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 MI, AFT, AFL-CIO,
Labor Organization-Petitioner.
_____/

APPEARANCES:

David Fink & Associates, by David Fink, and Christine Gerdes, Associate General Counsel, University of Michigan, for the Pubic Employer

Mark H. Cousens, for the Petitioner

DECISION AND ORDER

Pursuant to § 12 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.212, MSA 17.455(12), this case was heard on February 1, 2, 6, 21, 22, and 23, 2012, for the Michigan Employment Relations Commission (the Commission) by Julia C. Stern, Administrative Law Judge (ALJ) for the Michigan Administrative Hearing System. Pursuant to §§ 13 and 14 of PERA and based on the record, including both pre-hearing and post-hearing briefs filed by the parties and amicus briefs filed by the Michigan Attorney General and by Melinda Day and Students Against GSRA Unionization, we find as follows:

The Petition:

This petition for a representation election was filed by the Graduate Employees Organization, AFT/MI, AFT, AFL-CIO on April 27, 2011, and amended on January 13, 2012. Petitioner seeks to represent a unit of Graduate Student Research Assistants (GSRAs) at the University of Michigan (hereinafter the University). The University does not oppose the petition and is willing to consent to the conduct of an election by the Commission. The Petitioner and the University stipulated to the following definition of the unit:

> All graduate students in good standing who meet the minimum enrollment requirements set forth below and who are assigned by the appointing unit the title of Graduate Student Research Assistant for the purpose of performing or assisting in

research (including but not limited to library, laboratory, field/survey, experimental or clinical) either alone or with a member or members of the faculty.

In order to meet the minimum enrollment requirements, a Graduate Student Research Assistant must be:

1. For Term I and II: In good standing as a student in a graduate degree program and registered for not less than six (6) credit hours each term or, with the written approval the student's faculty advisor, not less than five (5) credit hours consisting of not less than two (2) courses relevant to the student's degree program.

2. For Term III: In good standing as an active student in a degree program with no specific enrollment requirement.

Excluded are:

1. Graduate students who are compensated to conduct or assist in the conducting of research of a scholarly nature more than half of whose University support is provided by fellowship, including departmental fellowship, federal fellowships, fellowships sponsored by corporations or foundations, or fellowships sponsored by foreign governments. A fellowship is funding awarded to an individual student for which no services are required or expected;

2. Graduate students whose support is provided by a federal training grant;

3. Graduate students appointed more than two weeks after the commencement of the academic semester for which the appointment is made; or whose appointment expires more than two weeks earlier than the last day of the academic semester for which the appointment is made;

4. Graduate students who are also employed as University of Michigan faculty in any track;

5. University of Michigan positions covered by another collective bargaining agreement;

6. Supervisors of persons in this bargaining unit;

7. Confidential employees;

8. All other employees.

Background:

In a 1981 unfair labor practice case, *Regents of the Univ of Michigan*, 1981 MERC Lab Op 777 (hereinafter "the 1981 decision"), we were required to determine whether approximately 2,000 graduate students with appointments as graduate student assistants at the University of Michigan were "public employees" entitled to the rights accorded to employees under PERA, including the right to bargain collectively with their employer through representatives of their free choice. The majority of the Commission concluded that graduate teaching assistants (TAs) who taught undergraduate courses, and graduate student assistants (SAs) who counseled undergraduates and provided support services to them, were employees as that term is defined in PERA. The majority concluded that graduate research assistants (RAs), who performed research funded by grants under the supervision of faculty members who were the primary researchers, were not employees within the meaning of the Act. The TAs and SAs are, as they were in 1981, in a bargaining unit represented by the Petitioner in this case.[1]

On May 19, 2011, after the instant election petition was filed, the University of Michigan's Board of Regents, by a vote of six to two, adopted a resolution supporting the right of GSRAs to determine whether to organize into a bargaining unit. The resolution explicitly stated that the Regents recognized the GSRAs as employees of the University. Following that resolution, the University and Petitioner entered into an agreement for a consent election. However, we declined to conduct the election, and, on September 14, 2011, issued an order dismissing the petition. We noted in our order that when a petition is filed, we do not usually inquire into the nature of an employment relationship unless a party raises a challenge. However, we concluded that this case was different because our previous decision that the GSRAs at the University were not employees under PERA raised the question of whether we had jurisdiction to conduct an election in this case. We held that because an agreement by the University and Petitioner was not sufficient to confer jurisdiction, we could not assume the GSRAs were employees based solely on this agreement. We also noted that Petitioner had not provided us with any information suggesting that the circumstances of the GSRAs had changed since the 1981 decision. We concluded that, absent a showing of a substantial and material change of circumstance, we were bound by our previous decision.

On October 3, 2011, Petitioner filed a motion for reconsideration of our decision to dismiss its petition to which it attached an affidavit signed by a current GSRA attesting to certain facts. On November 1, 2011, Students Against GSRA Unionization, an entity purporting to represent the interests of GSRAs opposed to unionization, filed a motion to intervene in the proceeding. On November 30, 2011, the Michigan Attorney General also filed a motion to intervene and opposing reconsideration of our decision to dismiss the petition. On December 16, 2011, we issued an order denying both motions to intervene and granting reconsideration of our September 14, 2011 decision to dismiss the petition. The order referred the matter to an administrative law judge to conduct an expedited evidentiary hearing to give Petitioner the opportunity to prove, by substantial, competent evidence, such material change of circumstances since our 1981 decision as to warrant a finding that some or all of the GSRAs were employees and entitled to the protection and benefits of PERA. We stated in our order that we would require competent proof as to each category of employee to show

[1] Teaching assistants are now called Graduate Student Instructors (GSIs), student assistants are called Graduate Student Staff Assistants (GSSAs), and research assistants are called Graduate Student Research Assistants (GSRAs). This opinion uses the current titles and acronyms.

that the facts were different from our previous decision. We also stated that it was Petitioner's burden to show that there had been a substantial and material change in circumstances and stated that it was a heavy burden to meet.

Hearings before the ALJ took place in February 2012, and the parties filed both prehearing and post-hearing briefs. Although not intervenors, both the Michigan Attorney General and Students Against Unionization were permitted to file amicus briefs.

On March 13, 2012, after the post-hearing and amicus briefs had been filed, the Legislature adopted 2012 PA 45 (Act 45), and gave it immediate effect. Act 45 amended the definition of "public employee" in § 1(a) of PERA to add this paragraph:

> *(iii)* An individual serving as a graduate student research assistant or in an equivalent position and any individual whose position does not have sufficient indicia of an employer-employee relationship using the 20-factor test announced by the internal revenue service of the United States department of treasury in revenue ruling 87-41, 1987-1 C.B. 296 is not a public employee entitled to representation or collective bargaining rights under this act.

Thereafter, Petitioner filed suit in federal court challenging the constitutionality of Act 45 on several grounds. The University joined as an intervening plaintiff. We suspended our consideration of the petition pending this litigation. On February 5, 2014, Federal District Judge Mark Goldsmith issued a decision granting the plaintiffs' motion for summary judgment on the ground that the Legislature's enactment of Act 45 had violated the "change of purpose" clause of Article IV, § 24 of the Michigan Constitution. The Court concluded that Act 45 was enacted in violation of the Michigan Constitution and is, therefore, invalid and unenforceable.

Positions and Arguments of the Parties and Amici:

Petitioner

Petitioner's argument begins with the well-established principle that an individual may be at the same time a student of an educational institution and an employee of that institution under PERA. In *Regents of the Univ of Michigan,* 1971 MERC Lab Op 270, *aff'd* 389 Mich 96 (1973) (hereinafter "the interns and residents decision") we concluded, and the Supreme Court affirmed, that interns and residents simultaneously enrolled as graduate students at the University and providing patient care at its hospital were employees under PERA. As Petitioner points out, the Supreme Court noted in that decision that PERA makes no exception in its definition of a public employee for individuals with the dual status of employees and students.

Petitioner argues that although the GSRAs are students, and may derive an academic benefit from the work they do, the work they perform is the University's work. That is, contrary to the conclusion the Commission reached in 1981, the GSRAs are not "in business for themselves." Moreover, the GSRAs function as employees, are hired as employees, are provided wages and benefits as employees, are subject to the same obligations as employees, and must provide and confirm effort as a condition of continued employment. In addition, they have the rights of

employees under a variety of employment laws. Students have none of these benefits or rights and are subject to none of these obligations.

With respect to its burden of proof in this case, Petitioner asserts that our December 11, 2011 directive that it demonstrate a "substantial and material change in circumstances since the 1981 decision" bears some similarity to the "law of the case" doctrine. This doctrine applies after an appeals court has ruled on an issue, and bars a trial court, or subsequent appellant court, from deciding that issue differently in the same litigation. Petitioner notes that this doctrine applies without regard to whether the original decision was actually correct, that it is a matter of practice and discretion rather than an absolute limit on the court's authority, and that it will not be applied if there is a material or substantial change in the facts or if there has been a change in the law. *Hill v City of Warren*, 276 Mich App 299, 308 (2007). Petitioner asserts that it should not be necessary for it to demonstrate that every fact mentioned in our 1981 decision was different in 2012. Rather, Petitioner argues, we should recognize that sufficient facts are different, and the law is different, so that the 1981 decision is not a limit on our authority.

On the facts, Petitioner points out that the University has dramatically increased its participation in research since the 1981 decision, and that this dramatic expansion requires a great deal more assistance from non-faculty, most of whom are GSRAs. It notes that eighty percent of the money paid to GSRAs comes from externally funded grants, and that GSRAs are included in grant application budgets as "personnel." The research performed under these grants is directly related to one of the University's essential missions, the expansion of knowledge. While University faculty, as "principal investigators" (PIs) apply for these grants, grants are awarded to the University and not to the PI or GSRA, and the University owns the product of the research. Petitioner argues that GSRAs are essential to the carrying out of research at the University because the University would otherwise have to hire other individuals to do the work.

