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BILL ANALYSIS

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Senate Bill 1015 (as enrolled) **PUBLIC ACT 543 of 1996**
Sponsor: Senator Leon Stille
Senate Committee: Human Resources, Labor and Veterans Affairs
House Committee: Human Resources and Labor

Date Completed: 1-30-97

RATIONALE

The public employment relations Act provides a framework establishing the rights and privileges of public employees. In doing so, the Act also provides a definition of who is a public, as opposed to a private, employee. In order to provide all of the services it is obligated to provide, the State sometimes contracts with private entities for the performance of certain functions. These private entities then hire employees and take whatever other actions are necessary to see to it that the services are provided. As the result of efforts to privatize some services typically provided by the State, the number of private employees performing these types of jobs has increased and is expected to continue to do so. Some of the employees of these private entities apparently have tried to unionize as State employees.

Attempts to unionize generally are protected under State law if the employees are public employees, or under Federal law for private employees. Recently, the State has been named as an employer in a number of cases involving attempts to form a union by the employees of private companies that have contracted with the Department of Community Health (DCH) or the former Department of Mental Health (DMH) to run community mental health homes. Although the National Labor Relations Board (NLRB) recently has taken jurisdiction of these types of claims in some cases, determining that the employers are under the Board's jurisdiction and not exempt because of close ties with public employers, that has not always been the case. Some people believe that steps should be taken to prevent such claims from being filed by changing the definition of public employee to exclude explicitly workers hired by private entities that have contracts with the State. (See **BACKGROUND** for a discussion of relevant case law.)

CONTENT

The bill amends the public employment relations Act to revise the definition of "public employee".

Under the Act, "public employee" means a person holding a position by appointment or employment in State government; one or more political subdivisions of the State; the public school service; a public or special district; the service of an authority, commission, or board; or any other branch of the public service. The bill provides that, beginning on its effective date, 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. (Since the bill was not given immediate effect by the Legislature, it will take effect on March 31, 1997.)

MCL 423.201

BACKGROUND

AFSCME v *Louisiana Homes, Inc.* (203 Mich App 213 (1994))

Michigan Council 25 of the American Federation of State, County, and Municipal Employees (AFSCME) petitioned the Michigan Employment Relations Commission (MERC) for certification as the collective bargaining agent of workers who provided direct care to mentally ill or mentally retarded persons in residential facilities operated by Louisiana Homes, Inc. under contact with the DMH. The petitioner (AFSCME) named Louisiana Homes and the DMH as joint employers for collective bargaining purposes. The Commission found the DMH to be a joint employer and the DMH appealed that finding.

The Michigan Court of Appeals affirmed the MERC decision, and the Michigan Supreme Court denied leave to appeal. The DMH then sought reconsideration, raising a question of whether MERC lacked jurisdiction because of Federal preemption. On reconsideration, the Supreme Court vacated the Court of Appeals opinion and remanded the case for consideration of the question of MERC's jurisdiction.

The DMH claimed that MERC lacked jurisdiction because of Federal preemption under the National Labor Relations Act (NLRA). (The NLRA generally covers private-sector employers engaged in interstate commerce.) States and their political subdivisions are exempt from the NLRA's definition of "employer", and, thus, are not within the jurisdiction of the NLRB. The NLRB also has included in that exemption "an otherwise statutory employer...if an exempt governmental entity exerts a substantial degree of control over it". The Court of Appeals held that, in this matter, "resolution of the NLRA preemption issue turns on the status of the relationship between the DMH and Louisiana Homes".

The Court decided that, although there was an "arguable" case for Federal preemption, "if it can be shown that the NLRB...has declined or would decline to assert jurisdiction, then a state court or tribunal would be free to assert its jurisdiction". The Court found that "the DMH exercises significant control over various aspects of Louisiana Homes' labor relations". Twice previously, labor disputes involving the DMH and employer health care institutions similar to Louisiana Homes were submitted to the NLRB. The NLRB declined to assert jurisdiction in both instances "on the basis that extensive control by the DMH over the employer's labor relations made meaningful bargaining impossible".

