sic] of their own free will'" is inconsistent with Charging Parties' claims that home help providers are not public employees. However, Charging Parties' assertion that the SEIU Healthcare Michigan's agreement to extend the collective bargaining agreement was unlawful appears to be based on their contentions that the home help providers are not public employees. As with the allegation that Michigan Quality Community Care Council violated § 10(1)(b), there is no merit to the allegation that SEIU Healthcare Michigan violated § 10(3)(a)(i) if the home help providers are not public employees. If Charging Parties, who are home help providers, are not public employees, we have no jurisdiction over this matter and must dismiss this action on that basis. See *City of Lansing v Carl Schlegel, Inc,* 257 Mich App 627 (2003).

Charging Parties' Request to Retroactively Set Aside the 2005 Consent Election

Charging Parties seek to have this Commission retroactively set aside the 2005 consent election and resulting certification of Respondent SEIU Healthcare Michigan as the exclusive representative of the bargaining unit. However, Charging Parties have offered no authority in support of their contention that we can retroactively set aside a consent election or a certification of representative that occurred more than seven years ago. In order to award the relief Charging Parties are seeking, that relief must be based on a finding that Respondents committed an unfair labor practice that would have voided the 2005 election. Charging Parties have failed to allege any facts to support such a finding. Accordingly, we find no basis to set aside the election or the certification of SEIU Healthcare Michigan.

Moreover, if the charges alleged facts sufficient to show Respondents committed an unfair labor practice that could serve as a basis to void the 2005 election, the charges would be untimely. Under Section 16(a) of PERA, a charge must be filed within six months of the date the charging party knows or has reason to know of the unfair labor practice. *Wines v Huntington Woods*, 97 Mich App 86 (1980). Charging Parties have not alleged that, despite the exercise of due diligence, they only learned of facts regarding unfair labor practices relating to the formation of the bargaining unit within six months prior to their September 20, 2012 filing of the charges in this matter. This Commission has long rejected the doctrine of continuing violation if the inception of the violation occurred more than six months prior to the filing of the charge. *Detroit Bd of Ed*, 16 MPER 29 (2003); *City of Adrian*, 1970 MERC Lab Op 579, 581. The six-month statute of limitations is jurisdictional and cannot be waived. *Walkerville Rural Communities Sch*, 1994 MERC Lab Op 582, 583. Therefore, to the extent that the charges relate to actions occurring at the time of or prior to, the 2005 election, the charges are untimely and must be dismissed on that basis.

In 2005, both Respondents agreed that the Commission had jurisdiction under PERA to conduct the representation election. There was no challenge to the Commission's jurisdiction to the election or to the status of the home help providers as public employees. It was, therefore, the responsibility of the Commission to conduct the election and to certify the representative for whom the majority of the bargaining unit members voted. Since the election was a consent election and, at the time, there were no objections by interested parties, the Commission was required to rely on the representations made by the parties as to the appropriateness of the bargaining unit's composition. It is now too late to reconsider Commission action that occurred over seven years ago.

More importantly, the majority of the employees voting in the election chose to be represented for purposes of collective bargaining and selected Respondent SEIU Healthcare

Michigan to be their representative. While the charges assert that Charging Parties are acting on behalf of similarly situated home help providers, only two members of the bargaining unit, Charging Parties Haynes and Glossop, have asked that we remove SEIU Healthcare Michigan as their bargaining representative. There has been no petition to decertify Respondent SEIU Healthcare Michigan as the exclusive representative of the home help providers. Unless the majority of the voting home help providers elect to decertify SEIU Healthcare Michigan following a properly filed and supported decertification petition, we have no authority to change their elected representative. A union cannot be decertified merely because two bargaining unit members no longer wish to be represented. As long as the majority of the voting bargaining unit members choose to be represented in collective bargaining by SEIU Healthcare Michigan, we have no authority to change Respondent's status as their representative. Moreover, if the home help providers are not public employees, we have no jurisdiction over them or their selection of a bargaining representative.

In their brief, Charging Parties claim that on January 18, 2012, Michigan Quality Community Care Council accepted $12,000 from SEIU Healthcare Michigan and that doing so constituted a conflict of interest. We have no authority to determine whether Michigan Quality Community Care Council's receipt of those funds constituted a conflict of interest. Our authority is limited to determining whether those actions constituted an unfair labor practice. Charging Parties have pointed to nothing in Section 10(1) of PERA that makes a public employer's receipt of funds from a union an unfair labor practice. Nor have Charging Parties provided us with any legal authority that would support a finding that a public employer's receipt of funds from a union is an unfair labor practice. Charging Parties rely on *Local 1814, Int'l Longshoreman's Ass'n, AFL-CIO v NLRB*, 735 F2d 1384 (1984) as support for their contention that we have the authority to set aside a union certification on this basis. However, that case involves the National Labor Relations Board's order that a union be decertified for the acceptance by union officers of kickbacks from an employer. We see no similarity between the circumstances in this case and union officers' acceptance of kickbacks from an employer. Where an employer pays kickbacks to a union officer, there is a significant risk that the union officer, as agent for the bargaining unit members, would put his own interests ahead of those he is employed to represent. However, that situation is not analogous to the facts alleged here.