Petitioner asserts that while it is likely that GSRAs will use information, methodology or data from their research projects on their dissertations, the purpose of the grant is clearly not to pay for dissertations. Rather, the granting agency expects that it will receive a product, tangible or intangible, in exchange for the money it has provided. According to Petitioner, although the relationship between GSRAs and their research projects is symbiotic, the project goals come first and the dissertations are the byproducts.

According to Petitioner, GSRAs are hired in essentially the same manner as any other job seeker. GSRAs seek out research projects in which they are interested just as employees seek out work. What amounts to an interview is conducted by the PI, who selects the GSRA in the same manner as an employer would select an employee. A prospective GSRA is not simply assigned to a specific project, nor can a GSRA claim the right to work on a particular project. Rather, GSRAs come to be part of research projects as the result of mutual agreements reached between them and the projects' PIs. The GSRA then receives an offer letter from the University setting out the stipend that will be provided per semester or month, and stating that the offer is conditioned on proof of eligibility to work in the United States, satisfactory contributions to the involved research, and continued satisfactory academic performance. The GSRA must then execute an oath of allegiance to the United States Constitution, an obligation imposed only on employees and not on students.

A GSRA may change research projects multiple times, and does not necessarily work with his or her academic advisor. GSRAs are supervised by the PI, and perform duties assigned by the PI. This includes, from time to time, preparing periodic progress reports to be submitted to the granting entity. GSRAs are subject to periodic reviews of their work performance and are evaluated for effort. A GSRA appointment is subject to termination for cause, including, but not limited to, unethical or dishonest behavior or other misconduct. GSRAs are subject to a variety of University rules applicable only to employees, not to students, including rules pertaining to the creation of false or misleading data and restrictions on romantic or sexual relationships with students over whom they have supervisory responsibility.

Unlike when the record in the 1981 decision was developed, the University now both acknowledges the GSRAs to be employees and treats them as such. Petitioner argues that this fact is important because the University is the best judge of whether the GSRAs are employees. The University establishes a minimum wage for GSRAs, although a department or PI may pay more. Unlike fellowship payments, GSRA stipends are subject to federal tax because the stipends are considered compensation for services rendered to the University. In addition to their stipends, GSRAs with full-time appointments receive employer-paid health and life insurance, dental insurance, travel accident insurance, paid tuition, and up to three weeks of sick leave within a twelve month period. The GSRAs are subject to many University rules applicable only to employees.

Since the 1981 decision, Petitioner argues, there has also been increased legal recognition of the employee status of graduate research assistants. Since the 1981 decision, graduate research assistants have been held by courts to be protected by various employment laws, including Title VII of the Civil Rights Act of 1964, and the Michigan Whistleblower's Protection Act, MCL 15.361. In addition, the University considers GSRAs to be employees under the Family Medical Leave Act and entitled to leave benefits under that statute.

The University

The University agrees with Petitioner that the GSRAs are employees as well as students. The University objects to the statement in our December 16, 2011 order that Petitioner has a "heavy burden" to show a change in the material facts or circumstances since the 1981 decision. It notes that the Michigan Supreme Court has held that the proof required in an administrative proceeding is the same as that required in a civil judicial proceeding: a preponderance of the evidence. *Aquilina v General Motors Corp,* 403 Mich 206, 210-211 (1978). According to the University, Petitioner should be required to do no more than demonstrate that, in 2012, GSRAs qualify as employees under PERA. However, it asserts that even if Petitioner has the burden of showing a change in facts or circumstances, the record establishes that there are numerous material differences between the facts that the Commission relied upon in the 1981 decision and the facts today.

The single most important change in circumstances since the 1981 decision, according to the University, is that the University now recognizes the GSRAs to be its employees. In addition to the Regents' statement in their resolution of May 2011, the University notes that it consistently and uniformly refers to the GSRAs as employees in its internal documents, including its faculty handbook, and that these documents use the words of employment, including "hiring," "job," "employer," and "employment," in referring to a GSRA appointment. According to the University,

the use of these terms in internal University documents reflects the fact that the University entrusts the GSRAs with the benefits and responsibilities of employment. As an example, the University points out that when GSRAs are hired, they are required to produce documentary evidence of authority to work under the immigration laws and told that their offer is contingent on "satisfactory contribution to the required research." They are subject to rules and restrictions that apply only to employees and do not apply to students, including graduate students receiving fellowships or scholarships. These include the obligation to take an oath of loyalty to the Constitution as well as a number of employee rules and policies. These policies include procedures for investigating allegations of misconduct in the pursuit of scholarship and research; policies applying to romantic relationships between faculty and students; and the University's technology transfer policy governing the ownership of intellectual property created through the use of resources administered by the University. In addition, the University provides GSRAs with benefits it provides only to employees, including sick leave and life insurance.

The University argues that our conclusion in 1981 that the value of the GSRAs' research to the University was merely "indirect," as opposed to the direct benefits provided by the GSIs teaching undergraduate students, is no longer valid. It points out that the University's research budget and the number of GSRAs have both increased hugely since the 1981 decision. Moreover, while operating expenditures for instruction and for research have both increased over this period, the increased focus on research has resulted in a narrowing of the gap between these two categories. Today, according to the University, there is nothing indirect about the value of research to the University. Moreover, the evidence in the record clearly demonstrates that the GSRAs perform research in the manner of employees.

Amici

The Attorney General asserts that we should find, as we did in 1981, that the GSRAs are not public employees under PERA. He argues that as we held in our September 14, 2011 order, the University cannot give the Commission jurisdiction to order an election simply by agreeing with the Petitioner that the GSRAs are its employees. It is irrelevant, therefore, whether the University considers the GSRAs to be employees and entitled to the protections of certain employment laws, or provides the GSRAs with benefits it provides to its employees. He also asserts that the evidence presented at the hearing in 2012 demonstrates that the facts we relied upon in the 1981 decision to find the GSRAs not to be employees are still true today.

The Attorney General concedes that the evidence presented at the hearing shows a substantial increase in research budget, funding, and expenditures for the University since 1981. Many factors have contributed to this increase, including increased federal commitment to research in health and energy and changes in the law making it easier for the University to receive revenue from intellectual property created from research. He asserts, nevertheless, that the University was not, at the time of the 1981 decision, and is not now in "the business" of producing research. It does not, for one thing, engage in research to make a profit, as indicated by the fact that it spends vastly more of its own funds on research than it receives from the licensing of intellectual property. Nor is the purpose of a GSRA appointment to provide faculty with low-cost researchers for research projects, as indicated by testimony that in most cases the cost of employing post-doctoral researchers would be less than the cost of supervising and training a GSRA while they are becoming efficient and

competent researchers. While the University's research mission benefitted in 1981 and benefits now from the efforts of the GSRAs, the substance of the GSRA-University relationship remains the same. That is, the GSRAs are doing research primarily for their own education, in furtherance of their academic reputation and their dissertation.

The Attorney General points out that the testimony of individual GSRAs at the hearing regarding their own appointments does not necessarily represent the experiences of all or even the majority of the GSRAs. However, he argues that even the testimony of the witnesses called by Petitioner indicates that the GSRA-faculty relationship has not changed. GSRAs still, as they did in 1981, usually seek out research projects because of their interest in those projects and/or their relationship with the faculty members in charge of those projects. As in 1981, there was no evidence that GSRAs are ever randomly assigned to work on projects that have no academic relevance to their specific area of interest. As in 1981, GSRAs are primarily "working for themselves," in the sense that the research that they produce is directly used in the GSRA's dissertation, inspires interest in a topic that ultimately leads to a dissertation or, at least, is academically relevant. The Attorney General points out that only one of the GSRAs testified that the research she was performing as a GSRA was unrelated to her dissertation. He notes that, even at the time of the 1981 decision, the Commission recognized that the circumstances of certain individual GSRAs varied from the norm.

The Attorney General points out that in the 1981 decision, we discussed the fact that the GSRAs had more flexible hours and more flexibility in performing their work than the GSIs. This continues to be the case for most GSRAs, even though the PIs supervising the GSRAs' research have the authority to impose attendance requirements. The Attorney General notes that only one GSRA testified that she was even aware that the University had a sick leave policy for graduate students. Rather, GSRAs testified that if they became ill, they were not financially penalized and other researchers on their project worked informally with them to make sure that the project did not fall behind.

Like the Attorney General, Melinda Day and Students Against GSRA Unionization accuse Petitioner and the University of incorrectly focusing on the volume of University research and of mistakenly equating the University with a business. The Students Against GSRA Unionization point to testimony that the federal government, through the award of scholarships and fellowships in addition to grants, recognizes the value of training researchers along with the importance of quality research. They also point to facts showing that the University spends hundreds of millions of dollars annually of its own funds on research, far more than the relatively small amount of revenue it receives from the transfer of intellectual property created by its research. They argue that if the University for some reason decided to cease training graduate researchers and concentrate solely on producing research results, academics at other educational institutions who voluntarily review grant applications and make recommendations to the granting agencies would likely stop doing so. As a result, the University would no longer receive the hundreds of millions of dollars per year in federal grants it currently receives. According to the Students Against GSRA Unionization, however much research at the University has grown in volume since 1981, graduate student education continues to be one of the core purposes of University research.

Students Against GSRA Unionization note that in the 1981 decision, the Commission rejected the suggestion that its decision should be based solely on the GSRAs' role in producing

research results, (the "but a cog in the wheel" argument), in favor of a focus on the graduate student. They argue that Petitioner's belief that research can be easily segregated from a student's educational pursuits, particularly the pursuit of the doctorate, is not supported by the testimony of its own witnesses. It points out that all but one of the GSRAs called to testify by Petitioner at the hearing indicated that the data for their dissertations either came from their GSRA research or was inspired by it.

Stipulated Facts and Findings of Fact:

The evidentiary record in this case consists of exhibits, testimony presented by witnesses called by the parties, testimony by witnesses called by the ALJ, and certain stipulations of fact submitted by the parties. Facts received by stipulation are noted as such below.