Since MERC had "sufficient showing...that the NLRB would refuse to assert jurisdiction" the Court found "that state jurisdiction was not lacking because of preemption under the NLRA, and, therefore, the MERC had jurisdiction to decide this case". The Court affirmed its prior decision upholding MERC's finding that the DMH was a joint employer.

AFSCME v *Mental Health Department* (215 Mich App 1 (1996))

This case involved the consolidation of several cases regarding petitions filed with MERC by AFSCME and the UAW, seeking certification as collective bargaining agents for employees of various nonprofit corporations funded by the DMH to provide group home services. The Commission determined that the DMH was a joint employer, and the Department appealed, claiming that MERC lacked jurisdiction because of preemption under the NLRA.

The DMH argued that the providers were private employers, so MERC did not have subject-matter jurisdiction because of Federal preemption. Although the same issue was decided in 1994 in the *Louisiana Homes* case discussed above (*Louisiana Homes II*), after oral arguments were presented to the Court in these consolidated cases, the NLRB "expressly overruled the reasoning of the precedent relied on by the *Louisiana Homes II* Court in deciding the preemption issue".

In a 1979 case, the NLRB had established a test for determining whether it would assert jurisdiction over an employer with close ties to an exempt entity (such as a state or its political subdivision). This test was clarified in a 1986 case before the NLRB, which stated: "...we will examine closely not only the control over essential terms and condition of employment retained by the employer, but also the scope and degree of control exercised by the exempt entity over the employer's labor relations, to determine whether the employer in issue is capable of engaging in meaningful collective bargaining" (*Res-Care, Inc.*, 280 NLRB 670).

Citing similar cases in which the NLRB applied the *Res-Care* test, the *Louisiana Homes II* Court held that those cases "constituted a sufficient showing...that the NLRB had declined or would decline to assert jurisdiction, and that the MERC was therefore free to assert its jurisdiction". In a 1995 NLRB case, however, the Board overruled the *Res-Care* test, deciding that it was "unworkable and unrealistic" and "had been applied to employers with close ties to exempt entities in a varied and confusing manner" (*Management Training Corp.*, 317 NLRB 1355).

In *Management Training*, the NLRB ruled that, because of the "varied and confusing approaches" to applying the *Res-Care* test, "jurisdiction should no longer be determined on the basis of whether the employer or the Government controls most of the employee's terms and conditions of employment". The NLRB opined that the test's emphasis on respective control of economic terms and conditions was oversimplified and "decided

that it is not proper for the Board to decide whether to assert jurisdiction based on the Board's assessment of the quality and/or quantity of factors available for negotiation". The Board decided that, for purposes of determining whether it would assert jurisdiction, it will consider only whether the employer meets both the NLRA's definition of "employer" and the applicable monetary jurisdictional standards. Further, the NLRB said in a footnote that it "will not employ a joint employer analysis to determine jurisdiction. Whether the private employer and the exempt entity are joint employers is irrelevant".

The Court of Appeals in *AFSCME* v *Mental Health Department*, then, held that, unlike in *Louisiana Homes II*, there was no longer "a sufficient showing that the NLRB would decline to assert its jurisdiction". Accordingly, the Court ruled that MERC must defer to the NLRB.

ARGUMENTS

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

Supporting Argument

The bill is needed so that the State will not be drawn into a collective bargaining relationship with thousands of private sector employees who work for contractors doing business with the State. The bill makes it clear that when the State or a political subdivision contracts with a private sector organization to provide services, the employees of that organization are not public employees simply by virtue of that contract nor is the State or political subdivision an employer of those employees by virtue of that contract.

Reportedly, about 13,000 employees currently work for contractors providing care under contracts with the former Department of Mental Health alone. The State also has been privatizing a number of functions, including liquor distribution and the production of biological products. With the likelihood that the State will continue to privatize services, including in the area of corrections, it is imperative that it not be liable as a co-employer of employees of private contractors that contract to provide services. If the State were to be considered a joint employer, this could drive up the costs of contracting for services, since the contractors' employees' wages and benefits could be higher than they are currently and the State would have to engage in the collective bargaining process for those employees.

