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-

STUDENTS AGAINST GSRA UNIONIZATION,
Proposed Intervenor,

-and-

MICHIGAN ATTORNEY GENERAL,
Proposed 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 Proposed Intervenor Students Against GSRA Unionization

Bill Schuette, Michigan Attorney General; Richard A. Bandstra, Chief Legal Counsel; and Kevin J. Cox and Dan V. Artaev, Assistant Attorneys General for Proposed Intervenor Michigan Attorney General

DECISION AND ORDER ON MOTIONS TO INTERVENE AND MOTION FOR RECONSIDERATION OF ORDER DISMISSING PETITION

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 Petitioner) on April 27, 2011. On July 28, 2011, a Motion to Intervene and for Summary Disposition was filed by Melinda Day. In a Decision and Order issued on September 14, 2011, we dismissed the petition for a representation election and denied Day's motion.

On October 3, 2011, the GEO filed a Motion for Reconsideration of our decision to dismiss its petition for a representation election, accompanied by an affidavit attesting to certain facts that were not previously before us.[1] The University of Michigan (University) filed its Response to Petitioner's Motion for Reconsideration, accompanied by two affidavits, on October 17, 2011. On November 1, 2011, a Motion to Intervene and to Deny Petitioner's Motion for Reconsideration, accompanied by an affidavit and a brief, was filed by Melinda Day's attorney on behalf of an entity identified as Students Against GSRA Unionization. Petitioner (on November 4, November 9, and November 16, 2011) and the University (on November 4) each filed supplemental pleadings objecting to the motion to intervene and supporting the motion for reconsideration. On November 30, 2011, we received a motion from the Michigan Attorney General seeking to intervene in this matter and opposing reconsideration of our September 14, 2011 decision. The Attorney General's motion included a request for oral argument. Petitioner filed a brief in opposition to the Attorney General's motion to intervene on December 5, 2011, and Proposed Intervenor Students Against GSRA Unionization, filed its Brief in Response to Attorney General's Motion to Intervene on December 6, 2011. On December 7, 2011, we received the Attorney General's reply to Petitioner's brief and a letter from Petitioner objecting to the December 6, 2011 brief submitted by Students against GSRA Unionization. On December 9, 2011, we received the University's brief opposing intervention by the Attorney General. Later the same day, we received Petitioner's objection to our receipt of the Attorney General's reply to Petitioner's brief in opposition to the Attorney General's motion to intervene, and shortly thereafter, the Attorney General's reply to the University's brief opposing intervention by the Attorney General.

As indicated below, Proposed Intervenor, Students Against GSRA Unionization, has no standing in this matter. Therefore, their Brief in Response to Attorney General's Motion to Intervene will not be considered. Further, we find that oral argument will not materially assist us in this matter and, therefore, deny the Attorney General's request to argue before us. The General Rules of the Michigan Employment Relations Commission, 2002 AACS, R 423.101 - 423.484 do not provide for the filing of reply briefs. Although such briefs may be considered in the absence of objections, we have received an objection to receipt of the Attorney General's reply brief and, therefore, will not consider it. We have reviewed the remaining filings in accordance with the Commission Rules and after giving each filing appropriate consideration, we are persuaded that the issues raised by the petition for a representation election should be referred to a senior administrative law judge for an expedited evidentiary hearing, and that both motions to intervene should be denied.

Procedural History:

On April 27, 2011, the GEO filed a Petition for Representation Proceedings seeking an

[1] Our decision to dismiss the petition seeking an election occurred at a meeting of the Commission on August 8, 2011. No hearing on the facts preceded that decision.

election among Graduate Student Research Assistants (RAs) at the University of Michigan. On May 19, 2011, the University of Michigan's Board of Regents, by a vote of six to two, adopted a resolution that purported to recognize RAs as employees and to support allowing the RAs to determine whether to organize into a union. Thereafter, a Consent Election Agreement was presented to us for approval in order that the parties might proceed to an election and possible certification of the GEO as the RAs' representative in collective bargaining under PERA.

