

**STATE OF MICHIGAN
IN THE SUPREME COURT**

Appeal From The Michigan Court of Appeals
Honorable David S. Owens, Presiding

SHERRY LOAR, MICHELLE BERRY,
and PAULETTE SILVERSON,

Plaintiff-Appellants,

Supreme Ct. No. 140810

Court of Appeals No. 294087

v.

MICHIGAN DEPARTMENT OF HUMAN
SERVICES, and ISHMAEL AHMED, in his
official capacity as Director of Michigan
Department of Human Services,

Defendant-Appellees.

**BRIEF OF AMICUS CURIAE
AMERICAN CIVIL RIGHTS UNION
IN SUPPORT OF
PLAINTIFF-APPELLANTS' APPLICATION
FOR LEAVE TO FILE APPEAL**

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INTRODUCTION

This case presents critical questions regarding institutionalized misappropriation and diversion of public funds, and forced unionization as state employees of self-employed, privately owned and operated, home based, independent contractors serving the general public. Under a state program to assist low income mothers in working and thereby reducing the burden of public assistance on taxpayers, the Michigan Department of Human Services (DHS) is authorized under state law to pay these independent providers for child care services to qualifying low income mothers.

Unrelated to any significant proportion of these independent, small business, child care providers, the DHS entered into an agreement with a local community college to form the so-called Michigan Home Based Child Care Council (MHBCCC or Council). The MHBCCC does not employ any of the small business child care providers receiving payments from the DHS for child care services to qualifying low income mothers, as these providers are all independent small businesses. Nevertheless, the United Auto Workers Union (UAW) and the American Federation of State, County and Municipal Employees (AFSCME) joined together to form a new union operating under the alias Child Care Providers Together Michigan (CCPTM), and the MHBCCC then entered into a “collective bargaining agreement” with CCPTM purporting to name the CCPTM as the exclusive bargaining representative for the independent, small business, child care providers.

The CCPTM filed a petition for certification elections with the Michigan Employment Relations Commission (MERC) purporting to represent a collective bargaining unit composed of the independent, small business, child care providers. MERC then ran a supposed certification election by mail in which 6,396 individuals voted, out of 71,800 small business child care providers. MERC certified the CCPTM on the basis of this sham “election” held for self-employed individuals who are not in any sense state employees. The MHBCCC then entered into an alleged collective bargaining agreement (Agreement) with CCPTM supposedly covering the 72,000 small business child care providers as members of the “union.”

That Agreement provided that union dues would be paid to the union out of the DHS payments to the child care providers for child care services to low income mothers trying to work to get off of welfare. DHS subsequently commenced diverting almost \$4 million a year to a “union” formed by AFSCME and the UAW out of these payments.

The home care providers in this action first heard of the new union purportedly representing them when they received a notice with their payment checks from DHS saying that a portion of their payment for services rendered had been diverted to the “union.” They consequently sued to recover the millions legally owed to them which had been misappropriated. If these self-employed small business owners cannot obtain relief through this action, then state and maybe federal taxpayers will have been looted as well out of funds intended to help the poor get off of welfare. Moreover, a precedent will have been set for other small businesses who provide services to be paid for at least partially by the state to be similarly defrauded.

STATEMENT OF FACTS

The federal government provides Michigan with a Temporary Assistance for Needy Families (TANF) block grant to help finance public assistance to low income, single parent (mostly mothers) families with children.¹ TANF includes work requirements for receiving this assistance. To make those work requirements feasible for single parent mothers with small children, the program includes funding for child care services. For fiscal 2010, DHS was provided \$238.8 million to help pay for such child care services.²

The single parent mothers themselves choose and employ their own child care providers from among:

- institutional day-care centers,
- group day care homes where the care is provided within the provider's own home for 6 to 12 children,
- family homes where the care is again provided within the provider's home for 1 to 7 children including 1 or more of the provider's own children,
- day care aides who provide the care within the child's own home, and
- relative care providers who are relatives of the child, such as grandparents, aunts and uncles, and who provide care for the child within their own home.³

Under the Michigan Child Care Licensing Act, group child homes must be licensed, and family child care homes must be registered. MCL 722.115(1). DHS regulates all of these child care providers, but does not employ them. Rather, the mothers

¹ See generally 42 USC Sections 601-19.

