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Motion of Melinda Day to Intervene in the Petition of Graduate Employees Organization Before the Michigan Employment Relations Commission

July 28, 2011

MACKINAC CENTER FOR PUBLIC POLICY

STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

REGENTS OF THE UNIVERSITY OF MICHIGAN,

Employer,

and Case No. R11 D-034

GRADUATE EMPLOYEES ORGANIZATION/AFT

Petitioner
_____/

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BRIEF IN SUPPORT OF MOTION TO INTERVENE AND FOR SUMMARY DISPOSITION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

REGULATIONS

CONSTITUTIONAL PROVISIONS

JURISDICTIONAL STATEMENT

The representation petition of the Graduate Employees Organization/AFT (GEO) should be dismissed for lack of subject-matter jurisdiction. In 1981, the Commission held that Graduate Student Research Assistants (RAs), the group that the GEO now seeks to represent, are not public employees under the Public Employment Relations Act (PERA). *Regents of the Univ of Michigan and Graduate Employees Org*, 1981 MERC Labor Op 777. The Commission has subject-matter jurisdiction only over public employees. *Lansing v Carl Schlegel, Inc*, 257 Mich App 627 (2003); *Prisoners' Labor Union at Marquette v Dep't of Corrections*, 61 Mich App 328, 330 (1975).

STATEMENT OF QUESTION INVOLVED

Can the Michigan Employment Relations Commission grant the representation petition of a union seeking to organize people whom the Commission itself has ruled are not public employees, given that only public employees are under the Commission's jurisdiction?

University of Michigan Board of Regents' answer: Yes.

Graduate Employees Organization/AFT's answer: Yes.

Intervenor's answer: No.

STATEMENT OF FACTS

This matter concerns an issue that has been settled in Michigan for three decades — that Graduate Student Research Assistants (RAs) are not public employees and therefore cannot participate in mandatory collective bargaining under PERA. The same union, GEO, which lost that claim against the same employer in 1981 before the Commission, *Regents of the University of Michigan and Graduate Employees Organization*, 1981 MERC Labor Op 777, has returned once again to seek to have RAs organized as public employees.

This renewed attempt appears to be due to developments in similar, but not controlling, federal labor law. A quick review of the federal decisions on graduate students in private universities may provide the Commission with useful context.

For decades, graduate students at private universities could not participate in mandatory collective bargaining. The National Labor Relations Board first addressed the issue in *Leland Stanford*, 214 NLRB 621 (1974), and held that graduate students were not employees under the National Labor Relations Act. The NLRB found that the payments made to graduate students were "in the nature of stipends or grants to permit them to pursue their advanced degrees" and that a graduate student's interaction with the university was directed "toward the goal of obtaining the Ph. D. degree." *Id*. at 621-22. The NLRB found that the pursuit of a degree divided those who could not participate in mandatory collective bargaining from those who could. *Id*. at 623 (comparing "research associates" who already have

a degree with graduate assistants who do not). The NLRB concluded that graduate students are "primarily students" and that "they are not employees." *Id.*

Twenty-six years later, the NLRB reached a different conclusion when the issue arose at a different university. *New York Univ*, 332 NLRB 1205 (2000). The board held that even though graduate students were "predominately students," they could still "be statutory employees." *Id.* at 1205. The NLRB rejected the pursuit-of-degree distinction; the claim that the money the students received was really financial aid, not compensation; and the argument that the educational benefit to the graduate students should prevent an employee designation. *Id.* at 1206-07.

