

**STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION**

In the Matter of:

UNIVERSITY OF MICHIGAN,
Public Employer,

Case No. R11 D-034

-and-

GRADUATE EMPLOYEES ORGANIZATION/AFT,
Petitioner-Labor Organization,

-and-

MELINDA DAY,
Intervenor.

APPEARANCES:

Christine M. Gerdes, Associate General Counsel, for the Public Employer

Mark H. Cousens, for the Labor Organization

Mackinac Center Legal Foundation, by Patrick J. Wright, for the Intervenor

**DECISION AND ORDER DISMISSING PETITION AND
DENYING MOTION TO INTERVENE**

Pursuant to Sections 12 and 13 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.212 and MCL 423.213, this matter came before the Michigan Employment Relations Commission on a petition for a representation election filed by the Graduate Employees Organization/AFT (GEO or Union). Subsequently, a Motion to Intervene and for Summary Disposition was filed by Melinda Day. Based on the pleadings and briefs filed by the parties on or before August 8, 2011, the Commission finds as follows:

Facts:

On April 27, 2011, the GEO filed a Petition for Representation Proceedings seeking an election among graduate student research assistants (RAs). The GEO seeks to accrete RAs to its existing bargaining unit of graduate teaching assistants (TAs) and

graduate student staff assistants (SAs) at the University of Michigan (U of M or Employer). The petition describes the RAs that Petitioner proposes to include in, and those it intends to exclude from, the bargaining unit as follows:

A graduate student research assistant (GSRA) is a graduate student who is employed to conduct or assist in the conducting of research of a scholarly nature which benefits the University, a faculty member, academic staff supervisor, granting agency, or any other agent or unit of the University. Duties of GSRA's may include, but are not limited to, the gathering and analyses of data, the development of theoretical analyses and models, the production or publication of scholarly journals and research reports, and the maintenance of laboratories and equipment. Research conducted by such an employee may be academically relevant to his or her academic program and may also benefit the employee and be used in his/her dissertation or other academic work.

Excluded are:

1. Graduate students who are compensated to conduct or assist in the conducting of research of a scholarly nature which meets both of the following conditions:
 - a. does not benefit the University, a faculty member, academic staff supervisor, granting agency, or any other agent or unit of the university; and
 - b. is used in his/her dissertation or other personal academic product.
2. Supervisors
3. Confidential employees
4. All other employees.

On May 19, 2011, the University of Michigan's Board of Regents, by a vote of six to two, adopted a resolution supporting the right of RAs to determine for themselves whether to organize into a union. The resolution also stated that the Regents recognized the RAs as "employees." The Employer and the Union have presented a Consent Election Agreement to us for approval in order that the parties may proceed with an election and possible certification of the GEO as the RAs' representative in bargaining under PERA.

Melinda Day is a member of the proposed bargaining unit and seeks to intervene in this proceeding under Rule 145(3) of the General Rules of the Michigan Employment Relations Commission, 2002 AACRS, R 423.145(3). She also requests that the representation petition be dismissed for lack of subject matter jurisdiction. The Union filed a motion in opposition to Day's motion to intervene on August 3, 2011.¹

¹ On the same date, the Employer and the Union executed the Consent Election Agreement, which further defines the proposed bargaining unit and clarifies that it would be a separate unit of RAs rather than an accretion to the existing unit represented by the GEO.

Discussion and Conclusions of Law:

The Petition for Representation Proceedings

In a 1981 unfair labor practice case involving these same parties, the Commission determined the employment status of approximately 2,000 graduate students who had appointments as graduate student assistants. There, the Commission reviewed the nature of the employment of each of the three types of graduate student assistants: the TAs, who teach certain undergraduate courses; the SAs, who counsel undergraduates, advise them on course selections, and provide other professional and quasi-professional support services; and the RAs, who perform research under the supervision of a faculty member who is the primary researcher of a research grant. The Commission majority concluded that the TAs and SAs were employees under PERA, but the RAs were not. *Regents of the University of Michigan*, 1981 MERC Lab Op 777. Their conclusion relied, in part, on the decision in *Regents of the Univ of Michigan and Univ of Michigan Interns-Residents Assn*, 1971 MERC Lab Op 270, in which the Commission explained that the key to determining whether medical residents were employees was whether the “work is being performed in a ‘master-servant’ relationship or whether the person performing the work does so as his own ‘master.’” In the 1981 case, the Commission majority explained at 1981 MERC Lab Op 785 -786:

TAs provide a benefit to the University rather than engaging in pursuits of their own. They provide services similar to those of nonstudent employees; they do not control what courses they teach or what hours they work; they are supervised and may be removed for inadequate performance; and, they are compensated based on the amount of work they provide. . . . Likewise, SAs perform regular duties of a type which benefit the University.