Subsequently, Melinda Day, a member of the proposed bargaining unit, sought to intervene in this proceeding under Rule 145(3) of the General Rules of the Michigan Employment Relations Commission, 2002 AACS, R 423.145(3). She also asked that the representation petition be dismissed for lack of subject matter jurisdiction. The Petitioner filed a motion in opposition to Day's motion to intervene.

On September 14, 2011, we denied the motion to intervene and dismissed the petition for a representation election. While Commission Rule 423.145(3) provides that an employee, group of employees, individual, or labor organization may intervene in an election proceeding, Day had not offered any evidence that members of the proposed unit supported her petition to intervene; she further lacked standing to participate in these proceedings.

Based on our decision in *Regents of the University of Michigan*, 1981 MERC Lab Op 777, in which we held that RAs are not employees entitled to the benefits and protection of PERA, we declined to conclude that they have become employees based on the University's recent willingness to recognize them as such. We reasoned:

> "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."

Discussion and Conclusions of Law:

The Motions 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 states 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. The affidavit filed in support of the motion to intervene submitted on behalf of Students Against GSRA Unionization simply states that the group has 371 members. There is no assertion as to how many of this number support the motion to intervene and no authorization cards accompanied that motion. Furthermore, intervention in an election proceeding is only granted when, upon a proper showing of interest, a rival to the labor organization seeking representative status wishes to be included on an election ballot. See

Commission Rule 145(3). The group known as Students Against GSRA Unionization does not seek placement on a ballot. Rather, it seeks to intervene in this proceeding for the purpose of expressing its opposition to our conducting an election, a purpose that it lacks standing to pursue in a representation proceeding. For those reasons, we must deny its Motion to Intervene and for Summary Disposition.

The Attorney General seeks to intervene under MCL 14.28. That statute provides:

> The attorney general shall prosecute and defend all actions in the supreme court, in which the state shall be interested, or a party; he may, in his discretion, designate one of the assistant attorneys general to be known as the solicitor general, who, under his direction, shall have charge of such causes in the supreme court and shall perform such other duties as may be assigned to him; and the attorney general shall also, when requested by the governor, or either branch of the legislature, and may, when in his own judgment the interests of the state require it, intervene in and appear for the people of this state in any other court or tribunal, in any cause or matter, civil or criminal, in which the people of this state may be a party or interested.

The right of the Attorney General to intervene is not unlimited and should be restrained where such intervention is clearly inimical to the public interest. *People v Unger*, 278 Mich App 210, 260-61 (2008) citing *In re Intervention of Attorney Gen*, 326 Mich 213, 217 (1949). See also *Federated Ins Co v Oakland Co Rd Comm*, 475 Mich 286 (2006), where the Attorney General was prohibited from intervening to prosecute an appeal from a lower court ruling that had not been appealed by the losing party.

The Attorney General argues that unionization of the University's RAs "may negatively affect" the University's reputation and competitiveness. We are clearly cognizant of the University's national standing and reputation as a major research institution. However, that is not a factor that we may consider in determining whether the RA's are public employees within the meaning of PERA. If the RAs are not public employees, we have no jurisdiction over their relationship with the University and the matter is at an end. If they are public employees, they are entitled, by law, to seek an election to determine whether they will bargain collectively through a representative of their choice. We cannot consider speculation as to the impact on the University by the RAs potential exercise of a statutory right; it is merely our responsibility to determine whether the RA's have the right to organize under PERA. We find opposition to the exercise of a statutory right is inimical to the public interest.

Although there is no dispute between Petitioner and the University over whether an election should be authorized in this matter, we must determine whether, in light of the Commission decision in *Regents of the University of Michigan*, 1981 MERC Lab Op 777, we have jurisdiction to do so. Thus, we must find whether there has been a material and substantial change of circumstances since the 1981 decision that would justify our further review of the RA's status. Such a review is an investigatory and not an adversarial proceeding. *University of Michigan*, 1970 MERC Lab Op 754, 759. MCL 423.212. We must carry out our statutory

responsibility without interference from non-parties opposed to the very rights provided to public employees by PERA.