The Expansion of Research at the University

One of the core missions of the University is to better the world through scholarship, which includes the creation and dissemination of research. Some of the notable achievements based on University research include the development of the Salk polio vaccine in the 1930s, a heart lung machine for premature babies in the 1960s, and, more recently, the Index of Consumer Confidence, and Flumist, a vaccine nasal spray. According to University Provost Philip Hanlon, the University's research mission was important at the time of the 1981 decision. He testified that its importance to the University has not increased since 1981. However, the size of the University's research operations has increased substantially over this period.

The parties stipulated that in 1981, research expenditures for the University totaled approximately $130 million. Adjusting for changes in the Consumer Price Index, this represents approximately $355 million in 2011 dollars. By contrast, according to the parties' stipulation, during the 2010-2011 academic year research expenditures for the University exceeded $1.236 billion. For that academic year, the University's research expenditures exceeded those of any other public university in the United States. For all universities in the United States, the University ranked below only Johns Hopkins University in the size of its research budget.

The majority of funds for research at the University in fiscal year 2011 came from outside sources ("sponsors"). Approximately $824 million, or 66.7 percent of the total, came from the federal government. Funding from non-federal sponsors, including direct grants from industry, foundations, and the State of Michigan, made up another 8.5 percent of the total, or approximately $105 million. Funds from the University itself made up the remainder, approximately $306 million, or 24.8 percent of the total. Funds from the University, mostly in the form of "internal grants," while still a relatively small figure, constitute a larger percentage of the total than in 1981, when only approximately $16 million, in 2011 dollars, of the $355 million spent on research came from University funds.

Most funding for research, including funding from the University itself, takes the form of grants. Faculty members apply for these grants as the PI and are responsible for their oversight. Grant applications include a narrative that sets out the hypotheses that the grant research is designed to test and explains the research's value. Although research funded by a grant must comply with the

terms of the grant, the specific hypotheses and the scope of the research may change while the grant remains in place. The primary purpose of research grants is the advancement of knowledge. However, Associate Dean for Graduate Post-Doctoral Studies Victor DiRita testified that, at least for the National Institute of Health (NIH) grants under his supervision, the fact that a particular project within the scope of a grant may provide a student with a good dissertation topic is a fact that might be mentioned in the grant narrative because the NIH recognizes educating students as a goal worthy of financial support.

In 2012, all grant applications went through an approval process within the University designed to ensure that the application met the technical requirements of the grant and complied with University policies. This function was carried out by the Office of Research and Sponsored Projects (ORSP), which in 2012 had an annual budget of approximately $4 million. In addition to reviewing grant applications, the ORSP provides University PIs with a variety of other grant-related support services, including: receiving and disbursing grant funds, assistance in preparing grant budgets, and dealing with funding agencies.

For all grants funded by sponsors, the application is made in the name of the University and the grant is awarded to the University, not the faculty member. If a PI moves to another university, the grant remains with the University unless the University agrees to transfer it. Internal grants are awarded by the University to faculty for specific research projects. For example, when the University hires new faculty, it typically gives them start-up funds to begin building a research program before they begin to apply for sponsored grants.

Although the level of federal funding for research waxes and wanes from year to year, there has been a large increase since 1981 in the amount of federal funds available to universities. Most of the growth in the University's research expenditures since the 1981 decision, according to Assistant Provost Hanlon, is attributable to this large increase. However, the University has substantially increased its share of the available funding through the efforts of its faculty and services such as the ORSP. The University continues to plan for the future expansion of its research capabilities, including, in 2009, investing $108 million in purchasing and refitting a new property in Ann Arbor to create a multidisciplinary research hub and laboratory complex known as the North Campus Research Complex (NCRC).

Another factor in the growth in research expenditures between 1981 and 2011 was the passage of the Patent and Trademark Laws Amendments of 1980 (the Bayh-Dole Act). Prior to the legislation, which took effect in 1982, the federal government could assert ownership of intellectual property created in universities pursuant to the terms of a federal grant. The Bayh-Dole Act allows universities and other nonprofit organizations to retain title to intellectual property created with funds from federal grants. In exchange, they must make efforts to market inventions based on the intellectual property to private industry and must share a portion of the royalties or proceeds from the transfer with the individual inventors. The University has a unit, the Office of Technology Transfer, whose purpose is to effectively transfer University technologies (i.e., results from University conducted research) to the market so as to generate benefits for the University, the community, and the general public. The Office of Technology Transfer provides guidance to researchers and faculty on technology transfer issues during the course of research; handles the process of obtaining patent, copyright, and trademark rights; provides advice to individuals

interested in forming start-up businesses based on University technology; markets University technology to industry partners; handles licensing, transfer, and related agreements with these partners; and provides legal advice for all steps of the transfer process. In fiscal year 2010, the University had 97 new technology license/option agreements, 153 new patent applications, 290 "discoveries," 10 new start-ups, and received $39.8 million in royalty payments and equity sales. Since 2001, the University has earned more than $167 million in royalties and equity sales from discoveries, about thirty percent of which was shared with inventors. About half of the rest was used by the University to support and encourage more cooperation between faculty researchers and industry, and between faculty researchers and venture capital sources. While the money the University receives from technology transfers does not yet represent a substantial amount of its budget, it has had some notable individual successes. Bayh-Dole, therefore, has substantially increased the incentives for some types of research.

Notably, however, the percentage of the University's total operating expenditures attributable to research has actually declined since 1981. For the year ending June 30, 1981, research expenses made up 15 percent of the total, while in the year ending June 30, 2011, the percentage was 13 percent. The percentage of operating expenditures attributable to instruction also dropped over this period, from 26 percent to 15 percent.

Graduate Students and the GSRA Appointment

The parties stipulated that 2,128 graduate students held GSRA appointments on April 27, 2011, the date the petition for representation election was filed. According to the record in the 1981 decision, the University had only about 340 GSRAs at that time. In 2012, more graduate students held appointments as GSRAs than as GSIs. According to the 1981 decision, in 1981, GSRAs made up only about 17 percent of the graduate student assistants whose employment status was at issue, while GSIs comprised about 77 percent. The increase in the overall number of GSRAs is, of course, partly attributable to the expansion of research at the University. However, the increase in the percentage of graduate student assistants with GSRA appointments since 1981 is also attributable to a decision by the University to deemphasize teaching assistantships in favor of research support and scholarships after a 1986 University task force concluded that multi-year teaching assignments tended to interfere with graduate students' academic progress and prolonged the period necessary to complete their dissertations.

University-wide, ninety-three percent of the students with GSRA appointments are in graduate doctoral programs. In 1981, a GSRA appointment was made after a student's application to a University graduate program was accompanied by an application for financial support. Almost all University departments have now adopted a full funding model for graduate students in doctoral programs. When a department has a full funding model in place, students get commitments, at the time they are admitted to graduate doctoral programs, that they will be getting five years of financial support from the University as long as they are making satisfactory academic progress. However, departments have the choice of providing a longer or shorter period of support. DiRita testified that the medical school guarantees funding until the student gets a degree, even if it is longer than five years, and that the average is five and one-half years. Professor Annemarie Palinscar, Associate Dean for Academic Affairs at the School of Education, testified that the School of Education

guarantees only four years of financial support. Scholarships, fellowships, training grants, and GSI, GSSA, and GSRA appointments are all components of that financial support.[2]

The goal of students in graduate doctoral programs is to obtain a doctoral degree, although about fifty percent of students University-wide leave their programs short of obtaining the degree. Obtaining the degree requires the completion of a doctoral dissertation. During the first and second year of most doctoral programs, the focus is on expanding the students' knowledge of the fields they are about to study. During those first years, the students typically take classes in their field and may also have to take language classes. In doctoral programs in the medical school, students also do research rotations through different labs to allow them to experience different fields before they chose the lab, mentor, and field that will form the basis of their dissertation. These research rotations are funded by stipends paid by the University, and are not GSRA appointments. At some point, the students take qualifying exams to demonstrate that they have a broad knowledge of their field and preliminary exams to demonstrate more focused knowledge in their area of interest. After passing these exams, students move to the candidacy stage of their programs where the focus is on completing their doctoral dissertations. At some point in their academic careers, depending on the department, graduate students are assigned or acquire a dissertation or thesis faculty advisor and a dissertation committee comprised of other faculty members. The committee and advisor must approve the student's thesis topic and eventually approve the completed dissertation. The student also receives advice and input from the advisor and the dissertation committee while working on the dissertation.

University-wide, graduate students are more likely to receive scholarships or fellowships at the beginning of their graduate programs. However, an individual student may receive all or any combination of scholarships, fellowships, and GSI, GSSA, and GSRA appointments while completing his or her academic program. Students may have GSRA appointments in the pre-candidate as well as the candidate stage of their programs, and several students with GSRA appointments testified at the hearing that they had GSRA appointments in the first semester of their graduate programs. Graduate students may also have both GSI and GSRA appointments, or a GSRA appointment and a fellowship, during the same academic semester. At least in the Medical School, according to DiRita, a student may successively be funded by a training grant, a fellowship and a GSRA appointment while working on the same project. Katherine Barald, professor of cell and developmental biology at the Medical School and professor of biomedical engineering at the College of Engineering, testified that all four graduate students currently working in her research lab were receiving fellowships, but that two of them had been GSRAs at one point in their University careers.

The University, on its human resources website, describes a GSRA appointment as "an appointment which may be provided to a student in good standing in a University of Michigan graduate degree program who performs personal research (including thesis or dissertation preparation) or who assists others performing research that is relevant to his or her academic goals."

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[2] Fellowships may be funded by the University or by outside sources. If the latter, the fellowship is awarded to the University but on behalf of a student, not a faculty member. Training grants also come from various sources, including the federal government. The purpose of a training grant is to support the training of researchers, including graduate students and post-doctoral fellows. According to DiRita, NIH funds many training grants which allow students to work with faculty in departments other than their own and to work in the same lab and side-by-side with GSRAs. It appears from the record that training grants may be largely limited to the medical and biomedical fields. Palinscar testified that in the School of Education, all graduate students receive either GSRA or GSI appointments.

