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MEMORANDUM

Date: September 16, 2009
To: The Honorable Pam Byrnes, Chair,
House Standing Committee on Public Health Care Reform
From: Carol J. Cukier, Legal Counsel *CJC*
Re: Constitutional Considerations in Legislation Concerning Public Employer Health Benefit Reform

QUESTION

This memorandum responds to your question concerning House Bill No. 5345 of 2009, which proposes a mechanism to standardize health benefits offered by public employers. The memorandum addresses the following question:

What issues might cause concerns as to the constitutionality of provisions in House Bill No. 5345 of 2009, if it were enacted into law as introduced?

SHORT ANSWER

The major issues arise under constitutional provisions that grant specific power or rights to certain people or governmental agencies. The provisions that might be interpreted to restrict the application of some provisions in the bill, include the following:

1. The civil service commission's power to fix rates of compensation and regulate all conditions of employment for employees in the classified state service under Const 1963, art XI, § 5.
2. The explicit bargaining rights given to state police troopers and sergeants in Const 1963, art XI, § 5.
3. The constitutional autonomy granted under Const 1963, art VII, §§ 5 & 6 to boards of institutions of higher education as to supervision of the institution and control of expenditures of the institution's funds.

DISCUSSION

1. **Powers Granted To The Civil Service Commission - Const 1963, art XI, § 5.**

House Bill No. 5345, as introduced, (the bill) includes a provision that proposes to require the civil service commission to offer only certain health benefit plans to employees in the state classified service, unless the commission can meet the conditions in the bill for opting out of that requirement. House Bill No. 5345, sections 16 and 17. The Michigan Supreme Court has recognized that Michigan constitutional provisions have granted “plenary and absolute powers” to the civil service commission regarding civil service employees. Viculin v Department of Civil Service, 386 Mich 375, 398 (1971). The history of the adoption of Const 1963, art XI, § 5 and its predecessor section in the Michigan Constitution of 1908 (Const 1908, art VI, § 22) is described in cases such as Council #11, AFSCME v Civil Service Commission, 408 Mich 385 (1980), which explains that the Michigan electorate and the drafters of the Michigan Constitution of 1963 had approved the sections to remove the issues of state employee selection, promotion, and compensation from most political pressures, including legislative controls.

In Michigan Association of Governmental Employees (MAGE) v Civil Service Commission, 125 Mich App 180, 187 (1983), the Michigan Court of Appeals noted that, until the legislative power to reject or reduce rates of compensation was included in paragraph 7 of Const 1963, art XI, § 5, “the [civil service] commission had absolute authority to set compensation at any time during the course of a fiscal year without legislative oversight.” [Emphasis added.] Paragraph 7 of section 5 of article XI of the Michigan Constitution of 1963 provides as follows:

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.

This provision is described by the Court of Appeals in MAGE as “a narrowly drawn veto power [vested in the Legislature] over increases in wages to state employees.” MAGE, at 189.

Notwithstanding the use of the term “wages” in the above quotation from MAGE and the use of the term “rates of compensation” in Const 1963, art XI, § 5, it appears that the power of the civil service commission (and coincidentally the veto power of the Legislature) extends to determinations regarding the provision of health insurance. This conclusion has several bases. First, MAGE concerned a legislative action to reject a 5% wage increase recommended by the civil service commission and additional vision care insurance coverage recommended by the commission. Second, the attorney general, in regard to Const 1908, art VI, § 22, the predecessor section to Const 1963, art XI, § 5, has

opined that the power to set “rates of compensation” gives the civil service commission the power to provide health benefits under its “discretion ... to provide within reasonable limits that a portion of the compensation be in some other form [a form other than the form of money].” OAG, 1959-60, No. 3,413, p. 206, 208 (October 12, 1959). Third, the only attempt of any delegate at the 1961-62 Constitutional Convention to define the powers of the civil service commission regarding compensation suggests a very broad grant of power. Delegate Brake, at 1961-62 Constitutional Convention Record, Vol II, p. 2783, in arguing for the adoption of Const 1963, art XI, § 5, ¶ 7, noted that, without paragraph 7, the commission would be “one body of people with complete control over wages, vacation time, sick leave and everything else having to do with the cost of employment, [and the] cost of your personnel.”