For a number of years, the State has been drawn into litigation in which employees of private sector organizations, which contracted with the State to provide group home services for developmentally disabled and mentally ill or impaired people, claimed through their unions that the State was a "joint employer". In some of these cases, MERC has determined that the DMH and the group home service providers were joint employers.

Under the bill, the employees of a private sector organization will not lose their right to be represented by the union of their choice and will not lose the right to bargain collectively with their employer. If the NLRB asserts jurisdiction over their employer, their union may be certified and bargaining may proceed under Federal law. If the NLRB declines to assert jurisdiction, the employees, through their union, may bargain under the provisions of Michigan's labor mediation Act (MCL 423.1 et seq.). The bill does not deprive employees of the right to representation or to have their union bargain collectively with their employer, but it does make clear who that employer is and helps to clarify under which statute labor relations are to be conducted.

Response: The bill may be unnecessary. While MERC has determined that the DMH was a joint employer with its contracted organizations, those determinations were reversed in the 1996 Court of Appeals consolidated cases. Moreover, that decision was based on an NLRB case that overruled the Board's previous test for determining its own jurisdiction relative to a contractor of an exempt entity. As a result, private employers will no longer be considered exempt from the NLRA by virtue of contracting with a state or political subdivision.

Opposing Argument

The NLRB does not automatically take jurisdiction over employers just because MERC is denied jurisdiction. Thus, the Court of Appeals decision in the consolidated cases, which declared that MERC's jurisdiction was preempted by the NLRA, does not necessarily mean that the NLRB will take jurisdiction. The employees in these cases, then, are in limbo unless and until the NLRB asserts jurisdiction. They may be left without collective bargaining protection, which means that, although they still may unionize, the employers are under no obligation to bargain in good faith with the employees' union. Moreover, Michigan's labor mediation Act is itself modeled on the NLRA, and covers only Michigan-based employers who do not engage in interstate commerce. It does not cover very many people, and it is questionable whether

it would necessarily cover employees not covered by the NLRA. So, if the NLRB, which deals with private employers, denies jurisdiction and the employees are explicitly excluded from Michigan's public employment relations Act, the employees might be left without any collective bargaining protection at all. At a time when the State is moving to privatize more and more of its services, this could leave an increasingly large number of Michigan workers in a vulnerable position.

Opposing Argument

Since the cases litigated against the former DMH have been decided in the Court of Appeals, the real effect of the bill may be on the State employees under the newly rewritten Mental Health Code. The rewritten Code creates a new kind of entity, the community mental health services program (CMHSP), that, while an official county agency, is virtually indistinguishable from a private agency. Although the Code requires that, upon creation of a CMHSP, current employees be transferred to the authority and that existing collective bargaining agreements be honored, these provisions apply for only one year. There are no guarantees under the new Code that will protect employees past this one-year period. Labor and advocacy groups reportedly expressed concerns at the time the revised Code was being debated that employees could be eliminated on grounds other than job performance (such as union involvement) and that the CMHSPs could drastically reduce wages, cut benefits, and even replace higher-paid, experienced workers with lower-paid, less experienced employees. While the bill will not directly allow the State to divest itself of these State mental health workers, this may be a step in that direction.

Response: The bill will not affect employees of the community mental health system. Those workers are local *public* employees. The bill excludes from the definition of "public employee" the employees of a *private* entity that provides services under a contract with the State.

Opposing Argument

The bill attempts to dictate to courts what course they should take in deciding labor relations issues. Two factors determine whether an entity is a de facto employer--money and control. If the State provides the money for wages and benefits and dictates the terms and conditions of employment, then it is the employer.

Legislative Analyst: P. Affholter

FISCAL IMPACT

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

Fiscal Analyst: M. Tyszkiewicz

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