² Fiscal 2010 Appropriation, 2009 PA 129.

³ Auditor General Performance Audit, Child Development and Care Program Payments at 41 (July 29, 2008).

themselves choose which of these child care providers to employ, for what time periods, and for how long, with complete authority to begin or terminate services at will.

The DHS application form for relative care providers to receive state payment for services rendered states in regard to the applicant, “I understand that I am considered to be self-employed and not an employee of DHS.”⁴ The application for day care aides states,

“I understand the parent/substitute parent is my employer (not DHS) and is responsible for the employer’s share of any employer’s taxes that must be paid such as Federal Insurance Contributions Act (FICA) and Federal Unemployment Tax (FUTA) taxes. My employer (parent/substitute parent) is also required to provide me with a W-2 at the end of the year for tax purposes.”⁵

Similarly, the DHS Child Development and Care Handbook advises both child care providers and their employer parents:

When a parent chooses a provider, both the parent and provider are forming a business relationship with each other. This is an agreement between the parent and provider that may be in writing. Any agreement should at least cover:

- How payment will be made.
- Hours of care.
- Charge for care.
- When payment is expected.
- And any notice of when care is no longer needed.

The parent is responsible for any child care charges not paid by DHS. He/she also has to pay for the cost of any care provided while the parent is not involved in DHS Approved Activities, and for child care services provided before being authorized for child care by DHS.

All child care providers, except for Aides, are self-employed. This means that the provider runs their own business. If the provider is an Aide, he/she works for the parent of the child and is a household employee of the parent under federal law. Under the Fair Labor Standards Act the parent has to pay the employer’s share of any employer’s taxes that need to be paid, such as Social Security, Federal Insurance Contribution Act (FICA) and Federal Unemployment Tax Act (FUTA) taxes. Parents also have to give a W-2 form at the end of the year to the aide so they can do their taxes.

Please note: Provider is not employed by the State of Michigan or the

⁴ http://www.michigan.gov/documents/dhs/DHS-0220-R_194100_7.pdf

⁵ http://www.michigan.gov/documents/dhs/DHS-0220-A_194099_7.pdf

Child Development and Care Program. Providers are not eligible for unemployment insurance.⁶

On July 27, 2006, DHS entered into an agreement with Mott Community College purporting to create the so-called Michigan Home Based Child Care Council (MHBCCC or Council). Complaint, Exhibit 8. The agreement purported to give the MHBCCC the “right to bargain collectively and enter into agreements with labor organizations. [The MHBCCC] shall fulfill its responsibilities as a public employer under the Public Employment Relations Act [PERA].⁷” Id. at para. 6,10. Note, however, that the child care providers again are employed neither by DHS or the MHBCCC, but are independent small businesses employed directly by the parents receiving the child care services.

Meanwhile, the UAW and AFSCME formed the CCPTM union. In September, 2006, the CCPTM filed a petition for a certification election with the Michigan Employment Relations Commission (MERC) claiming to cover a collective bargaining unit including all the home based child care providers. Complaint, Exhibit 11. That includes the group day care providers, family day care providers, day care aides, and relative care providers, as described above, excluding only the institutional day care centers. In October and November, 2006, MERC ran a purported certification election by mail in which 6,396 individuals voted, out of 71,800 in the claimed bargaining unit. Complaint, Exhibit 13; Auditor General Performance Audit, Suitability of Child Development and Care Program Providers (July 22, 2008) at 58. On the basis of this sham “election,” MERC certified CPPTM on November 27, 2006 as a collective

⁶ http://www.michigan.gov/documents/dhs/DHS-PUB-0230_222206_7.pdf

⁷ PERA governs the union organization of public employees in Michigan. Organizing child care providers such as Plaintiffs under federal law is not an option because the National Labor Relations Act (NLRA) specifically defines “employee” to exclude both independent contractors and domestic services, 29 USC Section 152(2).

bargaining representative for 72,000 small business child care providers. Complaint, Exhibit 13.