The record indicates that the fundamental distinction between a GSRA appointment and other types of financial aid is that GSRAs receive stipends in exchange for their work as researchers on a project or projects funded by a grant, including sponsored grants and internally funded grants. Despite the description on the website, the record indicates that graduate students receive GSRA appointments only for periods during which they are performing research that is funded by an externally or internally sponsored grant. That is, if a graduate student is performing research on a project but the student's stipend is funded by a fellowship or a training grant, the student is not a GSRA. As indicated by the testimony of several students with GSRA appointments, if a student's dissertation topic does not overlap with the student's work on a project funded by a sponsored grant, the student's dissertation research may have to be performed while doing other research as a GSRA or while teaching as a GSI. It is, however, the case that, University-wide, most research performed by graduate doctoral students is done as part of a GSRA appointment, and most graduate doctoral students write their dissertations based on research done as a GSRA.

Most GSRA appointments are made for periods coinciding with academic terms. How many semesters a student has a GSRA appointment varies with the student and the department. A GSRA in the Electrical Engineering and Computer Science Department of the College of Engineering testified that he has had a GSRA appointment since he began his graduate studies at the University in 2007. He began by working on one project and, after six months to a year, decided that he wanted to switch to another with another faculty member PI. He has worked on that project since 2008. Two other GSRAs, one in the Department of Material Science and Engineering in the College of Engineering and another in the School of Education, testified that they were in their seventh semesters as GSRAs. The GSRA in the Department of Material Science has worked on three separate grant-sponsored projects, while the GSRA in the School of Education has worked on the same project for all seven semesters. A fourth GSRA, in the Department of Astronomy, testified that he had a GSRA appointment in his first semester at the University in the fall of 2009, and another working on the same project the subsequent summer. At the end of 2010, he switched to a different project with a different faculty PI and has held a GSRA appointment on that project since that time. Other GSRAs testified that they held GSRA appointments for one or two academic years.

All GSRA appointments are based on a "fraction of effort," which represents a minimum commitment of hours per week. A fifty percent appointment is considered full-time and requires a minimum commitment of twenty hours per week. Depending on their other academic commitments and the nature of their project, however, GSRAs may spend many more than twenty hours per week on their research. GSRAs must have a minimum twenty-five percent appointment, with a minimum ten hours per week commitment, to receive certain benefits, including paid in-state tuition. These benefits are discussed in a separate section below. The parties stipulated that the minimum full-time equivalent stipend rate for four calendar months for GSRAs on the University's Ann Arbor campus is $17,630 per term. On the Flint campus that stipend is $12,525 per term. Departments and PIs have the flexibility to offer GSRAs stipends at rates above the minimum.

In order to receive a GSRA appointment for terms I or II of the academic year, a GSRA must be a student in good standing in a graduate degree program and registered for not less than six credit hours each term, or, with the written approval of the student's faculty advisor, not less than five credit hours consisting of not less than two courses relevant to the student's degree program. The

record indicates that in at least some departments, a GSRA's research, considered "independent study," counts toward the credit hour requirement.

The stipends and benefits received by GSRAs, with the exception of certain benefits discussed below, are funded by the grants that fund the projects on which the GSRA is assigned to work. Grant applications, both external and internal, include budgets for personnel as well as other expenses. A grant budget may include a specified number of GSRAs, in addition to faculty, postdoctoral researchers, and other employees. When preparing a budget for a grant application, the PI must include all expenses attributable to GSRAs, except as discussed below. For grants that require itemized budgets, GSRAs are typically listed under the heading of "personnel." A PI may set the stipend for GSRAs working on the project at a rate above the University minimum by including the higher amount in the grant budget.

The University has a form appointment letter for GSRAs on its website. The appointing authority, either an academic department or research unit, can modify this letter or create its own. The form letter reads as follows:

> I am pleased to inform you that the Department of _____ is able to offer you a graduate student research assistantship. The beginning date for this appointment will be ____, and the ending date will be _____. Your appointment fraction will be ___%. This fraction will provide you with a stipend of $___/ per term or mo.
>
> Your appointment will support research with Professor ___ in her lab or on her project titled ____. Specific duties and schedules should be discussed with Prof. _____. Given that research support and the related activity can vary over time, your specific duties and schedules may also change.
>
> This offer is conditional and contingent upon the following:
>
> Satisfactory documentary evidence of work eligibility in the U.S.
>
> Satisfactory contribution to the involved research.
>
> Continued satisfactory performance in your academic program.
>
> In the case of Fall or Winter Term appointments: Registration for at least 6 credit hours of graduate course work during the term(s) of employment.
>
> A summary of the important features of GSRA appointments is contained in the attached document, titled "Some Important Features of GSRA Appointments."
>
> Please indicate your acceptance of this offer signing below in the space provided, and the letter to me by _____ (date).
>
> Finally, if other opportunities for support become available to you, or if there is a change in your plans which result in a decision not to accept or to continue as a

GSRA in the department, please notify me immediately. If you have any questions about this appointment, please see (Name, at phone number or email).

I accept this offer:

(Signature, date)

As noted above, graduate students in doctoral programs know that they will be offered either a GSRA appointment or another form of support for each term of their program. In general, students are not told when they are admitted what the form of support will be for each semester. However, according to the testimony of GSRAs, in some departments students are told when they are admitted what type of support – fellowship, GSRA appointment, GSI appointment, or some mix – they will have each term. In any case, graduate students do know at least some months in advance of their GSRA appointment that they will have this appointment. Departments also know in advance which students need to be supported by GSRA appointments each academic year and usually collect information from faculty on available GSRA opportunities.

Relationship of GSRA Appointment to Doctoral Studies

A GSRA appointment serves many purposes. As noted above, a GSRA appointment is one of the methods by which the University provides funding for graduate education. In the University's current system, GSRAs provide PIs with valuable assistance in carrying out the research faculty must do to fulfill their professional goals.[3] However, a GSRA appointment is also, across all departments, a method of training the next generation in the skills they need to become first-rate researchers. In addition, for most GSRAs, a GSRA appointment is essential to fulfilling their goals of completing a dissertation and developing an academic reputation as a researcher. Beyond these commonalities, the exact relationship between the dissertation and the GSRA appointment is subject to so much variation among departments and individual students that it is difficult to generalize.

Typically, a student with a GSRA appointment, or seeking one, hears about an interesting research project in his or her department and approaches the faculty PI, or the student goes to a faculty member and asks if the faculty member has or knows of a project. Some type of interview takes place during which the PI assesses whether the student is right for the project and the student assesses whether the project is suitable. The PI, however, makes the ultimate decision. Professor Barald testified that when a student approaches her about joining her lab, they sit down and talk to see if their research interests are sufficiently in tune. She testified that she might be inspired by a student's idea for a dissertation topic, or that the student might be enthused by a dissertation topic she suggests. However, she accepts only students who have such a strong interest in her area of research that they want it to be their dissertation topic. Professor Palinscar testified that it is typical for students in the School of Education to identify a faculty member or two with whom they wish to work at the time they apply for admission to the graduate program, and that one of the factors the

[3] As Vice President for Research Stephen Forrest explained, when the cost of training inexperienced researchers is factored in, it would cost the University less to hire postdoctoral employees to perform the tasks now performed by GSRAs. However, there is no indication in the testimony that it would be feasible to replace GSRAs with postdoctoral employees even if the University wanted to do this, i.e., that the University could find a sufficient supply of high quality postdoctoral employees to replace the GSRAs.

admission committee considers is whether the faculty and students are appropriately matched in terms of interest. Graduate students are assigned a faculty advisor at the start of their programs. If a student has a GSRA appointment, the student typically works on his or her advisor's grant unless the advisor's research group has no openings at that time. A GSRA in the Department of Nuclear Engineering also testified that before he was admitted to the graduate program, he received offers from two professors to work in their research group. He testified that when he was admitted, it was understood that during his first year he would work in that group and be partially funded by a fellowship and partially by a GSRA appointment.

Graduate students may change advisors and/or PIs, during their University careers, but the process of finding a second research project is much the same. A GSRA in the Department of Material Science Engineering testified that when she was in the process of finding her third advisor, she spoke with a faculty member and learned that the faculty member had put together a proposal for funding. The GSRA decided that the project interested her and the faculty member was pleased to find a GSRA who was interested in it and was knowledgeable on the topic. The GSRA in the Electrical Engineering and Computer Science Department asked around among his friends to find out what positions might be available when he was trying to decide whether to leave the University. He found a professor with openings in her research group, and he and the professor agreed that he would be a good fit for her group. The GSRA in the Department of Astronomy testified that he found a second project by going around to faculty who worked in areas he found interesting while he was finishing work on an earlier project. The particular research the GSRA was doing as part of the first project was wound down after he decided to switch projects, although other research on that project continued.

One GSRA in the School of Social Work testified that in her department, faculty put together descriptions of the projects on which they are working at the end of each academic year and circulated them to students eligible for GSRA appointments the following year. Both students and faculty submitted their top choices for projects/students to the department, which would then match them. That GSRA, however, found her project by approaching a faculty member she liked and telling the professor that the GSRA would put the professor as her first choice if the professor put together a project that the GSRA was interested in and the professor agreed to put the GSRA as her first choice.

As indicated above, GSRAs often move from one project to another. The GSRA in the Department of Material Science testified that she was a student of one professor for two academic years, during which she worked on that professor's project and the professor served as her academic advisor. This project involved semi-conductor research. After four semesters, the GSRA decided that she did not want to pursue any more research with that professor, and switched to another professor and another project in the department; the second professor then became her academic advisor. The GSRA worked with the second professor for about seven months, and then moved to a third project. The GSRA in the Electrical Engineering and Computer Science Department decided to switch projects at about the time he finished his master's degree. The GSRA in the Department of Astronomy worked on one project for two or three semesters, and then switched to a second project.