Furthermore, the Attorney General is not seeking to intervene in order to advocate for the interest of a State agency. Rather, the Attorney General seeks intervention for the purpose of opposing a policy decision made by the Board of Regents of the University of Michigan, an autonomous State institution. Article VIII, Section 5 of the Michigan Constitution vests the University's Board of Regents with sole responsibility for the general supervision of the University. The Board of Regents adopted a resolution supporting "the rights of University Graduate Student Research Assistants, . . . to determine for themselves whether they choose to organize." It is not our role to determine whether the Regents made the correct policy decision in passing that resolution. A Commission proceeding is not the proper forum for the Attorney General to debate the correctness of a policy decision made by an autonomous State institution, which is not determinative of the decision that we will make in this matter. Moreover, we are not bound by the Regents' assessment of the RAs' status under PERA. We find that it would be inappropriate to allow the Attorney General to intervene for the purpose of opposing a policy decision made by the Regents when that policy decision does not determine the results of our investigation in this matter. We find that such intervention would be unduly disruptive of the proceedings and inimical to the public interest. Accordingly, we deny the Attorney General's motion to intervene.

The Petition for Representation Proceedings

In 1981, the Commission determined that RAs were not employees covered by PERA. *Regents of the University of Michigan*, 1981 MERC Lab Op 777. The petition, here, seeks 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 submitted a copy of a resolution by which the University of Michigan Regents has recognized RAs as "employees." As we observed in our September 14, 2011 decision in this matter:

> 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.

We have carefully considered the Petitioner's motion for reconsideration and the affidavit filed with it. In its motion, Petitioner asserts that the doctrine of res judicata does not apply to a representation matter such as this. We agree with Petitioner's argument that the doctrine of res judicata does not apply to this matter. As explained in *Eastern Michigan Univ*, 1999 MERC Lab

Op 550, 560; 13 MPER 31017 (1999):

> [I]t is normally inappropriate to apply the doctrine of res judicata to a representation proceeding such as this case, barring a showing that the identical factual and legal determination is being relitigated in the subsequent proceeding.
>
> Representation proceedings are nonadversary, information gathering procedures, as distinguished from contested, adjudicatory unfair labor practice cases conducted under Chapter 4 of the Administrative Procedures Act, MCL 24.275, MSA 3.560(175). See *Lake County and Sheriff*, 1999 MERC Lab Op 107, 112. . . . [P]reclusion doctrines such as res judicata and collateral estoppel apply to administrative decisions which are adjudicatory in nature. These doctrines are not designed to apply to bargaining unit determinations that rely on the specific facts presented at a particular time, and on the statute and policies applied by the particular administrative agency. Bargaining units tend to change and evolve over time as the employer's work complement and operations change.

Prior to our September 14, 2011 decision, Petitioner did not offer evidence or specific allegations of fact to indicate that there had been a material change in the circumstances of the RAs relationship with the University in the thirty years since the decision was issued in *Regents of the University of Michigan*, 1981 MERC Lab Op 777. However, they have now submitted an affidavit attesting to facts that may provide a basis for finding that there has been a substantial material change in the RAs' status. Some of the facts attested to in the affidavit, which were not before us when we decided to dismiss the petition for election, suggest that some or all of the RAs presently may possess the necessary indicia of employment to distinguish them from the RAs who were the subject of this Commission's 1981 decision.

Representation cases such as this are investigatory proceedings in which it is our duty to try to find the truth. Now that Petitioner has asserted facts that may indicate there has been a substantial and material change in circumstances since the 1981 decision, it is our statutory obligation to send this matter to an administrative law judge to gather facts with which we can make a final determination as to whether a question of representation may exist.[2] We make no finding as to whether the RAs that Petitioner seeks to represent are employees of the University; however, the assertions in the affidavit submitted by Petitioner persuade us that this matter requires further inquiry under §12 of PERA. Therefore, this case must be referred to a senior administrative law judge to conduct an evidentiary hearing at which Petitioner will have the opportunity to attempt to show that there has been a substantial and material change in circumstances since *Regents of the University of Michigan* was issued. As indicated in our order below, it is Petitioner's burden to show that there has been such a change and it is a heavy burden to meet.