If, under MAGE and the other referenced authority, the civil service commission has the power to recommend health insurance coverage as part of its constitutional power to recommend the “rates of compensation,” then that recommendation is also subject to the “narrowly drawn veto power” of the Legislature. The narrowness of that power is highlighted in portions of Const 1963, art XI, § 5, ¶ 7. One provision expressly provides that the action of the Legislature in regard to the civil service commission’s recommendations must take place, if at all, within 60 calendar days after it receives the commission’s recommendations. Furthermore, to override the recommendations, the Legislature must act by at least a two-thirds majority of the members elected to and serving in each house. Enacting a statutory restriction on state classified employee benefits might be considered to extend beyond the narrowly drawn veto power that the Constitution grants to the Legislature as to compensation for employees in the classified service.

Courts have allowed general laws such as the Elliott Larsen civil rights act and the handicapper civil rights act to apply to employees in the state classified service. Marsh v Civil Service Dep't, 142 Mich App 557, 569 (1985). The limits of the Legislature’s ability to enact laws that apply to the classified civil service were explained in Department of Social Services v Kulling, 190 Mich App 360 (1991). The classified service is not exempt from general laws enacted to enforce constitutionally guaranteed rights under an express grant of constitutional power. Kulling, p. 364. (See also, OAG 2006, No. 7,187, p. 81 (February 16, 2006).) The Legislature's only express power to enact laws directed specifically to public employees is in Const 1963, art IV, § 48, which grants the power to enact laws "providing for the resolution of disputes concerning public employees." That provision also includes an express exemption from that grant for employees in the state classified civil service. Thus, there is a question as to whether a court would find a law that applies only to public employees to be a general law, and also whether it could be found to be enacted under an express grant of constitutional power so as to be applicable to employees in the classified state service.

2. Bargaining Rights Of State Police Troopers And Sergeants. Const 1963, art XI, § 5.

State troopers and sergeants are granted express constitutional rights to collective bargaining in a provision added to the state constitution of 1963 by the voters in 1978, which states as follows:

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.

Const 1963 art XI, § 5, ¶ 5

The extent of the bargaining rights protected under that constitutional provision has not been the subject of reported caselaw. The constitutional provision, itself, however, is very explicit in listing compensation and retirement among the various aspects of employment over which the officers have collective bargaining rights.

The bill under consideration explicitly preserves certain bargaining rights for public employees concerning health benefits. House Bill No. 5345, Sec. 16. However, because it mandates that public employers offer only certain health care benefits plans (subject to opt out provisions), the bill would raise a question as to whether that mandate would impermissibly infringe on the constitutionally guaranteed bargaining rights of state police troopers and sergeants.

3. Powers Granted to Boards Of Institutions Of Higher Education. Const 1963, art VII, §§ 5 & 6.

The bill proposes to require the governing board of a public institution of higher education to offer only certain health benefit plans to employees, unless it can meet the requirements in the bill for opting out of that requirement. House Bill No. 5345, Sec. 16. Section 5 of article VIII of the Constitution of 1963 establishes the governing boards of the University of Michigan, Michigan State University, and Wayne State University, as corporate bodies. The portion of that section that provides for independence of the universities' governing boards from legislative control states:

. . . Each board shall have general supervision of its institution and the control and direction of all expenditures from the institution's funds. . . .

1963 Const, art VIII, § 5.

The governing boards of certain other public institutions of higher education are granted similar powers in 1963 Const, art VIII, § 6.

The constitutional status of those public institutions of higher education has largely preserved the autonomy of those boards from attempts at legislative control over administration of those institutions.

In cases under former Michigan constitutions, the Michigan Supreme Court refused to apply a law requiring a completion bond for all public building construction or the state accounting laws to universities with constitutional status. Sterling v Regents of University of Michigan, 110 Mich 369 (1896). Weinberg v Regents of the University of Michigan, 97 Mich 246 (1893). Board of Regents of the University of Michigan v Auditor General, 167 Mich 444 (1911). (See: 1850 Const, art 13, §§ 7 and 8 and 1908 Const, art XI, § 8.)