Charging Parties' Request That We Order SEIU Healthcare Michigan to Return Union Dues and Agency Fees Paid by Them and Similarly Situated Home Help Providers

Now that PERA has been amended by 2012 PA 349 and the Labor Relations and Mediation Act (LMA) has been amended by 2012 PA 348, it is illegal for employers and unions in Michigan to include provisions in new collective bargaining agreements that require the payment of agency fees as a condition of employment. The collective bargaining agreement between Respondents expired February 28, 2013. Therefore, Charging Parties are no longer required to pay agency fees as a condition of maintaining their employment. Their coworkers, however, still have the right to choose whether they want to continue to pay union dues to support their bargaining representative.

According to Charging Parties' representations, Michigan Quality Community Care Council is not functioning as an employer. If, for the purposes of this matter, we assume that to be true, we would not have jurisdiction over that organization. Moreover, now that PERA has been amended by 2012 PA 45 and 2012 PA 76, Charging Parties may be able to establish that home help providers are not public employees. If that is the case, we would have no jurisdiction over home help

providers and, therefore, we would lack jurisdiction over this matter. However, it does not follow that MERC can find the collective bargaining agreement between SEIU Healthcare Michigan and Michigan Quality Community Care Council to be void due to the possible change in the status of the parties.

Moreover, in *SEIU Health Care Michigan v Richard Snyder, et al*, Case No. 12-12332 (ED Mich, 2012), the judge held that the contract clause of the U.S. Constitution prohibits enforcement of the 2012 legislation removing home help providers from the category of public employees as it would impair an existing contract. Based on the reasoning in that decision, we must refrain from finding the collective bargaining agreement between SEIU Healthcare Michigan and Michigan Quality Community Care Council to be void. Although Charging Parties contend that neither res judicata nor collateral estoppel apply, they offered no authority that would allow the Commission to ignore the federal court ruling as precedent on the application of the U.S. Constitution's contract clause to the 2012 amendments to PERA and the collective bargaining agreement between the Respondents. Since the preliminary injunction in *SEIU Health Care Michigan* applied only until the expiration of Respondents' contract and that contract expired on February 28, 2013, the defendants in that case are no longer required to deduct union dues or agency fees from the wages of home help providers. However, dues paid previously would be covered by the preliminary injunction.

Finally, Charging Parties seek reimbursement of agency fees not only for the named parties but for similarly situated home help providers. They have failed to allege that any other persons have authorized Charging Parties to represent them in seeking such relief on their behalf. The other home help providers have the right to choose whether they will continue to support SEIU Healthcare Michigan as their bargaining representative. More importantly, Charging Parties have offered no authority to support the contention that the Commission has the authority to grant relief to persons who are not named as parties in this action in the absence of evidence that they have been harmed by an unfair labor practice committed in violation of PERA. On the contrary, for any supposed claims of other individuals to be pursued, those claims must be filed by those individuals in their own names and must allege a violation of § 10 of PERA by the respondent. Rule 151(2) of the General Rules of the Michigan Employment Relations Commission, 2002 AACS, R 423.151(2). The charges filed herein were filed only in the names of Patricia Haynes and Steven Glossop and do not allege facts sufficient to establish a violation of § 10 of PERA.

Conclusion

We have carefully examined all other arguments raised by the parties and find they would not change the result. The charges filed in this matter with respect to the creation of the bargaining unit, the 2005 consent election, and the certification of SEIU Healthcare Michigan as the bargaining representative, do not allege sufficient facts to establish that Respondents' actions with respect to those events violated the rights of public employees as protected by PERA. If, Charging Parties were home help providers in 2005, but home help providers were not public employees at that time, Charging Parties were not protected by PERA and Respondents' relationship with Charging Parties was not subject to PERA, so no valid PERA claim accrued in 2005. If a valid claim had accrued in 2005, it is barred by the statute of limitations. If Charging Parties were public employees when these charges were filed on September 20, 2012, they have failed to allege facts that are sufficient to establish their contention that Respondents violated PERA by agreeing to the April 9, 2012 contract extension. If Charging Parties were not public employees when these charges were filed, they have

no rights that are protected under PERA, and therefore, the charges do not assert a PERA violation.

For the foregoing reasons, we find that the charges fail to state a claim upon which relief can be granted under the Public Employment Relations Act, 1965 PA 379, as amended, MCL 423.201 – 423.217 and must be summarily dismissed pursuant to Rule 165 of the General Rules of the Michigan Employment Relations Commission, 2002 AACS, R 423.165. Accordingly, we issue the following order:

ORDER

The charges filed in this matter by Patricia Haynes and Steven Glossop are dismissed.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Edward D. Callaghan, Commission Chair

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Nino E. Green, Commission Member

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Robert S. LaBrant, Commission Member

Dated: _____