



CRC MEMORANDUM



No. 1119

A publication of the Citizens Research Council of Michigan

September 2012

STATEWIDE BALLOT ISSUE: PROPOSAL 2012-04 ESTABLISHING THE MICHIGAN QUALITY HOME CARE COUNCIL AND PROVIDE LIMITED COLLECTIVE BARGAINING RIGHTS TO HOME HEALTH CARE WORKERS

CRC's Analysis of State Ballot Issues

This paper is one in a series of papers that analyze the six questions Michigan electors will be voting on at the November 6, 2012, general election. The papers, information about webinars, links to the actual proposed amendments, and ballot language can be accessed at <http://election.crcmich.org>. The Citizens Research Council of Michigan does not endorse candidates for office or take positions on ballot issues. In analyzing these ballot issues, CRC hopes to provide more information so that voters can make better informed decisions in formulating their vote.

A proposal for an initiated constitutional amendment that will appear on the November 6, 2012 ballot would establish a "Michigan Quality Home Care Council" in the state constitution and would affirm limited collective bargaining rights for about 42,000 home health care workers. These workers are hired and fired by the elderly or disabled participants of the Medicaid-funded Home Help Services Program, and are paid by the Michigan Department of Community Health.

The proposal would add a new Section 31 to Article V (Executive Branch) of the 1963 Michigan Constitution to establish the Michigan Quality Home Care Council, which would be the "public employer" of home health care aides, even though the participants of the Home Health Care Program would continue to have the right to select, hire, train and direct, or terminate the employment of their home health care aides. The proposal provides that par-

participant-employed home health care providers "shall have the same rights relating to collective bargaining with the Council as are otherwise provided by law to public employees not within the classified civil service relating to their public employers" and would amend Section 5 of Article XI (Classified State Civil Service) to add "in-home personal care providers subject to the authority of the Michigan Quality Home Care Council" to the list of those exempt from classified state civil service. Home health care providers would not be public or state employees for any other purpose and would not have the right to strike.

The Medicaid-funded Home Help Services Program will remain in effect regardless of the outcome of the proposal that has been placed on the November 2012 ballot: this proposal focuses on the unionization of home health care workers and the establishment of the Michigan Quality Community Care Council, not on the services available to the disabled and elderly.



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Background

The Michigan departments of Human Services and Community Health administer the Home Help Services Program, which supports people who need assistance with personal care and household chores and who are eligible for Medicaid (Medicaid is a means tested medical services program funded by the federal and state governments and managed by states). The eligible individuals select home health care aides, who are frequently relatives, and these aides are paid by the state, with state and federal funds. The purpose of the program is to allow disabled and elderly people to stay in their own homes and out of nursing homes, which is often preferred by participants while saving money for the state.

In 2004, the Michigan Quality Community Care Council (MQCCC) was formed by an interlocal agreement¹ between the Department of Community Health and the Tri-County Aging Consortium (the Area Agency on Aging serving Clinton, Eaton, and Ingham counties). MQCCC was identified as a public employer in the interlocal agreement, but MQCCC neither hires nor pays home health care workers. Under the agreement with DCH, MQCCC was tasked with maintaining a registry of providers and with coordinating personal assistance services. The interlocal agreement declared that home health care workers who receive only Medicare or Medicaid payments for their work are public employees, thus giving them the right to organize.

In 2005, the MQCCC recognized the Service Employees International Union (SEIU) Healthcare Michigan as the bargaining unit for home health care aides. In an election held under the Public Employment Relations Act (PERA), approximately 43,000 ballots were sent to home health care aides: 6,949 ballots were returned with “yes” votes, 1,007 ballots were

returned with “no” votes, and 589 ballots were spoiled. The Michigan Employment Relations Commission (MERC) certified SEIU Healthcare Michigan as the home health care workers’ bargaining unit. Union dues were withheld from home health care aides’ Medicaid-funded paychecks by payroll deduction starting in November 2006: workers pay 2.75 percent of their wages in dues to the union, reportedly about \$6 million in total annually. Workers have the right to opt out of the union, but if they do must still pay an agency fee of at least 65 percent of the dues, ostensibly for costs related to collective bargaining, contract administration, and grievance adjustment. The average home health care worker now earns about \$8.00 per hour.