The record indicates that GSRAs look for projects that interest them in the expectation, or at least the hope, that the GSRA appointment will assist them in completing a dissertation. Sometimes

the relationship is direct, as when a GSRA uses data generated by the project in his or her dissertation. Often the idea for the student's dissertation topic is suggested by research performed as a GSRA. In some cases, as Provost Hanlon testified from his personal experience, a PI will incorporate a particular topic into a grant project to provide a student with a dissertation topic even though the PI himself is not particularly interested in the topic. More often, at least in the area of medical research, it may be possible to incorporate a topic of particular interest to a GSRA within the scope of an existing grant. A GSRA's PI may propose topics to the GSRA. Sometimes the first project on which the GSRA works produces research that can be used as the basis for the GSRA's dissertation. Sometimes the GSRA, for one reason or another, will work on several different projects before finding a suitable dissertation topic. To give several examples, the project on which a GSRA in the Material Science Department was working at the time of the hearing was part of a large grant for nuclear reactor research with funding from the Department of Energy through a consortium of multiple universities, national laboratories, and private industry. The faculty member who had become the GSRA's advisor is one of the PIs for this grant. Although this is the third project on which this GSRA has worked, she testified that she expected that most of the data she was now generating would eventually go into her dissertation, after the research is published in an open journal. The GSRA in the Department of Electrical Engineering and Computer Science who appeared as a witness testified that after he joined his current advisor's research group, the professor decided to collaborate with another professor on a new project. The two PIs then obtained a grant for that project, and the GSRA began working on it. Although this was in a totally different area than the GSRA's previous work, he became interested in the new topic, took some classes related to it, and then decided that the research from this project would be the backbone of his dissertation.

Sometimes a GSRA switches projects for the explicit purpose of finding a dissertation topic, as the GSRA from the Department of Astronomy did. Sometimes a GSRA selects a dissertation topic based on the research from the project on which the GSRA has been working. For example, a GSRA in the School of Education is working on a grant exploring the teaching of mathematics in community colleges. She testified that in choosing her dissertation topic, she changed her original focus from remedial education so that she could use some of the data that she has been collecting as part of her GSRA assignment in her dissertation and so that the PI on her project could serve as her academic advisor. Sometimes a GSRA's dissertation topic is inspired by the research she has done as a GSRA even if she does not use data collected as part of her GSRA appointment, as a GSRA in the School of Social Work testified.

Although the record indicates that this is uncommon, a GSRA may pick a dissertation topic unrelated to her GSRA research. For example, a GSRA in the Education and English departments has a two academic year GSRA appointment at the University's Sweetland Center for Writing, an independent University entity that focuses on providing writing instruction to students at the University. This GSRA's research projects, which are funded by a grant from the University, involve collecting writing samples, interviewing students and doing surveys on ways to improve writing instruction at the University. This GSRA, however, has a particular interest in writing instruction at community colleges and in Native American tribal colleges in particular. Her dissertation topic involves research on writing instruction at a tribal community college in the southwest United States. Although the GSRA became involved in this research as a result of contacts outside the University and her dissertation research is not funded by her GSRA appointment, the PI for her GSRA research at the University is a part of her dissertation committee.

A research grant carries the expectation that papers will be produced and published as a result of the research and that presentations will be made at academic conferences. Even if research from a GSRA's project is not used in the student's dissertation, the GSRA may appear as a joint, or even sole, author on a paper based on this research. Although there was no testimony on this point, it appears from the stipulated exhibits that a GSRA may also appear as an inventor in a patent application resulting from research in which he or she participated as a GSRA. A student's progress in authoring papers and making presentations as a GSRA is considered a factor in evaluating the student's academic progress.

Most grants also require periodic progress reports. For some grants, there are written progress reports called "deliverables." GSRAs are often assigned to prepare these reports, under the supervision of the PI.

All graduate students are evaluated by faculty throughout their graduate career. Most departments have a graduate committee comprised of faculty whose role is to evaluate the academic progress of students in the graduate program. For students in the pre-candidate stage, the committee looks at each student at least once at the end of the year and evaluates their academic progress. Since pre-candidates are taking classes, they are evaluated, in part, on their classroom performance. In the Mathematics Department, for example, faculty members teaching graduate courses may be asked to prepare evaluations for each student in their classes for the graduate committee. Pre-candidates with research assignments, whether funded by a GSRA appointment, fellowship, or training grant, are also evaluated by their PIs or the faculty member supervising their research. The form of the evaluation is left to the department, or, in some cases, the individual faculty supervisor. A pre-candidate GSRA in the Department of Nuclear Engineering testified that his PI fills out an evaluation form for him each semester and discusses it with him, although he doesn't see it. He also testified that he is graded on his research, although one semester his PI decided to give him a letter grade, while in another the PI simply graded him as satisfactory. In the medical school, where students do several research rotations during their first year, all the faculty in whose labs they worked are asked to evaluate them individually and to identify any issues, such as remedial classes or tutoring, the students might need.

At the candidate stage, GSRAs are evaluated by their PIs, and students with research fellowships or training grants are evaluated by the faculty supervising their research. As noted above, eventually candidates acquire a dissertation supervisor and a dissertation committee which approves the dissertation topic and monitors the progress of the dissertation. Professor Barald testified that in the medical school, the student's dissertation committee generally consists of all the faculty members in whose labs the student has done a rotation. Professor Barald testified that she has prepared an evaluation form to be filled out by the PI and dissertation committee that recognizes certain milestones, including presentation of data by the student at a national meeting, the submission of research by the student to various publications, the passing of certain exams, participation in a research symposium, and finding other graduate students to work on aspects of the student's dissertation topic. The medical school is also in the process of implementing a system of individualized development plans intended to follow students' goals and progress through each year of graduate study.

According to Provost Hanlon, GSRAs are evaluated based on their academic progress, not whether progress is being made on the research project. He testified that a GSRA is evaluated, first, on whether the GSRA is putting forth adequate effort and second, whether he or she is making adequate progress in learning the craft of research. However, if a PI finds the GSRA's work to be unsatisfactory, the GSRA will be removed from the PI's project. The responsibility for funding the GSRA appointment then shifts to the student's department, which then looks for some other source of support for the student. If the GSRA has advanced to the point of working on his or her dissertation, however, and the PI is also the GSRA's dissertation supervisor, a decision by the PI to cut off support based on the GSRA's performance on the supervisor's research project can result in the student being asked to leave the graduate program.

All the GSRAs who appeared as witnesses testified that they have relatively flexible work hours. Usually, they at least have regular appointments during the course of a work week, including regularly scheduled meetings with their advisors and, typically, group meetings with the PI and other members of the research team. They also take direction from their PIs; if the PI tells them that something needs to be done that day, or by a certain date, they do it. Several with full-time equivalent appointments testified that they are expected to be in the office every day, and one testified that he normally works at least 9 am to 5 pm. Others testified that they work mostly on their own schedule and check in periodically with their advisors. Professor DiRita from the Medical School testified that he tells his GSRAs that he does not care if he never sees them, as long as they turn in data and he can prove the data is right. However, he also testified that he meets almost daily with his GSRAs in some way. All the GSRAs testified that they devote much more time per week to their research than the minimum hours required by their appointment. None of the GSRAs who testified at the hearing had requested paid sick leave or FMLA leave, although one testified that she had been sick for a couple of weeks and could not work. In that case, the work was rescheduled or assigned to someone else, and she caught up later when she was better.

The federal government requires institutions who receive federal funding to maintain an accurate system certifying the percentage of effort that employees devote to sponsored projects. Failing to comply with this requirement can result in financial and other penalties for the University. In addition, other organizations that provide sponsored funding may require verification that effort is consistent with the terms of the grant or contract. To comply with these requirements, the University requires all employees, including GSRAs, working on a project funded by a grant to prepare and sign an annual effort certification report that identifies the grant and attests that the employee spent at least the amount of time required by his or her appointment doing the work. This report is prepared and submitted through the University's on-line system. PIs are subject to multiple penalties if employees, again including GSRAs, working on the PIs' projects fail to comply with the effort certification policy. These penalties include, but are not limited to, suspension of the PIs' grant proposals and disciplinary action. Graduate students conducting research funded by fellowships do not have to complete an effort certification.

GSRAs are considered by the University to be employees for purposes of ownership of research results. Graduate students performing research while receiving fellowships are not considered employees, although their research results are treated the same way if produced with University resources, e.g., as part of a research group in a University laboratory. The pertinent sections of the University's technology transfer policy, under the heading "Ownership of Intellectual

Property," are as follows:

> A. Intellectual Property made (e.g. conceived or first reduced to practice) by any person, regardless of employment status, with the direct or indirect support of funds administered by the University (regardless of the source of such funds) shall be the property of the University, except as provided by this or other University policy. Funds administered by the University include University resources and funds for employee compensation, materials or facilities…
>
> * * *
>
> C. The University generally will retain ownership of Intellectual Property produced by Employees while participating in sabbaticals or other external activities if they receive salary from the University for such activity…
>
> D. The University will not generally claim ownership of Intellectual Property created by students. (A "student" is a person enrolled in University courses for credit except when that person is an Employee.) However, the University does claim ownership of Intellectual Property created by students in their capacities as Employees. Such students shall be considered to be Employees for purposes of this policy. Students and others may, if agreeable to the student and the Office of Technology Transfer, assign their Intellectual Property rights to the University in consideration for being treated as an Employee Inventor under this Policy.
>
> E. The University will own Intellectual Property made by a former University employee if the Intellectual Property was made both (1) with substantial University faculty guidance or University resources and (2) during activity directly relating to and closely following employment. For example, if a graduate student researcher completes a research project and is no longer technically an Employee, and an invention is conceived during the creation of a dissertation or similar activity relating to the research involving faculty guidance, the University will own the patent rights related to the invention. This rule does not affect a graduate student's ownership of the copyright on the dissertation itself.
>
> F. All Intellectual Property made under sponsored research agreements and material transfer agreements shall be owned by the University except where previously agreed otherwise in writing based on the circumstances under consideration. Such exceptions shall be approved and negotiated by the Office of the Vice President for Research; Intellectual Property subject to such exception shall nevertheless be subject to the disclosure requirements of this Policy

<u>The University Treats GSRAs as Employees</u>

Many of the University's written policies and procedures that mention GSRAs refer to them as employees. The effort certification and technology transfer policies discussed above are two examples, but there are many others.