Four years later, the NLRB reversed itself again in *Brown University*, 342 NLRB 483 (2004), holding that graduate students were not employees under the NLRA. Noting that the "academic reality" for graduate students "has not changed, in relevant respects, since our decisions nearly 25 years ago," the NLRB returned to its previous rationale. *Id.* at 492. The board rejected the argument that "changing financial and corporate structures of universities" should impact the analysis. *Id.* The board recognized that "some states permit collective bargaining at state universities," but it chose "to interpret and apply a single federal law differently to the large number of private universities under" its jurisdiction. *Id.* at 493.[1]

The board appears likely to reverse itself again and permit unions to organize graduate students under the NLRA. In an October 25, 2010, order in New York

[1] Two board members dissented and contended that the NLRB's decision was "out of touch with contemporary academic reality" and "harsh." *Brown University*, 342 NLRB at 493 (Members Liebman and Walsh dissenting).

University, the board indicated that "there are compelling reasons for reconsideration of the decision in *Brown University." New York Univ*, 2010 WL 4386482 (NLRB October 25, 2010).[2]

Thus under the NLRA, there was a long period in which graduate students could not be organized for mandatory collective bargaining because they were not considered employees of private universities under the statute. The last eleven years have seen the NLRB vacillate on this holding. One other interesting facet of the NLRB's holdings is that the board has uniformly considered graduate students in the aggregate and has not spent much time, if any, discussing whether various subgroups of graduate students should be evaluated separately.

In contrast to the federal rulings concerning the NLRA, the legal treatment of graduate students in Michigan has been unswerving for the last thirty years — two specific types of graduate students have met the PERA definition of public employee, while a third kind has not. The distinction between graduate students who are and are not public employees was set forth in a 1981 MERC decision in a dispute between the University of Michigan Board of Regents — the employer in the instant petition — and the GEO — the union in the instant petition. *Graduate Employees Org*.

That conflict concerned the GEO's claim that all people "holding appointments as graduate student assistants at the University of Michigan are employees within the meaning of PERA when engaged in activities within the scope

[2] The dissenting member stated that the order "merely serves to reinforce the view of the Board's critics who charge that its view of the law is wholly partisan and thus changeable based on nothing more than changes in Board membership." *Id*.

of the graduate student appointment." *Graduate Employees Org,* 1981 MERC Labor Op at 791. At the time, there were approximately 2,000 graduate student assistants at the university. *Id*. at 780. The record revealed that graduate students were split into three categories: (1) graduate student teaching assistants (TAs), whose duties consisted primarily of teaching about 30% of the university's undergraduate courses, *id*. at 780; (2) graduate student staff assistants (SAs), whose duties included counseling undergraduates and advising them about course selection, *id*. at 781; and (3) graduate student research assistants (RAs), who generally "perform[ed] research under the supervision of the faculty member who is the primary researcher of a research grant." *Id*.[3]

After 19 days of hearings, a 3,000-page record, several volumes of exhibits, and briefs that both approached nearly 100 pages, the Administrative Law Judge recommended that TAs and SAs be categorized as public employees and that RAs not. This Commission accepted that recommendation.

The Commission explained that while "PERA does not define public employees to specifically include or exclude students, MERC has consistently held that students can be employees." *Id*. at 782. The Commission noted that its holding that medical interns at the University of Michigan could be both students and

[3] At the time, TAs were 77% of graduate student assistants; SAs were 4%; and RAs were 17%. *Id*. at 780-81. Some students held multiple designations, and they account for the remainder.

In the university's current nomenclature, TAs are referred to as graduate student instructors (GSIs); SAs are graduate student staff assistants (GSSAs); and RAs are graduate student research assistants (GSRAs). For ease of reference, Intervenor will use the titles that the Commission used in 1981.

public employees had been affirmed by the Michigan Supreme Court. *Id*. at 783 (citing *Regents of the Univ of Michigan v MERC*, 398 Mich 96 (1973)).

The Commission noted and rejected the NLRB's then controlling "primarily student" approach under the NLRA. *Graduate Employees Org*, MERC Labor Op at 784. The test the Commission then adopted for determining a student's status under PERA was "whether students are providing benefit for another rather than pursuing their individual goals." *Id*.