Opponents decried the forced unionization of home health care workers, arguing that they were not public employees and that the Michigan Employment Relations Commission should not have certified the election.

State funding for MQCCC was eliminated in FY2012, but private funding continued and MQCCC continued to serve as the public employer of home health aides for the purposes of PERA. The Department of Community Health continued to withhold union dues from the Medicaid-funded payments to the workers.

Public Act 76 of 2012

Among other provisions, PERA requires public employers to bargain in good faith with representatives of employees. Public Act (PA) 76 of 2012 amended PERA to address specific collective bargaining situations. The new act defines a public employee as “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

¹ An interlocal agreement is a contract between governmental units.

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Proposal 2012-04

The proposal would add a new section (Section 31) to Article V of the Michigan Constitution to provide:

§ 31: Michigan Quality Home Care Council

1. *State programs to assist elderly persons and persons with disabilities by financing. In whole or in part, in-home personal care services, shall afford to program participants who are able to do so the option to hire and direct individual providers of such services.*
2. *There is hereby established a Michigan Quality Home Care Council whose purpose shall be to facilitate participants' ability to more effectively exercise that option, including by improving the availability, reliability and skills of the individual provider workforce. Council duties and functions shall include:*
 - a) *Providing training opportunities for providers, to improve provider skills, and for participants, to facilitate their ability to hire and manage providers;*
 - b) *Providing for a registry that may refer qualified providers who have had appropriate background checks for employment, however participants shall retain the right to hire providers not referred from the registry;*
 - c) *Ensuring that financial management services are available to participants to facilitate their ability to employ providers, to ensure compliance with applicable laws, and to make appropriate employment-related payroll deductions;*
 - d) *Setting compensation standards, subject to appropriations by the Legislature, and other terms and conditions for the employment of individual providers by program participants; and*
 - e) *Other related duties and functions, not inconsistent with the foregoing, as assigned to the Council by law or as necessary or convenient to implement the purposes of this Section.*
3. *The Council shall be governed by a board of eleven (11) members, including:*
 - a) *Nine individuals appointed by the Governor with expertise regarding participant needs, no fewer than seven of whom shall be current or former program participants, participant representatives, or participant advocates; however such positions shall initially be filled by those similarly qualified members of the Michigan Quality Community Care Council board who last filled those positions prior to the passage of this Section. Upon expiration of each such initial member's term of appointment, the position to be filled under this paragraph shall have a term of four years;*
 - b) *Serving as Chair, the Director of the Department of Community Health, or of the successor executive department principally responsible for administering State medical assistance programs providing services governed by this Section, or his designee; and*
 - c) *The Director of the Department of Human Services, or of such successor executive department, as the Governor determines has responsibilities relating to State programs providing services governed by this Section, or his designee.*
4. *The Council shall be a public body within the Executive Branch, with the normal powers, duties, rights and responsibilities, including regarding contracting, acquiring and disposing of property, and adopting rules. The Council may accept gifts, grants, bequests, or assets from any source, expend such funds, and accept assistance from other governmental agencies, to effectuate its purposes. The Council shall assume and succeed to the authorities, duties and obligations of the Michigan Quality Community Care Council to the extent consistent with this Section, including any obligations to recognize provider representatives and to honor any unexpired agreements (to the extent of a term not to exceed 3 years) with such representatives, as last incurred or entered into by that Council prior to the adoption of this Section.*
5. *Consistent with this Section, participant-employed providers governed by this Section shall have the same rights relating to collective bargaining with the Council as are otherwise provided by law to public employees not within the classified civil service relating to their public employers, and the Council shall be governed by such collective bargaining arrangements, to be enforced by the appropriate labor relations agency. But such providers shall not, as a consequence of this Section, be considered public or State employees for any other purpose, nor be entitled to any other legal benefit reserved to such employees. Collective bargaining under this Section shall not deprive participants of their right to select, supervise, train and direct, or terminate, an individual provider. Such providers shall not have the right to strike.*
6. *Nothing in this Section shall be construed in a manner that conflicts with a state's obligations under Medicaid. The Department of Community Health or other responsible agency shall cooperate with the Council, including by providing assistance as necessary or convenient to implement the provisions of this Section.*

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The proposal would amend Article XI, Section 5 of the Michigan Constitution, as follows (new language capitalized):