[2] If this were an adversarial proceeding, Petitioner's failure to assert sufficient facts in its initial pleading to support a finding that we have jurisdiction over this matter would result in a dismissal with prejudice. Representation cases are information gathering, rather than adversarial, proceedings.

ORDER

The Motions to Intervene filed on behalf of Students Against GSRA Unionization and by the Attorney General are denied.

The motion for reconsideration is granted, the petition for a representation election filed by the Graduate Employees Organization/AFT, is reinstated, and this matter is referred to a senior administrative law judge for an expedited evidentiary hearing. At such hearing, the Petitioner shall have the burden of proving, by substantial, competent evidence, such material change of circumstances since the decision in *Regents of the University of Michigan*, 1981 MERC Lab Op 777, as to warrant a finding that some or all of the Graduate Student Research Assistants are employees of the University of Michigan and are entitled to the protection and benefits of the Public Employment Relations Act. The Commission will require competent proof as to each category of employee to show that the facts are different from our previous decision.

We direct the administrative law judge to issue a detailed pre-hearing order regarding the disclosure of witnesses and exchange of exhibits in response to which both the Petitioner and the University shall provide relevant information and actively participate in the hearing process. The administrative law judge may call any witnesses and receive any evidence, in addition to testimony and other evidence offered by the Petitioner and the University, as may be probative and relevant, and may, by subpoena, compel the production of evidence. The administrative law judge may receive stipulations of fact from the parties, but shall not accept any stipulation as to the ultimate legal issue of employment status.

If, upon the conclusion of the hearing, the Commission determines from the factual record that some or all of the Graduate Student Research Assistants in question are employees of the University and are covered by PERA, the Commission will direct an election by secret ballot as to those positions only, in a new unit, or as an accretion to an existing unit, or take such other action as may be appropriate.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____
Nino E. Green, Commission Member

_____
Christine A. Derdarian, Commission Member

Dated: _____

COMMISSION CHAIR CALLAGHAN, CONCURRING IN PART AND DISSENTING IN PART:

For the reasons stated in decision of the majority, I agree with that the Proposed Intervenor, Students Against GSRA Unionization, does not qualify as an intervenor under the Commission's rules and their motion to intervene should be denied. However, I disagree with the majority's decision to grant reconsideration of our September 14, 2011 decision dismissing the representation petition. I would deny the motion for reconsideration and dismiss the Attorney General's motion to intervene as moot. Since the majority is granting reconsideration, I disagree with their denial of the Attorney General's motion to intervene.

The basis for MERC's 1981 opinion, which held that RAs are not employees, but are, instead, students, holds true today. Nothing has materially changed the nature of the mentor-mentee relationship that is so critical to the research function of the University of Michigan as a world class research university. Even though the numbers of RAs and the amount of funding have increased, the essential nature of the mentor-mentee relationship between student and faculty member that is at the core of the university research function remains unaltered. However, that crucial relationship would be placed in peril if this Commission were to reverse its 1981 decision.

This is precisely why University of Michigan President Mary Sue Coleman and nineteen University department heads opposed the resolution by the University Regents declaring that the RAs are employees. In urging the Regents not to adopt the resolution, President Coleman told them that characterizing "research assistants as University employees. . . . could fundamentally alter the relationship between faculty and graduate students." President Coleman, a nationally recognized researcher, also warned, "this matching process and the collegial relationship built on it, are the keys to the recruitment of the very best faculty and staff, and essential to the quality of our graduate education overall." This view was echoed by the June 24, 2011 letter to the provost signed by nineteen current and former deans, which said in part, "We believe that such a union would put at risk the excellence of our university and the success of our graduate student assistants."