Applying this test, it was determined that TAs and SAs were public employees:

> TA's provide a benefit to the University rather than engaging in pursuits of their own. They provide services similar to those of nonstudent employees; they do not control what courses they teach or what hours they work; they are supervised and may be removed for inadequate performances; and, they are compensated based on the amount of work they provide. They are supervised by faculty who retain control and oversight, as Respondent's principal representatives, for the quality of the work performed. They are subject to the immediate direction and control of the Respondent and they may be disciplined or relieved of their duties for inadequate performance. The work they perform fulfills one of the central missions of the Respondent. Likewise, the SA's perform regular duties of a type which benefit the University.

Id. at 785. Thus, while the TAs and SAs were "principally students," they were public employees in "their teaching and counseling." *Id*.

The Commission held that "sufficient indicia of an employment relationship" did not exist with RAs:

> The nature of RA work is determined by the research grant secured because of the interests of particular faculty members and/or by the student's own academic interest. They are individually recruited and/or apply for the RA position because of their interest in the nature of the work under the particular grant. Unlike the TA's who are

> subject to regular control over the details of their work performance, RA's are not subject to detailed day-to-day control. RA's 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 TA's and SA's 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. RA's . . . are working for themselves.

Id. at 785-86.

The Commission's decision was not appealed to the Court of Appeals.

On April 27, 2011, the GEO filed a certification petition with MERC. Just as in 1981, the GEO again seeks to represent RAs at the University of Michigan.

At the May 19, 2011, meeting of the University of Michigan Regents, the following resolution was passed by a 6-2 vote:

> Resolved, that consistent with the University of Michigan's proud history of strong, positive, and mutually productive labor relations, the Board of Regents supports the rights of University Graduate Student Research Assistants, whom we recognize as employees, to determine for themselves whether they choose to organize.

http://www.regents.umich.edu/meetings/06-11/2011-06-I-1.pdf.[4] With this resolution, the controlling board of the University of Michigan declared it university policy that contrary to this Commission's holding, RAs were public employees who could engage in mandatory collective bargaining under PERA.

Intervenor then filed the instant motion and brief.

[4] The six Democratic Party regents voted in favor. The two Republican Party regents were opposed.

ARGUMENT

The Commission lacks subject-matter jurisdiction over graduate student research assistants, since they are not public employees by the Commission's own ruling.

The Commission has previously held that RAs are not public employees. The Commission has subject-matter jurisdiction over public employees only. The fact that the GEO and the University of Michigan have "agreed" that RAs are public employees does not make them so; nor does it reverse this Commission's own holding to the contrary. Further, as a consequence of this Commission's 1981 decision, the GEO is precluded by the doctrine of res judicata/claim preclusion from relitigating the issue of whether graduate RAs at the University of Michigan are public employees. To overcome the application of res judicata, the GEO must show a material change in the law or the facts. There has been no material change in the law, and the GEO has not even attempted to meet its burden of demonstrating a material change in the facts.

The Court of Appeals has defined subject-matter jurisdiction as "the types of cases and claims that a court has authority to address." *In re AMB*, 248 Mich App 144, 166 (2001). It noted that jurisdiction must be present and that a court has a duty to raise the issue even if the parties do not:

> Jurisdiction of the subject matter of a judicial proceeding is an absolute requirement. It cannot be conferred by consent, by conduct or by waiver or by estoppel. Subject matter jurisdiction is so critical to a court's authority that a court has an independent obligation to take notice when it lacks such jurisdiction, even when the parties do not raise the issue.

Id. at 166-67 (footnote and internal citations omitted). Subject-matter jurisdiction is the very source of a court's authority. Without subject-matter jurisdiction, a court's orders are void:

> When there is a want of jurisdiction over the parties, or the subject matter, no matter what formalities may have been taken by the trial court, the action thereof is void because of its want of jurisdiction, and consequently its proceedings may be questioned collaterally as well as directly. They are of no more value than as though they did not exist.