The classified state civil service shall consist of all positions in the state service except those filled by popular election, heads of principal departments, members of boards and commissions, the principal executive officer of boards and commissions heading principal departments, employees of courts of record, employees of the legislature, employees of the state institutions of higher education, all persons in the armed forces of the state, IN-HOME PERSONAL CARE PROVIDERS SUBJECT TO THE AUTHORITY OF THE MICHIGAN QUALITY HOME CARE COUNCIL, eight exempt positions in the office of the governor, and within each principal department, when requested by the department head, two other exempt positions, one of which shall be policy-making. The civil service commission may exempt three additional positions of a policy-making nature within each principal department.

The civil service commission shall be non-salaried and shall consist of four persons, not more than two of whom shall be members of the same political party, appointed by the governor for terms of eight years, no two of which shall expire in the same year.

The administration of the commission's powers shall be vested in a state personnel director who shall be a member of the classified service and who shall be responsible to and selected by the commission after open competitive examination.

The commission shall classify all positions in the classified service according to their respective duties and responsibilities, fix rates of compensation for all classes of positions, approve or disapprove disbursements for all personal services, determine by competitive examination and performance exclusively on the basis of merit, efficiency and fitness the qualifications of all candidates for positions in the classified service, make rules and regulations covering all personnel transactions, and regulate all conditions of employment in the classified service.

State Police Troopers and Sergeants shall, through their elected representative designated by 50% of such troopers and sergeants, have the right to bargain collectively with their employer concerning conditions of their employment, compensation, hours, working conditions, retirement, pensions, and other aspects of employment except promotions which will be determined by competitive examination and performance on the basis of merit, efficiency and fitness; and they shall have the right 30 days after commencement of such bargaining to submit any unresolved disputes to binding arbitration for the resolution thereof the same as now provided by law for Public Police and Fire Departments.

No person shall be appointed to or promoted in the classified service who has not been certified by the commission as qualified for such appointment or promotion. No appointments, promotions, demotions or removals in the classified service shall be made for religious, racial or partisan considerations.

Increases in rates of compensation authorized by the commission may be effective only at the start of a fiscal year and shall require prior notice to the governor, who shall transmit such increases to the legislature as part of his budget. The legislature may, by a majority vote of the members elected to and serving in each house, waive the notice and permit increases in rates of compensation to be effective at a time other than the start of a fiscal year. Within 60 calendar days following such transmission, the legislature may, by a two-thirds vote of the members elected to and serving in each house, reject or reduce increases in rates of compensation authorized by the commission. Any reduction ordered by the legislature shall apply uniformly to all classes of employees affected by the increases and shall not adjust pay differentials already established by the civil service commission. The legislature may not reduce rates of compensation below those in effect at the time of the transmission of increases authorized by the commission.

The appointing authorities may create or abolish positions for reasons of administrative efficiency without the approval of the commission. Positions shall not be created nor abolished except for reasons of administrative efficiency. Any employee considering himself aggrieved by the abolition or creation of a position shall have a right of appeal to the commission through established grievance procedures.

The civil service commission shall recommend to the governor and to the legislature rates of compensation for all appointed positions within the executive department not a part of the classified service.

To enable the commission to exercise its powers, the legislature shall appropriate to the commission for the ensuing fiscal year a sum not less than one percent of the aggregate payroll of the classified service for the preceding fiscal year, as certified by the commission. Within six months after the conclusion of each fiscal year the commission shall return to the state treasury all moneys unexpended for that fiscal year.

The commission shall furnish reports of expenditures, at least annually, to the governor and the legislature and shall be subject to annual audit as provided by law.

No payment for personal services shall be made or authorized until the provisions of this constitution pertaining to civil service have been complied with in every particular. Violation of any of the provisions hereof may be restrained or observance compelled by injunctive or mandamus proceedings brought by any citizen of the state.

Provisions of existing Constitution altered or abrogated by the proposal if adopted:

Article XI, Section 5

The classified state civil service shall consist of all positions in the state service except those filled by popular election, heads of principal departments, members of boards and commissions, the principal executive officer of boards and commissions heading principal departments, employees of courts of record, employees of the legislature, employees of the state institutions of higher education, all persons in the armed forces of the state, eight exempt positions in the office of the governor, and within each principal department, when requested by the department head, two other exempt positions, one of which shall be policy-making. The civil service commission may exempt three additional positions of a policy-making nature within each principal department.