The Court also held that the workmen's compensation law could not apply to the university without its consent. Agler v Michigan Agricultural College, 181 Mich 559 (1914). However, more than thirty years later, an equally divided Court revisiting the issue let stand a lower court's decision to allow worker's compensation laws to apply to university employees. Peters v Michigan State College, 320 Mich 243 (1948). The equally divided decision of the Supreme Court in Peters resulted in an outcome contrary to that in Agler, without overruling Agler and without establishing precedential value on the constitutional issue.

The Court of Appeals held that a statute waiving [common law] governmental immunity to tort actions applied to waive the immunity of a university board to a tort claim based on automobile negligence. Branum v Board of Regents of the University of Michigan, 5 Mich App 134 (1966). The court in Branum stated a principle that the courts appear to be following in applying general laws, such as criminal laws, to universities, as follows:

. . . It is the opinion of this Court that the legislature can validly exercise its police power for the welfare of the people of this State, and a constitutional corporation such as the board of regents of the University of Michigan can lawfully be affected thereby. The University of Michigan is an independent branch of the government of the State of Michigan, but it is not an island. Within the confines of the operation and the allocation of funds of the University, it is supreme. Without these confines, however, there is no reason to allow the regents to use their independence to thwart the clearly established public policy of the people of Michigan.

Branum, at 138-139.

Although Branum was not a decision of this state's highest court, the Michigan Supreme Court has cited it and the controlling decision in Peters with favor to support subsequent decisions.

In some instances, the Court has cited particular grants of legislative power to support applying a general law to a state university. In three cases that are perhaps most relevant to the current inquiry, the Court held that the laws regulating the procedure for handling public employee disputes could apply to universities. The Court has noted that the constitutional powers of universities are not plenary. Eastern Michigan University v Labor Mediation Board, 384 Mich 561, 566 (1971). The Eastern Michigan decision harmonized the express power given to the Legislature to enact laws concerning public employee disputes in Const 1963, art IV, § 48, with the powers granted to universities in Const 1963, art VIII, § 5. The Court made a similar holding in Regents of the University of Michigan v

Employment Relations Comm'n, 389 Mich 96 (1973) in which the Court permitted the public employment relations act, 1965 PA 379, (PERA), to apply to a university as a public employer. (See also: Central Michigan University Faculty Ass'n v Central Michigan University, 404 Mich 268 (1978)). The Court held that PERA could apply to grant collective bargaining rights to interns, residents, and postdoctoral fellows at a university. The Court cautioned, however, that the law could not apply to require collective bargaining as to matters within the university's educational sphere. Regents, p 109. The Court distinguished the exclusion of the civil service commission from the application of PERA, since the civil service commission is expressly named and exempted in the constitutional grant of legislative power to enact laws concerning public employee disputes. In contrast to the express grant of power to the Legislature to pass laws to regulate disputes concerning public employees, however, the state constitution includes no such express grant of power to pass laws concerning compensation for either public employees in general or for employees of public institutions of higher education. Accordingly, the basis that the court used to support the application of PERA to employees of public institutions of higher education does not necessarily extend more broadly to support the application of any law regulating public employees.

A statute enacted pursuant to the police power to protect the public welfare that is declared in section 51 of article IV of the Michigan Constitution of 1963, does not apply to a public university unless it is very clear that the Legislature intended the statute to apply. Accordingly, the Court of Appeals declined to require Northern Michigan University to comply with the building code when other laws concerning construction of university dormitories did not include such a requirement. Marquette County v Northern Michigan University, 111 Mich App 521 (1981). The Court of Appeals has declined to apply a law to a university, however, even if the university was expressly included among the entities to which the law purported to apply, in the absence of a clearly established public policy supporting the law. The Court of Appeals held that a law requiring universities to refrain from investing in businesses that operate in the Republic of South Africa infringed on the university's authority to allocate its funds. Regents of the University of Michigan v Michigan, 166 Mich App 314, 329-330 (1988), app dis (on stipulation of the parties) 432 Mich 873 (1989). In that case, the law did not apply to all public entities but focused narrowly on universities, indicating the lack of a clear public policy against such investments of public funds.