Jackson City Bank Trust Co v Fredrick, 271 Mich 538, 544-45 (1935). Jurisdiction cannot be expanded by the court or the parties:

> The jurisdiction of a court arises by law, not by the consent of the parties. Parties cannot give a court jurisdiction by stipulation where it otherwise would have no jurisdiction. When a court lacks subject-matter jurisdiction to hear and determine a claim, any action it takes, other than to dismiss the action, is void. Further, a court must take notice of the limits of its authority, and should on its own motion recognize its lack of jurisdiction and dismiss the action at any stage in the proceedings.

Bowie v Arder, 441 Mich 23, 54 (1992) (citations omitted).

R. 423.165(2)(b) allows a challenge that the Commission lacks subject-matter jurisdiction.

On two separate occasions, the Court of Appeals has held that MERC has subject-matter jurisdiction over public employees only. In *Prisoners' Labor Union at Marquette v Dep't of Corrections*, 61 Mich App 328 (1975), the Court of Appeals held that inmates would be under MERC's jurisdiction "if, and only if, those inmates are 'public employees' within in [sic] the meaning given that term in PERA." *Id*. at 330.[5]

[5] After reviewing the correctional facilities act, MCL 800.321 et seq and the purposes behind it, the Court of Appeals held that inmates were not public employees.

In *Lansing v Carl Schlegel, Inc*, 257 Mich App 627 (2003), the Court of Appeals affirmed MERC's decision that it lacked jurisdiction to decide an unfair labor practice claim brought by a private contractor. The Court of Appeals explained the limits of PERA: "PERA addresses the bargaining rights and privileges of public employees, using the term 'public employee' to distinguish those individuals covered under PERA from private employees." *Id* at 631. Further, the Court of Appeals stated that "PERA is directed at *public* rather than *private* employees and it indicates no intent to regulate the labor relations of public employers generally." *Id.* at 637.

The Commission's 1981 decision in *Graduate Employees Organization* means that RAs are not public employees, and that the Commission does not have subject-matter jurisdiction. The decision is both a directly controlling precedent and the basis of res judicata/claim preclusion.

The Michigan Supreme Court has set forth the res judicata elements:

> The doctrine of res judicata is employed to prevent multiple suits litigating the same cause of action. The doctrine bars a second, subsequent action when (1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first.

Adair v State, 470 Mich 105, 120 (2004). Here, the first and third elements are clearly met. In the 1981 decision, the Commission reached the exact question at issue here — whether RAs are "public employees" under PERA. Thus, GEO's only hope is to claim that Intervenor is not in privity with the University.

Regarding privity, the second factor in res judicata, the Michigan Supreme Court explained:

> To be in privity is to be so identified in interest with another party that the first litigant represents the same legal right that the later litigant is trying to assert. . . . If the relief sought by one plaintiff to remedy a challenged action is indistinguishable from that sought by another . . . the interests are identical.
>
> Thus, . . . a perfect identity of the parties is not required, only a "substantial identity of interests" that are adequately presented and protected by the first litigant.

Id. at 122. Intervenor is an RA who seeks a ruling that she is not a public employee under PERA and therefore not subject to mandatory collective bargaining. Her contention involves the exact same argument presented by the University of Michigan in this Commission's 1981 decision. At that time, the university, just like the Intervenor in the instant matter, wanted to prevent the formation of a mandatory collective bargaining unit of RAs at the University of Michigan. In fact, it is only the university's failure to adhere to the winning argument it made in 1981 that requires Intervenor's involvement in this case.

Thus, all three elements of res judicata are met. But, "[r]es judicata does not act as a bar to an action where the law changes after the completion of the initial litigation and thereby alters the legal principles on which the court will resolve the subsequent case," *Ditmore v Michalik*, 244 Mich App 569, 581 n. 5 (2007).