The civil service commission shall be non-salaried and shall consist of four persons, not more than two of whom shall be members of the same political party, appointed by the governor for terms of eight years, no two of which shall expire in the same year.

The administration of the commission's powers shall be vested in a state personnel director who shall be a member of the classified service and who shall be responsible to and selected by the commission after open competitive examination.

The commission shall classify all positions in the classified service according to their respective duties and responsibilities, fix rates of compensation for all classes of positions, approve or disapprove disbursements for all personal services, determine by competitive examination and performance exclusively on the basis of merit, efficiency and fitness the qualifications or all candidates for positions in the classified service, make rules and regulations covering all personnel transactions, and regulate all conditions of employment in the classified service.

State Police Troopers and Sergeants shall, through their elected representative designated by 50% of such troopers and sergeants, have the right to bargain collectively with their employer concerning conditions of their employment, compensation, hours, working conditions, retirement, pensions, and other aspects of employment except promotions which will be determined by competitive examination and performance on the basis of merit, efficiency and fitness; and they shall have the right 30 days after commencement of such bargaining to submit any unresolved disputes to binding arbitration for the resolution thereof the same as now provided by law for Public Police and Fire Departments.

No person shall be appointed to or promoted in the classified service who has not been certified by the commission as qualified for such appointment or promotion. No appointments, promotions, demotions or removals in the classified service shall be made for religious, racial or partisan considerations.

Increases in rates of compensation authorized by the commission may be effective only at the start of a fiscal year and shall require prior notice to the governor, who shall transmit such increases to the legislature as part of his budget. The legislature may, by a majority vote of the members elected to and serving in each house, waive the notice and permit increases in rates of compensation to be effective at a time other than the start of a fiscal year. Within 60 calendar days following such transmission, the legislature may by a two-thirds vote of the members elected to and serving in each house, reject or reduce increases in rates of compensation authorized by the commission. Any reduction ordered by the legislature shall apply uniformly to all classes of employees affected by the increases and shall not adjust pay differentials already established by the civil service commission. The legislature may not reduce rates of compensation below those in effect at the time of the transmission of increases authorized by the commission.

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The civil service commission shall recommend to the governor and to the legislature rates of compensation for all appointed positions within the executive department not a part of the classified service.

To enable the commission to exercise its powers, the legislature shall appropriate to the commission for the ensuing fiscal year a sum not less than one percent of the aggregate payroll of the classified service for the preceding fiscal year, as certified by the commission. Within six months after the conclusion of each fiscal year the Commission shall return to the state treasury all moneys unexpended for that fiscal year.

The commission shall furnish reports of expenditures, at least annually, to the governor and the legislature and shall be subject to annual audit as provided by law.

No payment for personal services shall be made or authorized until the provisions of this constitution pertaining to civil service have been complied with in every particular. Violation of any of the provisions hereof may be restrained or observance compelled by injunctive or mandamus proceedings brought by any citizen of the state.

the public service, subject to the following exceptions: A person employed by a private organization or entity who provides services under a time-limited contract with this state or a political subdivision of this state or who receives a direct or indirect government subsidy in his or her private employment is not an employee of this state or that political subdivision, and is not a public employee..." Thus under PA 76, home health aides are not public employees. Furthermore, "An election shall not be directed for, and the commission of a public employer shall not recognize, a bargaining unit of a public employer consisting of individuals who are not public employees. A bargaining unit that is formed or recognized in violation of this subsection is invalid and void." This prohibited MERC from recognizing SEIU Healthcare Michigan as the bargaining unit for home health care workers, and prohibited DCH from withholding union dues from home health care workers paid wholly by the state with Medicare or Medicaid

funds. PA 76 was made retroactive.

On May 25, 2012, the Michigan Attorney General opined that according to PA 76, the state had no legal authority to withhold union dues from the payments to home health care aides; he directed the Department of Community Health to cease deducting dues from home health care workers' payments and transferring that money to the SEIU. SEIU Healthcare Michigan sued.