The University's Office of Research and Sponsored Projects states on its website that payments to GSRAs are considered reasonable compensation for the performance of services rendered to the University in connection with research and, as such, are subject to federal and state income taxes.[4] The University withholds state and federal taxes from payments made to GSRAs, except social security taxes, which, pursuant to Internal Revenue Regulations, need not be withheld for employees who are also students of the institution. The University does not withhold taxes from fellowship payments made to United States citizens and resident aliens, although it notifies them that the portion of their fellowship above the amount of their tuition and fees is taxable.

The University requires GSRAs to complete federal Employment Eligibility Verification (I-9) forms or, in the alternative, to present a visa establishing that they are authorized to work.

The University's handbook for faculty describes three categories of "graduate student employees" – GSIs and GSSAs, GSRAs, and House Officers, who are interns, residents, and fellows employed by the University's Medical Center. Shortly before the hearing, the University's largest school, the School of Literature, Science and the Arts (LSA), did a presentation to its faculty entitled "Hiring the Graduate Student Research Assistant." In this presentation, the University told its faculty that "an employment relationship exists whenever there is an expectation of a certain effort level or outcome in exchange for pay, especially for, but not limited to, work supported by a grant." Therefore, according to this presentation, faculty should be alert to the distinction between the above and scholarship research done purely for academic progress, i.e., when there is no expectation of a specific effort level or outcome/product. According to this same presentation, the University's Layoff and Termination form, filled out when an employee is terminated, is to be filled out when a GSRA leaves the University and is not expected to soon be rehired by the University in some other position.

The University's "Procedures for Investigating Allegations of Misconduct in the Pursuit of Scholarship and Research" apply to "all instructional faculty, primary researchers, and other staff members, including, without limitation, graduate student research assistants, graduate student teaching assistants, graduate student staff assistants, undergraduate students employed in research or other scholarly activity, postdoctoral fellows and postdoctoral research associates, visiting faculty or staff, faculty or staff on sabbatical leave, adjunct faculty when performing University work, and faculty or staff on leave without pay." According to the policy, these procedures "apply to students only when acting in their employment or service capacity, and not as students per se." If the student or employee status of the accused is unclear, the responsible administrator can elect whether to apply the procedures applicable to employees or the procedures for handling allegations of academic misconduct.

The University has a written policy governing personal relationships between faculty and students. This policy applies to "any University or University-sanctioned teacher, mentor or supervisor of students." Both GSIs and GSRAs are explicitly covered by this policy.

GSRAs are required to take an oath to support the Constitution. This oath is required of all employees. Students are not required to take this oath.

[4] The 1981 decision indicates that GSRAs' stipends were also subject to these taxes at that time.

The University provides benefit-eligible GSRAs (those who have a minimum twenty-five percent appointment for at least four continuous months) with a number of benefits. Those listed immediately below are also available to certain graduate students supported by fellowships and to medical students:

1. Health Insurance (GradCare Plan).

2. Prescription Drug plan

3. Dental Plan

4. Vision Plan

5. Legal Plan

The GradCare plan is a modified point-of-service health plan available to GSRAs, GSIs, GSSAs, benefit-eligible fellowship holders, and medical students; it is not offered to faculty or other employees. GSIs and GSSAs represented by Petitioner have a choice of medical plans, including the GradCare Plan. Medical students are required to either enroll in GradCare or provide verification that they have comparable health care coverage. For GSRAs, the entire cost of the above plans is usually underwritten by the grant funding their projects.

The parties stipulated that the University provides benefit-eligible GSRAs with the following benefits that are not available to graduate students who are primarily funded through scholarships or fellowships:

1. Health Care Flexible Spending Account
2. Dependent Care Flexible Spending Account
3. Tax-Deferred Supplemental Retirement Account (SRA)[5]
4. University, Optional, and Dependent Group Term Life Insurance
5. Travel Accident Insurance (for travel on University business)

University term life insurance covers the GSRA and is provided at no cost to the GSRA. Like most other benefits available to GSRAs, the cost of this life insurance is included in the grant under which the GSRA works.

GSRAs are eligible for paid sick leave (i.e., without reduction in their stipend/compensation) for up to three weeks in a twelve month period when unable to meet appointment obligations because of personal illness or injury. In addition, the University has judged GSRAs to be covered by the federal Family Medical Leave Act (FMLA) and to be eligible for unpaid leave as provided for in that statute.

The parties stipulated that in 1981, GSRAs did not have Health Care Flexible Spending Accounts or Dependent Care Flexible Spending Accounts because these plans did not exist at that

[5] The record does not indicate whether the University contributes to this account.

time; they did not have the right to continued coverage under the University's health care plan under the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) because that statute did not become effective until 1986; and they did not have rights to FMLA leave because the FMLA did not take effect until 1993. The GSRAs first became eligible to participate in a tax-deferred supplemental retirement account plan in 1989.

GSRAs also have a benefit referred to as a tuition waiver. GSRAs with a twenty-five percent or greater appointment do not pay tuition during the terms of their appointments. Resident tuition and fees for GSRAs are underwritten by the grant funding the GSRA's project. The University, through the GSRA's appointing department, covers the difference between resident and non-resident tuition for out-of-state GSRAs. A similar benefit is in effect for GSIs, but in that case the appointing department pays the entire tuition.

The University has an employee assistance program for faculty and staff. This service is available to GSIs, GSSAs, and GSRAs.

Rights of GSRAs Under Other Employment Laws

Petitioner and the University cite cases in which graduate research assistants have been found to be entitled to the protections granted to employees under various employment laws. Under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(f), an employee is defined as "an individual employed by an employer." In *Cuddleback v Florida Bd of Ed,* 381 F3d 1230 (CA 11, 2004), the Court of Appeals held that a graduate research assistant was an employee under this provision under the "economic realities test," even though her work was necessary to complete degree requirements, where she received a stipend and benefits for her work, the university provided equipment and training, and the decision whether to renew her appointment was based on employment reasons, such as attendance and communications, rather than academic reasons. The Court noted that courts typically refused to treat graduate students as employees for Title VII purposes only where their academic requirements were "truly central" to their relationship with their institution. See also *Ruiz v Trustees of Purdue Univ,* 2008 WL 833125 (2008), in which a district court applied a similar analysis and reached a similar conclusion. The parties also cite *Semus v Univ of Rochester,* 272 AD2d 836 (2000), in which the New York Supreme Court, applying the "right to control" test, found a graduate student research assistant to be an employee under the New York worker's compensation law.

In *McGee v Univ of Michigan Regents,* 2011 WL 1376281, the Court of Appeals let stand a jury verdict holding that a GSRA at the University engaged in activity protected by the Michigan Whistleblower's Protection Act, MCL 15.361, but that the University did not discharge or otherwise discriminate against him when a faculty member refused to allow the plaintiff to complete the term of his GSRA appointment in the faculty member's lab. The Whistleblower's Protection Act prohibits employers from discharging, threatening, or otherwise discriminating against employees because the employees have reported or threatened to report violations or suspected violations of laws, rules, or regulations to public bodies. From the Court's opinion, it does not appear that the University argued that the plaintiff was not an employee under the Whistleblower's Protection Act.

No consensus exists among jurisdictions regarding whether graduate student research assistants, or graduate student assistants of other types, are employees for purposes of collective bargaining laws. For example, graduate student assistants, including graduate student research assistants, were held to be public employees and thus entitled to the collective bargaining rights guaranteed to public employees under the Florida Constitution in *United Faculty of Florida, Local 1847 v Bd of Regents*, 417 So 2d 1055 (Fla App, 1982), as clarified by 423 So 2d 429 (Fla App, 1982). In *Graduate Employees Org, IFT/AFT v Illinois Educ Labor Relations Bd*, 315 Ill App 3d 278 (2000), the Illinois appeals court reversed a finding by the Illinois Labor Relations Board that graduate student assistants were not public employees under the statute, but remanded to the Board to determine, for each separate category of student assistant including GSRAs, whether their assistantships were "significantly connected" to their status as students. In *Ass'n of Graduate Student Employees, District 65, UAW v Public Employment Relations Bd*, 8 Cal Rptr 2d 275 (1992), the California appeals court held that graduate student assistants and graduate student researchers were not entitled to collective bargaining rights under the applicable public employee collective bargaining law. In *State v New York State Public Relations Bd*, 181 AD2d 391 (1992), a New York appellate court affirmed the finding of the Board that graduate and teaching assistants of the State University of New York were employees entitled to collective bargaining rights.

The National Labor Relations Board (NLRB) has taken different positions with respect to whether graduate student research assistants are employees under the National Labor Relations Act (NLRA), 29 USC §§ 151-169. In *Leland Stanford Univ*, 214 NLRB 621 (1974), the NLRB held that graduate student research assistants were not employees under the NLRA because they were "primarily students." It based its holding on the fact that: (1) the research assistants were graduate students enrolled as doctoral candidates; (2) they were required to perform research to obtain their degree; (3) they received academic credit for their research work, and (4) while they received a stipend from the university, the amount was not dependent on the nature or intrinsic value of the services performed or the skill or function of the recipient, but instead was determined by the goal of providing the graduate students with financial support. Subsequently, in *New York Univ*, 332 NLRB 1205 (2000), the NLRB concluded that graduate students performing work for the university as a condition of receiving financial aid after completing their coursework, and while working on their dissertations, were employees, where working as a graduate assistant was not a part of the graduate school curriculum or a requirement for receiving a graduate degree in most departments. However, in *Brown Univ*, 343 NLRB 483 (2004), the NLRB returned to what it concluded was the correct reasoning of *Leland Stanford*, and held that all graduate student assistants who have not yet received their degrees are primarily students and have a primarily educational, not economic, relationship with their university.

Discussion and Conclusions of Law:

In the 1981 decision, we distinguished the GSRAs' circumstances from those of the GSIs and other groups we had previously found to have dual status as employees and students under PERA, including the interns and residents the Supreme Court agreed were employees in their 1973 decision in *Regents of the Univ of Michigan.*[6] In our December 11, 2011 order, we stated that Petitioner was to prove, by substantial, competent evidence, such material change of circumstances since our 1981 decision as to warrant a finding that some or all of the GSRAs are employees. We stated that we

[6] 389 Mich 96 (1973).

would require competent proof as to each category of employee to show that the facts were different from our previous decision. We also stated that Petitioner's burden was "heavy."