MHBCCC then entered into an alleged collective bargaining agreement (Agreement) with CCPTM supposedly covering the 72,000 small business child care providers as members of the “union,” even though not one of these child care providers is employed by the MHBCCC. Complaint, Exhibit 14. The Agreement provided that union dues would be paid to the union out of the DHS payments to the child care providers for services rendered to the low income mothers that employed them. *Id.* DHS subsequently commenced diverting an estimated \$3.7 million for 2009 alone to a “union” formed by AFSCME and the UAW out of the payments owed to self-employed, home-based child care providers for services to poor mothers trying to work to get off of welfare. The diverted monies came from both federal and state funds provided for the TANF program.

Plaintiff child care providers operating private, independent, group day care homes brought this mandamus action against DHS on September 16, 2009 to recover the payments owed them under state law for services rendered to qualifying low income mothers, diverted by DHS to the UAW/AFSCME union front. On December 30, 2009, the Court of Appeals issued a ruling denying the Complaint without explanation. On February 10, 2010, the Court of Appeals denied a reconsideration motion seeking at a minimum an explanation of the ruling. Plaintiffs now seek review by this Court.

DISCUSSION

I. PLAINTIFFS ARE ENTITLED TO FULL PAYMENT FOR SERVICES RENDERED UNDER MICHIGAN LAW.

Under the Michigan Child Development and Care (CDC) Program, child care providers receive payments from DHS for child care services rendered to qualifying low income mothers, based on the income and other qualifications of the mothers. Plaintiffs in this action have provided child care services to such qualifying mothers, and so are entitled to the full amount of payment for such services rendered as provided under state law. But DHS has diverted a portion of such payment to the union front formed by the UAW and AFSCME, misappropriating close to \$4 million in such funds for 2009 alone. Under the CDC program, state law provides for these funds as well to go to Plaintiffs in payment for their services. We respectfully submit that this Court must grant review in this case to stop this improper diversion and misappropriation of funds from Plaintiffs providing child care services to low income mothers trying to work to get off of welfare.

State law does not authorize the diversion and misappropriation of funds in which DHS is engaged on behalf of the CPPTM “union.” As shown, *supra*, at 3-4, Plaintiff group day care providers are self-employed, home based, small businesses chosen and employed by the low income mothers receiving their services. They are not employees of MHBCCC or even of DHS. Consequently, MHBCCC has no right, power or authority to enter into a collective bargaining agreement on their behalf with CCPTM providing for any part of the payment for their services rendered to be diverted to the CCPTM union front.

Even the DHS has recognized this. In a filing in the Court of Appeals below, the DHS admitted, “[Plaintiffs claim] that DHS gave the [MHBCCC] the ‘power to collectively bargain’ DHS did not – indeed *could not* – grant MHBCCC the power to collectively bargain.” Defendants’ Reply to [Plaintiffs] Brief in Support of Answer to

Defendants' Motion to Dismiss Pursuant to MCR 2.116(C)(8) and (C)(4) at 1. (emphasis in original).

Moreover, under established Michigan law, Plaintiffs are not even public employees of any sort. MCL 423.201(1)(e) states,

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

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

Plaintiff group home care providers do not hold any position by appointment or employment in the government of the state, or any of its political subdivisions, or any other public authority mentioned. Moreover, if persons employed by direct private contractors with state or local governments are not public employees, then Plaintiff group home care providers which are not even contractors of any state or local government, but rather independent contractors of subsidized low income mothers, cannot be.