On June 20, 2012, in *SEIU Healthcare Michigan v. Richard Snyder* in the Eastern District of U.S. District Court, Southern Division (No. 12-12332), Judge Nancy Edmunds ruled that the state had violated the contract clause of the U.S. Constitution, and issued a temporary injunction protecting the SEIU contract until it expires in February 2013. The state Attorney General announced that he would appeal that decision.

The Proposed Constitutional Amendment

Proposal 2012-4 would reestablish a statewide registry of home health care aides and enshrine home health care workers' collective bargaining rights in the state constitution. The proposed constitutional amendment, if approved by the voters, would supersede PA 76 by adding a new Section 31 to Article V of the Michigan Constitution, establishing the Michigan Quality Home Care Council in the executive branch of state government. The Council board would consist of 11 people. Of the nine gubernatorial appointees, seven would have to be current or former program participants, participant representatives, or participant advocates, though the initial members would be the similarly qualified board members of the MQCCC board. The Council would be chaired by the director of the Department of Community Health; the director of Department of Human Services would also be a member. The Council would be required to assume any obligations of the MQCCC to recognize provider representatives and to honor unexpired bargaining agreements with providers. The Council would also:

- Provide training opportunities for providers to improve provider skills and for participants to

facilitate their ability to hire and manage providers;

- Provide for a registry that may refer prescreened home health care providers, though participants retain the right to hire providers who are not referred from the registry (many home health aides are family members or friends of the disabled or elderly participants);
- Ensure that financial management services are available to participants to facilitate their ability to employ providers;
- Set compensation standards subject to appropriations by the legislature, and other terms and conditions for the employment of providers by participants; and
- Other related duties.

This constitutional amendment would explicitly reinstate collective bargaining rights for home health care workers: "Consistent with this Section, participant-employed providers governed by this Section shall have the same rights relating to collective bargaining with the Council as are otherwise provided by law to public employees not within the classified

civil service relating to their public employers, and the Council shall be governed by such collective bargaining arrangements, to be enforced by the appropriate labor relations agency. But such providers shall not, as a consequence of this Section, be considered public or State employees for any other purpose, not be entitled to any other legal benefit reserved to such employees. Collective bargaining under this Section shall not deprive participants of their right to select, supervise, train and direct, or terminate, an individual provider. Such providers shall not have the right to strike.”

Currently, only state police troopers and sergeants have collective bargaining rights enshrined in the state constitution. This proposal would provide that home health care workers also have the right to collective bargaining, though they would not have civil service protection. Section 5, Article XI of the con-

stitution would be amended to include “in-home personal care providers subject to the authority of the Michigan Quality Home Care Council” to the list of those exempted from civil service. Section 5 currently provides that exempted positions include “those filled by popular election, heads of principal departments, members of boards and commissions, the principal executive officer of boards and commissions heading principal departments, employees of courts of record, employees of the legislature, employees of state institutions of higher education, all persons in the armed forces of the state, eight exempt positions in the office of the governor, and within each principal department, when requested by the department head, two other exempt positions, one of which shall be policy-making. The civil service commission may exempt three additional positions of a policy making nature within each principal department.”

Conclusion

The debate on this issue centers on whether the strategy adopted in 2004 is primarily a means to channel money to unions, or whether the proposed Council would actually improve the care available to participants of the Home Help Services Program. Providers are not required to avail themselves of the training opportunities; program participants are not required to select providers from the registry; participants are not required to avail themselves of financial management services.

The Home Health Care Program itself will remain in effect regardless of the outcome of this election on the proposed constitutional amendment: the program that pays for home health aides depends on federal and state funding, not on the bargaining rights or union affiliation of, nor payment of union dues by, home health care aides.

On November 6, 2012, Michigan voters will be confronted with a number of issues related to public sector collective bargaining (Proposal 2012-01 is a referendum on Public Act 4 of 2011 and Proposal 2012-02 would enshrine the right to collective bargaining in the state constitution). A question of primary importance is whether this particular issue is of such significance that it should be enshrined in the state constitution. The Michigan Constitution is the foundational document for the organization of government in the state. Its provisions are those that establish the power and structure of the government and the rights of individuals, and that should endure. Voters interested in reestablishing the MQCCC should thoughtfully consider whether a constitutional amendment is the best approach to this issue, or whether a voter initiated law or a referendum on PA 76 would have been a more appropriate way of addressing this issue.