There has been no change in the applicable legal principles since 1981. The definition of public employee originated in the Hutchinson Act, 1947 PA 336, § 2. See *Grandville Muni Exec Ass'n v Grandville,* 453 Mich 428, 432-33 (1996). In 1981, that definition was located at MCL 423.202, just as it was at its enactment, and it stated:

> No person holding a position by appointment or employment in the government of the state of Michigan, or in the government of any 1

> or more of the political subdivisions thereof, or in the public school service, or in any public or special district, or in the service of any authority, commission, or board, or in any other branch of the public service, hereinafter called a "public employee," shall strike.
>
> The current definition of public employee states in pertinent part:
>
> > "Public employee" means a person holding a position by appointment or employment in the government of this state, in the government of 1 or more of the political subdivisions of this state, in the public school service, in a public or special district, in the service of an authority, commission, or board, or in any other branch of the public service. . . .

MCL 423.201(1)(e). The language of the updated definition was virtually identical to that of the original, with only minor, nonsubstantive changes made to the order of the words in the sentence.

Const 1963, art 4, §48, indicates that the Legislature is the sole body with the authority to "enact laws providing for the resolution of disputes concerning public employees" (not including those within the state's classified civil service). MERC is responsible to determine whether a particular group meets this definition, but clearly, the Regents of the University of Michigan have no authority to change this definition. In short, the Legislature defines the term; MERC determines whether the definition is met; the Regents play no role in either decision.

The Legislature has amended the definition of public employee three times since 1947, when the Hutchinson Act was first passed. As part of 1994 PA 112, the Legislature relocated the employee definition to MCL 423.201(1)(e) and reworded it slightly, giving the provision its current form, which is set forth above. See *Grandville*, 453 Mich at 433; *id.* n. 9. In 1996 PA 543, the Legislature added MCL 423.201(1)(e)(i), which specifically exempts employees of private contractors

hired by either the state government or by local governments from the definition of public employees. In 1999 PA 204, the Legislature added MCL 423.201(1)(e)(ii), which created a special rule for public school administrators.

In *Carl Schlegel, Inc,* the Court of Appeals discussed the impact of 1996 PA 543. The court noted that the legislation was passed to narrow, rather than broaden, the scope of public employment: "the legislative history indicates that subsection 1(e)(i) was enacted to further define the limits of PERA's coverage, i.e., to public employees." *Carl Schlegel, Inc,* 257 Mich App at 632 (footnotes omitted).[6] In other words, the Legislature was rejecting an expansive view of public employment. Hence, none of the post-1981 amendments to PERA's public-employee definition indicate a legislative intent to change the treatment of graduate students.

Res judicata can also be averted where there is a change in the material facts. *Labor Council, Michigan Fraternal Order of Police v Detroit*, 207 Mich App 606, 608 (1994). If the GEO were to seek to avoid res judicata, it would bear the legal burden of showing that the duties of RAs have so fundamentally changed that RAs should now be classified as public employees.

But as described above, the 1981 fact-finding was extremely thorough. If the GEO wants to argue that new factual circumstances should lead to a different result, it would need not only to identify meaningful distinctions between the current facts and those documented in 1981, but also to explain how the current facts would reverse the Commission's conclusion under the logic the Commission

[6] The legislative history is Senate Fiscal Agency Bill Analysis, SB 1015, January 30, 1997.

applied at the time. The burden of proof and persuasion in this process would rest entirely with the GEO.

The Commission has a duty to examine its own jurisdiction regardless of the university's stance in the current petition. The importance of this jurisdictional matter requires an immediate resolution. Without subject-matter jurisdiction, this Commission has no authority in the instant matter. Unless the 1981 decision is reversed or otherwise found inapplicable, this Commission lacks subject-matter jurisdiction and must dismiss the representation petition.

RELIEF REQUESTED

Intervenor requests that this Commission dismiss the instant representation petition on grounds that RAs are not public employees under PERA and that this Commission therefore lacks subject-matter jurisdiction.

Respectfully Submitted,

_____

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