. . . [T]he relationship between the RAs and the University does not have sufficient indicia of an employment relationship. The nature of RA work is determined by the research grant secured because of the interests of particular faculty members and/or by the student’s own academic interest. They are individually recruited and/or apply for the RA position because of their interest in the nature of the work under the particular grant. Unlike the TAs who are subject to regular control over the details of their work performance, RAs are not subject to detailed day-to-day control RAs are substantially more like the student in the classroom They are working for themselves.

In the instant proceeding, a petition was filed seeking an election to determine whether RAs should be accreted to the unit from which they were excluded in 1981. In support of its petition, the GEO has submitted a copy of the resolution by which the U of M Regents recognize RAs as “employees.” Subsequently, the parties signed a Consent Election Agreement that embodies that recognition and seeks our approval of the formation of a separate unit of RAs. Usually, we do not inquire into the nature of an employment relationship or the legality of a bargaining unit when we have a Consent

Election Agreement signed by the parties. However, this is not the usual case because the issue of the Commission's jurisdiction is squarely before us in light of our previous decision involving these same parties. To decide this issue, we have no information that would allow us to reach a conclusion contrary to the one reached in 1981, that RAs are not employees under PERA.

Our jurisdiction derives from statutory authority and does not extend to individuals who are not employees of a public employer. The Commission's jurisdiction cannot be expanded by an agreement. Just as independent contractor status cannot be conferred upon an employee by agreement between the employee and an employer, employee status cannot be conferred by agreement upon one who is not an employee under the law. *Cf. Detroit Judicial Council*, 2000 MERC Lab Op 7; 13 MPER 31021 (2000) (no exceptions). We cannot find that RAs are employees based solely upon an agreement between the parties. Absent a showing of a substantial and material change of circumstance, we are bound by our previous decision.

Because Commission jurisdiction cannot be conferred by an agreement between the parties, a certification based upon the Petition that is before us would be vulnerable if challenged in the future. Were we to hold an election and certify the accretion of RAs to the existing unit of TAs and SAs or a separate unit of RAs, the certification would be subject to challenge in the event of a change of sentiment by the Employer as a result of change in the composition of the Employer's governing body or because of conflict between the Employer and the Union. If an unfair labor practice were charged after the parties, believing themselves to be in a legitimate collective bargaining relationship, had embarked on a series of transactions, questions about the Commission's jurisdiction over this matter could call into question the legitimacy of those transactions. On the record before us, we are not willing to allow the parties to proceed at their peril.

Having previously determined that RAs are not employees entitled to the benefits and protection of PERA, we decline to declare that they have become employees based on the Employer's change of heart and present willingness to recognize them as such. The RAs cannot be granted public employee status under PERA predicated on the record before us. However, if the parties agree that we should do so, we are willing to conduct an election as a service to the parties, and tabulate the results of that election without certifying representative status under PERA. The parties also remain free to utilize the services of the American Arbitration Association, or any other agency of their choosing, to conduct such an election.

The Motion to Intervene

While Commission Rule 423.145(3) provides that an employee, group of employees, individual, or labor organization may intervene in an election proceeding, it also provides that there must be evidence showing that ten percent of the members of the unit in which the election is sought support the petition to intervene. Day has not offered any evidence that members of the proposed unit support the petition to intervene; she, therefore, lacks standing to participate in these proceedings. For that reason alone, we

must deny Day's Motion to Intervene and for Summary Disposition.

ORDER

The petition for representation election filed by the Graduate Employees Organization/AFT, in this matter is hereby dismissed. The Motion to Intervene filed by Melinda Day is denied.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Edward D. Callaghan, Commission Chair

Nino E. Green, Commission Member

Christine A. Derdarian, Commission Member

Dated: _____