The developing law concerning the application of general legislation to constitutionally autonomous universities has seen the Court reexamine old precedent. In 1996, the Michigan Supreme Court overturned Weinberg in holding applicable to a university building project the requirement for a contractor to provide a performance bond before beginning construction work on a public building or improvement. W T Andrew Co v Mid-State Surety Corp, 450 Mich 655 (1996). (Also overturning William C Reichenback Co v Michigan, 94 Mich App 323 (1979).) In overruling those cases, the Court found several factors important. First, the bond requirement would be a lesser financial burden than the costs of complying with the employment laws that the Court had found applicable to public universities. W T Andrew, pp 664-665, 667 (citing: Regents of the University of Michigan, (1973), Branum v University of Michigan Board of Regents, 5 Mich App 134 (1966), and Peters, (Justice Reid's controlling opinion for an equally divided court). Second, the constitutional authority of public universities does not exempt them from general laws protecting the general welfare of the state. W T

Andrew, p 668. Third, although not expressly stated in W T Andrew and the other decisions upholding the application of laws to public universities, courts appear to have been more likely to enforce a law granting rights to members of the public, as opposed to a statutory direction to the university board (i.e., worker's compensation, collective bargaining rights, recovery on a contractor's performance bond).

The Court was presented with the opportunity to address the constitutional question in regard to applicability of the open meetings act in Federated Publications v Michigan State University Board of Trustees, 460 Mich 75 (1999). The Court held that the open meetings act could not apply to the internal processes that the university followed in exercising its constitutional power to select a president, resting its decision on two principal points. First, applying the law would infringe on the university's constitutional powers to supervise the institution granted in Const 1963, art VIII, § 5. Ibid. pp 88-89. Second, another constitutional section concerning university powers already addresses open meetings of university governing boards. Const 1963, art VIII, § 4. That section provides, in relevant part, that "[f]ormal sessions of governing boards of such institutions shall be open to the public." The constitutional requirement that formal meetings of the board must be open to the public carries the correlative negative implication that informal meetings need not be open. The Court reasoned that the existing constitutional provision on that subject limits the ability of the Legislature to legislate as to the universities' powers to determine those meetings that are formal meetings of the board and must be open to be public, and those that are informal and have no such requirement. Ibid. p 90.

There appears to be an increased tendency of the court to allow general laws to apply to affect matters and expenditures that were formerly considered the exclusive domain of those educational institutions. However, recent cases continue to uphold the constitutional autonomy as to statutory regulations directed at those institutions or matters that fall clearly within the educational sphere.

SUMMARY

1. The plenary power of the civil service commission concerning compensation of employees in the state classified service presents a question as to the legislature's power to regulate health benefits for employees in the state classified service. The Legislature has the power to reject or reduce the civil service commission's recommended compensation in the narrow manner constitutionally specified, which is the exclusive power given to the Legislature as to compensation of employees in the state classified service. Although a general law that the Legislature enacts to enforce constitutionally guaranteed rights pursuant to an express constitutionally granted power has been held to apply to civil service employees, House Bill No. 5345 may not fit the criteria the court has used in the few cases in which the court has permitted a law to apply to regulate conditions of employment in the state classified service. Accordingly, court cases indicate a question as to whether a court considering the bill, if enacted as introduced, could apply to restrict the civil service commission in selecting the health benefits offered to employees in the state classified service.

2. Express constitutional rights granted to state police troopers and sergeants to collectively bargain concerning compensation raise concerns that a court might hold that certain provisions in the bill could not apply to restrict the bargaining subjects for state police troopers and sergeants.
3. Michigan courts have refused to apply several laws to constitutionally autonomous governing boards of institutions of higher education. Courts have permitted an act to apply to the governing board of an institution of higher education with constitutional autonomy if the act is of general application and not aimed specifically at the university, if the law does not attempt to control educational activities, and if the law implements the clearly established public policy of the state. However, courts have refused to apply a law to constitutionally autonomous boards if the laws purports to directly regulate an activity that the Constitution has assigned to the control of the governing board of a university. Courts have permitted a law regulating collective bargaining of public employees to apply to governing boards of universities with constitutional autonomy. That law differs from the bill under consideration, however, because the Legislature has no express constitutional power to enact laws regarding public employees except as to laws concerning public employee disputes. The court decisions concerning governing boards of constitutionally autonomous institutions of higher education indicate constitutional limitations might be a consideration in the application of the restrictions in this bill to those boards.

CJC:ljm