The court in *Wayne County Civil Service Commission v. Board of Supervisors*, 22 Mich App 287 (1970), *affirmed Wayne Co. Civil Service Comm. v. Bd. of Supervisors*, 384 Mich 363, 375-76 (1971), established a four part test for determining the meaning of “public employee” under PERA. The employer of an employee is identified by the characteristics “1) that they select and engage the employee; 2) that they pay the wage; 3) that they have the power of dismissal; 4) that they have the power and control over the employee’s conduct.” *Id.* at 298. In the present case, the MHBCCC has none of these four characteristics in regard to Plaintiff group home care providers. Moreover, even the

DHS does not select and engage these providers, nor have the power of dismissal. Those powers reside in the low income mothers that choose their particular child care provider and receive the services of those providers. Moreover, while DHS holds some power to regulate the conduct of child care providers, such government regulation does not transform those regulated into employees of the regulator. It is the parent employing the provider who determines the hours of care.

In a case of very similar facts, *Morin v. Department of Social Services*, 134 Mich App 834 (1984) involved a certified day care aide hired by a parent whose child care costs were paid by the Department of Social Services (DSS) because the parent was participating in a work-training program. *Id.* at 836-37. When the aide was injured on the job, her father filed a workers' compensation claim contending that DSS was the employer. The court upheld the Workers' Compensation Appellate Board ruling that the aide was an independent contractor, not a DSS employee, saying,

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

Id. at 841-42.

Similarly, in the present case, while DHS pays for most of the cost of the child care providers so the welfare mothers can work, neither it nor MHBCCC has the right to hire or fire. Moreover, any necessary materials or equipment are supplied by the aide or the parent, not by MHBCCC or DHS. The child care providers hold themselves out to the public as child care providers, a job customarily performed in the capacity of a

contractor, and the child care providers can and do perform the same services for others. Consequently, the child care providers are not employees of MHBCCC or DHS.

Another case of similar facts is *St. Clair Co. Intermediate School Dist. v. St. Clair Co. Ed. Ass'n*, 245 Mich App 498 (2001), which involved a charter school authorized by an intermediate school district. The court held that the charter school and not the school district was the employer because,

“[T]he academy had the ultimate authority to hire, fire, and discipline its employees. The Academy also determined the wages, benefits, and work schedule of its employees. The [school district] certainly had extensive oversight responsibilities required by law. However, the [school district] did not exercise independent control over the academy’s employees on a daily basis and to such a pervasive extent that it could reasonably be considered their employer, whether independent of or jointly with the academy.”

Id. at 516. The court consequently concluded that the academy’s employees were not covered by the collective bargaining agreement of the school district. Similarly, in the present case, neither MHBCCC nor DHS has the ultimate authority to hire, fire and discipline the Plaintiff group home care providers, or determine their wages, benefits, and work schedule, nor exercise any independent control over them on a daily basis, even with DHS exercising some oversight responsibilities.

Similarly, in *City of Lansing v Carl Schlegel Inc.*, 257 Mich App 627, 632 (2003), the court held that employees of a subcontractor on a state contract were not “public employees” under PERA.

In *Regents of University of Michigan v. Employment Relations Commission*, 389 Mich 96 (1973), the court found the workers at issue there were public employees of the public employer university hospital because the university provided them with W-2 forms and withheld federal and state taxes and social security FICA contributions,

provided them with fringe benefits such as medical coverage, and the workers performed tasks for which the employer university hospital was compensated. Neither the MHBCCC nor DHS has any of those characteristics in regard to the Plaintiff group home care providers in this case. Indeed, DHS provides Plaintiff group home care providers a 1099 federal tax reform appropriate for independent contractors, not the W-2s appropriate for direct employees. Those 1099s state the compensation provided to Plaintiffs under the heading “Nonemployee Compensation.”

In *St. Clair Prosecutor v AFSCME*, 425 Mich 204 (1986) the court identified the ability to “appoint, supervise, and terminate” workers, and the power “to control the number and remuneration of” workers as characteristics of employers. But, again, neither MHBCCC nor DHS has these characteristics in regard to Plaintiff group home care providers. It is the low income mothers who choose these child care providers and receive their services that bear these characteristics.

In *Michigan Council 25, AFSCME v. Louisiana Homes, Inc.*, 192 Mich App 187, 192-93 (1991), the court found that an employer’s control would “extend far beyond mere licensing requirements or the provision of funds through a grant arrangement.” But the MHBCCC does not even bear these characteristics in regard to Plaintiff group home care providers, and even the powers and control of DHS does not extend beyond such factors.

