STATE OF MICHIGAN

COURT OF APPEALS

MOSAICA ACADEMY OF SAGINAW,

Appellant,

v

MICHIGAN EDUCATION ASSOCIATION,

Appellee.

UNPUBLISHED
June 25, 2002

No. 230332
MERC
LC No. 00-000042

Before: Owens, P.J., and Sawyer and Cooper, JJ.

PER CURIAM.

Mosaica Academy of Saginaw (Mosaica) appeals by right from the Michigan Employment Relations Commission's (MERC) decision and direction of election finding that it was the actual public employer of the employees at issue. We find this matter is controlled by our decision in *AFSCME v Dep't of Mental Health*, 215 Mich App 1; 545 NW2d 363 (1996), and vacate the MERC decision on the ground of federal preemption in favor of the National Labor Relations Board (NLRB).

A claim of federal preemption is a challenge to subject-matter jurisdiction that may be raised at any time. *Id.* at 4. MERC decisions are reviewed on appeal pursuant to Const 1963, art 6, § 28, and MCL 423.216(e). The MERC's findings of fact are conclusive if they are supported by competent, material, and substantial evidence on the record as a whole, and legal determinations may not be disturbed unless they violate a constitutional or statutory provision or they are based on a substantial and material error of law. MCL 24.306(1)(a), (f); *Police Officers Ass'n v Fraternal Order of Police, Montcalm Co Lodge No 149*, 235 Mich App 580, 586; 599 NW2d 504 (1999).

In the present case, determining where jurisdiction properly lies requires deciding whether, for the purposes of the National Labor Relations Act (NLRA), appellant Mosaica or Mosaica Education, Inc (MEI) is the actual employer. See *AFSCME*, *supra* at 3-6, 12-15. Subject to limited exceptions, when an activity is "arguably" subject to the provisions of the NLRA, states must defer to the exclusive competence of the NLRB. When a party asserts that state proceedings are preempted because the conduct at issue is within the purview of the NLRA, the claim represents a challenge to the subject-matter jurisdiction of the state court or tribunal that must be considered and resolved by the state court. *Id.* at 5, 14. However, if a party or tribunal shows that the NLRB would clearly decline jurisdiction through analysis of the NLRA

and NLRB decisions, a state tribunal or court may hear the case. *Id*. at 10-11, citing 29 USC 164(c).

There is no question that MEI is not a "state or political subdivision thereof." 29 USC 152(2). In contrast, according to ordinary statutory construction rules, appellant Mosaica is a state or political subdivision because it is a public school academy under Michigan law. *Id*.; *In re MCI Telecommunications Complaint*, 460 Mich 396, 411; 596 NW2d 164 (1999); MCL 380.501 *et seq*.; *Council of Organizations & Others for Ed About Parochiaid v Governor*, 455 Mich 557, 567-576; 566 NW2d 208 (1997). Therefore, if appellant Mosaica is the actual employer of the employees in question, the MERC properly asserted its jurisdiction instead of deferring to the NLRB. *AFSCME*, *supra* at 5-6.

However, it is unclear who the actual employer is in this matter, and the NLRA and NLRB no longer indicate how to factually decide this question for jurisdictional purposes. We have noted that the NLRB struck down the former "control" test and joint employer analysis[1] applicable where, as may be the case here, one private employer had "close ties to an exempt [public] entity." *Id*. at 6-7, 12-14. The NLRB abandoned this test, which considered which entity controlled most terms and conditions of employment, because:

> [B]y requiring the employer to have control of economic terms before it would assert jurisdiction, the Board seems to have made a judgment, either directly or indirectly, that not only were certain contract terms of higher priority than others, but that such terms must be a part of contract negotiations. This, we think, amounts to the Board's entrance into the substantive aspects of the bargaining process which is not permitted under [Supreme Court precedent]. [*Management Training Corp v Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local 222*, 317 NLRB 1335, 1357-1358 (1995), quoted in *AFSCME*, *supra* at 12.]

After the control test's demise, we have held that deference to the NLRB is more often necessary under the "arguable jurisdiction" standard. *AFSCME*, *supra* at 14-16. No NLRB decisions and Michigan cases since the *AFSCME* decision in 1996 have indicated the new jurisdiction test where, as here, there are two possible employers, one arguably public and one private. Further, the NLRB affirmed its decision in *Management Training*, *supra*, as recently as in *MCAR, Inc v AFSCME, Dist Council 85, AFL-CIO*, ___ NLRB ___; 2001 WL 431520. The

---

[1] Because the NLRB abandoned the joint employer doctrine, *AFSCME v Dep't of Mental Health*, 215 Mich App 1, 13-14; 545 NW2d 363 (1996), the parties' citation of *St Clair Co Intermediate School Dist v St Clair Co Ed Ass'n*, 245 Mich App 498; 630 NW2d 909 (2001), is irrelevant. *St Clair* did not analyze federal preemption because the question there was whether a public school district or its chartered public school academy was the actual employer under Michigan state law. See *id*. at 500, 505-506, 515-516. Although not stated in the *St Clair* decision, because both entities were public, i.e., state political subdivisions, the NLRA was inapplicable anyway. See *id*. at 498, 505-506; 29 USC 152(2). The only question remaining in *St Clair* was whether, under Michigan law's joint employer doctrine, the public school district or the public academy was the actual employer for purposes of enforcing an unfair labor practice charge. *St Clair Co Intermediate School Dist*, *supra* at 515-516.

NLRB's decisions since *Management Training* also support its assertion of jurisdiction in cases factually similar to the present matter. See, e.g., *id*.; *International Union of Operating Engineers, Local 70 v NLRB*, 940 F Supp 1439 (D Minn, 1996) (NLRB's assertion of jurisdiction over employees of private management company hired by public school district, on grounds that company was private rather than public employer, did not violate the NLRA).

Thus, while it seems clear that appellant Mosaica is a public entity subject to state labor relations law and MEI is a private entity subject to federal law, which is the actual employer on the facts of this case is vital to determining jurisdiction. Because the NLRB withdrew the control test ordinarily used for determining who is the actual employer, which is arguable in this case, this case should be deferred to the NLRB. *AFSCME*, *supra* at 14-16. As a result, the MERC's decision asserting its own jurisdiction was an error of law violating the federal preemption doctrine. *Police Officers Ass'n*, *supra* at 586.

Vacated.

/s/ Donald S. Owens
/s/ David H. Sawyer
/s/ Jessica R. Cooper