Because this is a representation proceeding, and not a contested case under the Administrative Procedures Act, MCL 24.275, normal preclusion doctrines, including res judicata and law of the case, do not apply. Moreover, we have previously held that in a representation case there is no formal burden of proof, although the record must contain sufficient evidence to support the findings sought by the petitioner. *Univ of Michigan,* 1970 MERC Lab Op 754, 760-761. When we directed Petitioner to prove that the material circumstances had changed since 1981, we were not applying any preclusion doctrine. Nor were we suggesting that we lacked the authority to overrule our own prior holding that GSRAs are not employees of the University within the meaning of PERA. Rather, we simply meant that we intended to follow the rationale of the 1981 decision and to rely on the facts we relied upon in that decision to find that the GSRAs were not employees within the meaning of PERA unless those facts had changed, or there was some other overriding change in circumstances that undermined the conclusion we reached in that decision. Because Petitioner was seeking an election among a group of individuals previously determined not to be employees, we placed the burden on Petitioner to demonstrate a change in facts or circumstances. Of course, Petitioner was not obligated to show that none of the facts mentioned in our 1981 decision remain the same, but only that there had been a change in the facts that were material to our conclusion in that decision. We conclude that Petitioner has not shown a change in material facts or circumstances. An explanation of this conclusion requires an explanation of the distinction we drew in the 1981 decision between the GSRAs and individuals found to have dual status as students and employees.

Section 1(e) of PERA defines a "public employee" as "a person holding a position by appointment or employment in the government of this state or its political subdivisions as described in that section, or in any other branch of the public service." Two provisos, neither of which pertains to graduate students, were added by the Legislature after PERA was enacted to make it clear that certain individuals are not "public employees" under this statute.

In 1971, six years after the passage of PERA, the Commission first addressed the question of whether a student of an educational institution may be an employee of that institution under PERA even though his activities performed as an employee contribute to his education at the same institution. In the interns and residents decision, we held that interns and residents enrolled as graduate students at the University's Medical School were, along with postdoctoral fellows, employees of the University under PERA. The interns and residents were providing medical care to patients at the University's hospital while being trained by the hospital's permanent medical staff under whose supervision they worked. Neither interns nor residents participated to any significant degree in classroom activities, but instead were primarily engaged in clinical work within the hospital; their primary activity was patient care. Residents and interns participated in a variety of relatively structured educational experiences, including lectures, conferences and discussions, but all of these occurred within the hospital setting and often involved actual patients. Supervision was "multi-tiered," with senior medical students, interns, residents of the first through the fifth year, and permanent staff all involved in patient care and each level looking to the next senior level for guidance and direction. In some departments, the role of the permanent staff was limited to providing consultations and participating in review of medical decisions when needed.

The interns and residents signed annual contracts with the University that were considered mutually binding on both parties. Both interns and residents received compensation which was subject to income tax, and the University deducted taxes from their paychecks. The interns and residents received fringe benefits available only to regular University employees, including health insurance.

Although the "economic reality" test had long been used in Michigan to determine employee status under the Worker's Compensation and other statutes, the test we applied to the interns and residents was whether the work was being performed in a master-servant relationship or whether the interns and residents were performing the work as their own "masters." We rejected the University's argument that the performance of services by the interns and residents was so related to their educational goals that it could not be the basis of an employment relationship. While acknowledging that education might be the primary goal, we concluded, at 279, that the "goal may be educational – to produce medical specialists – but the means is one of service – to employ the individuals in the performance of services to the institution." We distinguished the interns and residents from a student in an ordinary classroom setting who is not performing any services for the benefit of another, but is "engaged in pursuits of his own." The University also argued that the interns and residents were not employees because their services were not essential to the hospital's functioning. Instead, it argued, the permanent staff would have more time for direct patient care if relieved of the obligation for instructing and training the interns and residents. We found that this was simply an admission by the University that patient care was work that needed to be done and that the interns and residents were doing it. We found that a master-servant relationship did exist between the University and the interns and residents and that they were providing services for the benefit of the University as employees and not engaged in "pursuits of their own." We concluded, therefore, that the interns and residents were public employees under § 1(e) of PERA.

The Supreme Court, in affirming our conclusion that the interns and residents were employees of the University under PERA, agreed with us that PERA made no exception for individuals with dual status as students and employees, i.e. if the individuals were employees, they were entitled to the rights guaranteed by PERA even though they were also students of their employing institution. *Regents of the Univ of Michigan v Michigan Employment Relations Comm,* 389 Mich 96 (1973), *aff'g* 1971 MERC Lab Op 270. They also agreed that the fact that interns and residents were continually learning and developing new skills under the tutelage of more experienced physicians did not mean that they were not employees. The Court drew an analogy between the situation of interns and residents and another group familiar to it, "fledgling lawyers" at a law firm. The Court also noted that: the interns and residents had a portion of their compensation withheld for tax purposes; the University furnished them with W-2 forms required by the Internal Revenue Service; compensation was paid by University checks drawn from a University account; they received fringe benefits available only to University employees; they were required to sign the loyalty oath required by Michigan law to be signed by all public employees; and they were entrusted with many responsibilities that medical students were not, including writing prescriptions.

Two cases of note involving students were decided between the interns and residents' case and the 1981 decision involving graduate teaching and research assistants. In *Michigan State Univ,* 1976 MERC Lab Op 73, the students were undergraduate university students who worked for the

university part-time performing duties similar to those performed by the university's regular clerical, technical, and maintenance employees. In that case, the duties performed by the students were clearly unrelated to their educational goals. However, the student employees had to be enrolled as students, and their employment duties were fitted around their class schedules. The University argued that the students were not employees in part because they were on the campus to obtain an education, with their employment being a secondary occupation to defray the cost of their education. It also argued that their employment was, in any case, merely temporary. We rejected, as we had in the interns and residents case, the University's argument that the student employees were "primarily students" and, therefore, not employees of the University under PERA. We also concluded that the students' employment was neither casual nor temporary, as we had used these terms in previous cases.

The second decision was *Detroit Bd of Ed (McNamara Skill Center)*, 1972 MERC Lab Op 87. In that case, we held that unemployed individuals in various programs operated by the Detroit Public Schools to train unemployed persons in specific skills were not employees of either the Detroit Public Schools or the State of Michigan, which funded the program. Under the guidance of trainers, the trainees worked in a cafeteria, performed custodial or maintenance work, repaired cars, and repaired clothing. While participating in the programs, the trainees received training allowances. Although the trainees' allowances were docked for unexcused absences, we held that these allowances were not wages and that the trainees were not employees because they provided no significant services or benefits to either the State of Michigan, which paid their wages, or to the Detroit Public Schools.

These cases formed the background for the 1981 decision in which we concluded that GSIs and GSSAs at the University were employees under PERA, and that graduate student research assistants were not. It should be noted that the ALJ in the case, Shlomo Sperka, concluded that the decision must be based on precedent under PERA, including the interns and residents case.[7] He did not, therefore, discuss decisions arising under the National Labor Relations Act, 29 USC §§ 151-169, or under public employee collective bargaining statutes in other states, on the issue of whether graduate students were also employees for purposes of these statutes.

With respect to the GSIs, the ALJ found that although GSIs might directly approach a faculty member to inquire about teaching positions, some departments maintained postings of available GSI positions and the selection process for GSI assignments in those departments was fairly mechanical. Since GSIs were assigned courses according to their department's needs, it was only by chance that a GSI would be supervised by his or her academic advisor. The specific stipend paid to the GSI might be based on how many sections of a class the GSI taught. Moreover, this stipend was close to the salary of a non-tenure track faculty lecturer. While some departments provided their GSIs with structured syllabi, in general GSIs performed virtually all tasks associated with course instruction. The GSI might or might not receive guidance or training in teaching skills, and the degree of oversight of GSI teaching varied by department. Similarly, formal evaluation of the GSI was carried

[7] Because the 1981 case involved a charge alleging that the University committed an unfair labor practice by refusing to bargain with the Graduate Students Association, a decision and recommended order in that case was issued by ALJ Sperka. The ALJ concluded that GSIs and GSSAs were employees and GSRAs were not, and the Commission affirmed his conclusions on exceptions.

out in different ways by different departments, with some departments using student evaluations and some asking for input from faculty and other GSIs. In either case, the GSI's progress toward a degree did not depend on teaching skills or the development of those skills over time. The ALJ found that although the obligation of teaching classes might aid the GSIs in improving their knowledge of their subject, the GSIs, like the interns and residents, were merely gaining or improving skills while helping the University produce its "product," i.e., the instruction of undergraduates.