Note also, as discussed, *supra*, at 4, that Defendant DHS itself repeatedly characterizes the child care providers as self-employed or employed by the parent choosing them, and expressly not public employees, in the CDC Handbook, and in CDC application forms for relative care providers and day care aides.

Because Plaintiff group home care providers are not employees of MHBCCC, again MHBCCC cannot enter into a collective bargaining agreement covering them. But, in addition, since they are not public employees in Michigan, MERC cannot certify the CCPTM “union” as the collective bargaining agent for them. MERC has no authority or jurisdiction over private, small business, independent contractors in regard to their own union membership, and so its certification of CCPTM as their collective bargaining representative is not valid or operative.

II. THIS CASE PRESENTS CRUCIAL ISSUES REGARDING MISAPPROPRIATION OF STATE AND FEDERAL FUNDS, AND A PRECEDENT FOR EXPANDED, FUTURE MISAPPROPRIATION.

This case clearly satisfies the requirements for leave to appeal, as specified in MCR 7.302(B), which specifies as grounds for such leave:

“(2) the issue has significant public interest and the case is one by or against the state or one of its agencies or subdivisions or by or against an officer of the state or one of its agencies or subdivisions in the officer’s official capacity;
(3) the issue involves legal principles of major significance to the state’s jurisprudence;”

As discussed above, this case involves misappropriation of state funds and even federal funds contrary to state law, funds intended to help poor single parent mothers to work to get off of welfare. Under state law, those funds are to go to private sector, self-employed, home-based child care providers as chosen by the mothers themselves, for services rendered to those mothers. Instead, close to \$4 million of such funds have been diverted by Defendants to the coffers of a public employee union front for AFSCME and the UAW, without authorization by, indeed, contrary to, state law. Such misuse of public funds is by definition a matter of significant public interest.

Moreover, the Court below essentially refused to even hear the complaint of Plaintiff group home care providers to stop this diversion of their money. It would reflect a fundamental collapse by state government into dysfunctionality if Plaintiffs, let alone state taxpayers, are left with nowhere to go in the state to even have their argument heard for relief from this abuse.

The case is “against the state or one of its agencies,” namely the DHS. MCR 7.302(B). It is also “against an officer of the state or one of its agencies...in the officer’s official capacity,” namely Ishmael Ahmed, in his official capacity as Director of Michigan Department of Human Services.” MCR 7.302(B).

In addition, if the misappropriation in this case is allowed to stand without review, then it would serve as a precedent for further, expanded misappropriation. Funds intended to help the poor under DHS’s Adult Medical Program could be diverted and misappropriated into union treasury chests as supposed union dues for private sector health care providers that never joined a union. Funds intended to help the poor under DHS’s Food Assistance Program could be diverted and misappropriated to the benefit of big, powerful unions as supposed union dues for private sector food retailers who never joined a union. Small businesses who work on state contracts could also find that part of the payment for their services as well has been diverted and misappropriated by big unions that they have also never joined. This is just the beginning of the possible mischief.

The nation’s news media has recognized that this case involves a matter of significant public interest. Besides extensive discussion in state and local newspapers such as The Detroit News and the Detroit Free Press, it has been discussed in major

national newspapers such as the Wall Street Journal and major national magazines such as The Weekly Standard. Besides extensive discussion on state and local radio stations, such as NPR's Michigan Radio and Detroit's News/Talk 760 WJR Radio, it has been discussed on several nationally syndicated talk radio programs, such as Rush Limbaugh. Besides discussion and coverage on numerous state and local TV shows, it has been discussed on national cable television news networks, such as Fox News.

We respectfully submit that this case more than merits review at this point.

CONCLUSION

For all of the foregoing reasons, *Amicus Curiae* American Civil Rights Union respectfully requests that the Court grant Plaintiffs' application for leave to appeal and any other relief the Court deems appropriate.

Dated: April 12, 2010

Respectfully Submitted,

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