Indeed, it is for the aforementioned reasons that this Commission unanimously concluded, in September 2011, that we lack jurisdiction to grant the election petition as the matter has already been determined by our 1981 decision. We must not ignore our previous decision unless there has been a material and substantial change in circumstances that would justify a different result. Neither the petition nor Petitioner's motion for reconsideration has persuaded me that there has been "a substantial and material change of circumstance" since this Commission's 1981 decision on the question of whether the RAs are public employees as defined under PERA.

Just as nothing material has changed since 1981 to alter the prior Commission decision, so too, nothing has changed in the arguments made by Petitioner that would allow us to reconsider our September 14, 2011 decision. Rule 167 of the Commission's General Rules, 2002 MR R 423.167 governs motions for reconsideration and states in pertinent part:

> A motion for reconsideration shall state with particularity the material error claimed . . . . Generally, and without restricting the discretion of the commission, a motion for reconsideration which merely presents the same issues ruled on by the commission, either expressly or by reasonable implication, will not be granted. (Emphasis added)

I have thoroughly reviewed Petitioner's motion and the affidavit filed with it. However, I find nothing in Petitioner's arguments in support of its request for reconsideration that differs significantly from the arguments in the petition. Those arguments were considered and discussed in our September 14, 2011 Decision and Order.

I have also carefully read the University's response to Petitioner's motion. While the University's response does not oppose Petitioner's motion, the two affidavits submitted with that response stress the importance of the RAs' work in the graduate students' educational process. Indeed, both affidavits make it clear that the graduate students' work as RAs is an integral part of gaining the knowledge and skills necessary for them to earn their doctorate degrees. Both affidavits confirm that the following language from *Regents of the University of Michigan*, 1981 MERC Lab Op 777, 785-78, remains true today:

> 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. . . . RAs are substantially more like the student in the classroom . . . . They are working for themselves.

Neither Petitioners' motion for reconsideration nor its supporting affidavit contains sufficient allegations to give us reasonable cause to believe that the RAs might be public employees for whom a question of representation exists. Therefore, I find no basis for ordering a hearing under §12 of PERA. Further, I find no need for the Attorney General's intervention unless reconsideration is granted.

The Motion to Intervene by the Michigan Attorney General

The Attorney General seeks to intervene under MCL 14.28. That statute provides:

> The attorney general . . . shall also, when requested by the governor, or either branch of the legislature, and may, when in his own judgment the interests of the state require it, intervene in and appear for the people of this state in any other court or tribunal, in any cause or matter, civil or criminal, in which the people of this state may be a party or interested.

If I agreed with the decision to grant reconsideration in this matter, I would find the Attorney General's intervention appropriate. As discussed at our August 8, 2011 meeting, given

the parties agreement on the underlying issues, there is no case or controversy to put before an administrative law judge. At that meeting, legitimate concern was expressed over whether the University would present evidence at a hearing that might show facts exist contrary to the Regents' resolution. Petitioner has offered no arguments that might persuade me that an evidentiary hearing in this matter would fully disclose the facts necessary to accurately discern whether the RAs' relationship with the University has substantially changed since the decision in *Regents of the University of Michigan*, 1981 MERC Lab Op 777.

If I agreed with the decision to refer this matter to an administrative law judge for a hearing, I would be concerned that testimony regarding the relevant experiences of the University president, numerous deans and faculty members, and hundreds of RAs might not be presented without the Attorney General's intervention. Indeed, a decision to refer this matter for hearing would appear, to all who oppose the Regents' May 19 resolution, to be a sham if we were to permit only one side of this crucial debate to be proffered at hearing. If I had joined in the decision to refer the matter to an administrative law judge, then in the interests of fairness and due process, I would encourage the majority to grant the Attorney General's motion to intervene for the purpose of ensuring that both sides of this issue were fully and fairly examined. However, it is my opinion that we should not grant reconsideration of this matter.

Edward D. Callaghan, Commission Chair