The ALJ spent more time in his decision discussing the GSRAs than discussing the GSIs. The ALJ found that grant funding equaled a significant fraction of the University's budget. He found that this funding advanced the purposes of the University, since faculty research was one of its missions, as well as a vital professional activity of its faculty members. He also recognized that no matter what relationship the research conducted by the GSRAs had to their individual dissertations, the GSRAs were assisting the faculty PIs in fulfilling the PIs' obligations under their grants. He agreed that because their obligations to perform research funded by grants benefited the University and its faculty, the GSRAs, like the GSIs, were in a sense helping the University to "produce a product." The ALJ referred to the employment status of the GSRAs as a "close question" and acknowledged that a reasonable argument could be made that the GSRAs were employees. However, the contrary view, which the ALJ ultimately adopted, focused on the relationship of the GSRAs' research to their pursuit of their degrees. The ALJ summarized these arguments and the facts in the record that supported them at 1981 MERC Lab Op 777, 809-810, as follows:

> In seeking a research degree, the doctoral candidate develops a thesis topic together with a faculty member who is his or her graduate advisor. A committee of senior faculty may become involved in this process at a later point. The development of the thesis topic, its acceptance by the graduate advisor, its further shaping by the give-and-take of the candidate and the advisor, are part of a long and sometimes arduous intellectual exercise. *If all or part of the work is to be conducted pursuant to an RA appointment, the intermingling of the educational and employment relationship will be inevitable. The decision to accept a candidate, to accept his thesis proposal, and to conclude that the student and thesis warrant support are all, without a doubt, educational decisions. Once the appointment is made, these educational decisions will continue to be made at various points in the progress of the student towards his degree. Although the conditions of a particular RA appointment may be imposed upon the doctoral candidate as he pursues his work, the employment component is an afterthought imposed upon the existing situation.*
>
> Research carried on as part of a course of study is often identical with the research assigned as part of the "work" of the RA. In this situation study and work are identical. *The concerns of the department or professor with the work of the graduate student as "student" and with his "production" as an "employee" are one. Evaluating the quality of the work will permit no distinction between evaluation of the student in his progress as a degree candidate and as an employee carrying out his research. This is true for the majority of the research assistants, not only for those whose thesis work is identical with the research appointment.*

> The RA may fall in three rough groupings. A certain proportion of RAs have helped design the grant application to match their preselected thesis topic. Here the interrelation of work and study is obvious. Where the RA work is related to, but not identical with the thesis area, the result will be the same. *Although the grantor, (government agency or foundation) and the professor who is principal researcher will benefit from the research, nevertheless the professor must simultaneously evaluate the student's work in his role as "teacher." This work will be presented to him by the student to earn a research degree, either in a final thesis or during the progress of the work which the professor must monitor. At the same time, the professor as prime researcher and administrator of the RA appointment must evaluate and monitor the work for fulfillment of the obligations of the RA appointment.*
>
> A third category of RA's may work on research not directly related to a thesis. The student may not have yet selected a thesis. Some RA appointments are in research institutes on contracts to fulfill obligations to outside grantors. *The work may be thesis work, but depending on the closeness of the student's thesis topic to his job obligations, these RAs will come closer to the "employee" role.* At least appointments in this latter category are "academically relevant" to the student's course of study.
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> Where the RA appointment is less directly related to thesis work, the "ratio" of the work and student components may be altered. *These are questions of gradation; nevertheless, there appears to be no clear basis upon which to distinguish within the group of graduate student research assistants. In every case, the element of academic relevance to the degree program is present.* [Emphasis added]

Unlike ALJ Sperka, the Commission's discussion of the status of the GSIs and GSSAs was more extensive than our discussion of the GSRAs. We summarized the pertinent facts relative to GSRAs at page 781 of our decision.

> [T]he RAs comprise about 17% of the overall group of GSAs. They perform research under the supervision of the faculty member who is the primary researcher of a research grant. Assignment to a RA's position typically results through a mutual agreement between a particular faculty member and a particular student. This selection process takes into account the nature of the research project. The degree of the student's interest varies from cases where the research goal is identical to the RA's thesis topic to cases where the research goal is unrelated to thesis work. In most cases, the RA appointment reflects and closely tracks the student's academic discipline and interests. Evaluation of the RA's work is generally indistinguishable from evaluation of progress as a student. Unlike the TA who works under a specific class schedule, the RA's work is performed under a flexible time framework. A department might not even have a central roster of RAs since each works with a specific faculty member.

Our conclusions regarding the GSRAs were expressed in a single paragraph. We said, at 785:

> We also agree with [ALJ Sperka] that the relationship between 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 interest 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 frequently evaluated on their research by their academic advisors and their progress in their appointments is equivalent to their academic progress. Nor does the research product they provide further the University's goal of producing research in the direct manner that the TAs and SAs fulfill by their services. Although the value of the RA's research to the University is real it is clearly also more indirect than that of teaching 30% of the undergraduate courses. RAs are substantially more like the students in the classroom or the trainees in *McNamara. They are working for themselves.* [Emphasis added]

The statement that the GSRAs were "working for themselves" seems to have been an attempt to distinguish the GSRAs from the resident and interns that we had found in *Regents of the Univ of Michigan,* 1971 MERC Lab Op 270, not to be "engaged in pursuits of their own." This statement, however, and our reference to the research produced by the GSRAs as something of "indirect" value to the University, must be read in the context of the entire opinion, including the ALJ's decision. That is, both the ALJ and the Commission recognized that the GSRAs provide services to the University and its faculty that advanced both the University's mission to create and disseminate knowledge and the interests of individual faculty members. Both ALJ Sperka and we recognized that there were aspects of the GSRA-University relationship that resembled employment. However, we concluded that the GSRAs' research was too intertwined with their academic goals to be considered employment.

As ALJ Sperka found, research – the creation and public dissemination of knowledge – has long been one of the University's core missions. It was obvious at the time of the 1981 decision, as it is today, that work performed by GSRAs assists the University in fulfilling its mission. The fact that one of the purposes of the GSRA appointment is to train the student for a career as a researcher – and ensure a future supply of trained researchers - does not mean that a GSRA appointment is not employment. As we noted in the interns and residents case, service may be a means to attain an educational goal as well as, or in addition to, an end in and of itself. The interns and residents in that case, like other apprentices, were developing their skills as physicians while at the same time providing medical care to patients and services to the University. Moreover, completion of this apprenticeship was a condition of their becoming fully qualified physicians.

As at the time of the 1981 decision, there are aspects of the relationship between the GSRA and the University that resemble employment. One fact that seems to have changed is that while the generally flexible work schedule of GSRAs was cited in the 1981 decision as a factor indicating that

they were not employees, the record indicates that some GSRAs now have to keep regular hours and must seek permission from their PI not to come to work on a particular day. However, flexibility of working hours is only a minor factor in determining whether the relationship is one of employment.

Petitioner and the University presented evidence showing that the University now considers GSRAs to be employees for many purposes, including that it had judged them to be employees entitled to the protection of the FMLA. At the time of the 1981 decision, the University took the position that GSRAs, and GSIs, were not its employees. In addition, the parties cited cases from several jurisdictions finding graduate student research assistants to be employees for purposes of state and federal employment statutes not related to collective bargaining. Petitioner argues that the University is the best judge of whether GSRAs are its employees for purposes of PERA, and both parties argue that the fact that graduate research assistants have been found to be employees under other statutes is relevant to whether they are employees within the meaning of PERA. However, it is our obligation, subject to review by the Courts, to interpret PERA where its meaning is ambiguous and to determine, when the legislature has not, whether a particular relationship is one of "employment" under PERA. Clearly, individuals may be "employees" for purposes of other statutes and laws and not employees for purposes of PERA, and vice-versa. The fact that the University considers the GSRAs to be its employees, while relevant, is also not determinative of whether the GSRAs are employees for purposes of PERA.

The record establishes that in 2012, as in 1981, a GSRA appointment closely tracks a student's own specific academic goals. Almost all GSRAs seek out projects in order to find a subject that will serve as the basis in some way for their dissertations. Through GSRA appointments, GSRAs also develop the one-on-one relationships with a mentor or advisor critical to the process, which includes publishing papers and completing a dissertation that makes a real contribution to his or her area. Not all GSRA appointments, now or in 1981, evolve into such a relationship. However, the record indicates that if a GSRA, for any reason, does not establish such a relationship with the PI with whom he is working, the GSRA looks for another project or grant or faculty member. No GSRA testified that he or she had lingered in a project after concluding that it would not contribute to a dissertation, although one did testify that she remained in a project after selecting a dissertation topic elsewhere. That GSRAs often switch projects simply underscores the importance to a doctoral student of finding the right project. The nature of a GSRA's work is determined by the scope of the grant under which he or she is funded, which is generally determined by the interests of the faculty member PI who applied for the grant; unlike in the 1981 decision, there is no evidence in this record that PIs apply for grants specifically to fund GSRA research. However, if the scope of the grant can accommodate it, the PI may permit a student to pursue a research inquiry of the student's own personal choice. In addition, more than one PI testified that he had sought permission from a sponsor to modify the scope of the grant to permit a GSRA to work on his own line of inquiry. Moreover, whether the GSRA is pre-candidate or candidate, has chosen a dissertation topic or has not, has developed a relationship with a mentor or is still seeking one, his or her work as a GSRA is used to evaluate his or her progress as a student. That is, a graduate student with a GSRA appointment receives some grade, formal or informal, for his or her research work on the same basis as he or she receives a grade for his or her classes.

Although we may not have articulated this well in our 1981 decision, we conclude that it was the relationship between the GSRAs' research work and their academic goals, and not whether their

efforts benefitted the University, that led us to conclude in 1981 that the GSRAs were "working for themselves." This is what truly distinguished the GSRAs from the GSIs, whose teaching assignments were not related to their dissertation topics and often not closely related to their specific areas of interest. This also distinguished the GSRAs from the interns and residents, whose situation was more similar to the GSRAs in that both were undergoing training directly related to their future careers. However, the interns and residents were not required to maintain the type of close faculty relationships and support that GSRAs need in order to find a dissertation topic, bring their dissertation to fruition, and build an academic reputation. Therefore, it was not unreasonable to conclude that the services the interns and residents provided to the University constituted "employment," even though they were completing their medical education while providing these services. However, in 1981, we concluded that the benefit to the University of the GSRAs' research work could not be effectively separated from the role of this work in the attainment of their academic goals. As set out above, the material facts that led us to this conclusion have not changed, and our conclusion also has not changed. As we have often reiterated, in the appropriate case, the facts may support a conclusion that an individual can be both a student and an employee of an educational institution. See e.g. *Michigan State Univ,* 1976 MERC Lab Op 73; *Regents of the Univ of Michigan,* 1971 MERC Lab Op 270. However, it was not the Legislature's intent when it adopted PERA to give students the right to collectively bargain with their teachers. We conclude, as we did in 1981, that the GSRAs are solely students, and not employees of the University within the meaning of PERA. In accord with this conclusion, we issue the following order.

ORDER

The petition for representation election filed by the Graduate Employees Organization, AFT MI, AFT, AFL-CIO is dismissed.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____/s/_____
Edward D. Callaghan, Commission Chair

_____/s/_____
Robert S. LaBrant, Commission Member

_____/s/_____
Natalie P. Yaw, Commission Member

Dated: June 19, 2014