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Ruthanne Okun, Director
Department of Licensing and Regulatory Affairs
Bureau of Employment Relations
3026 W. Grand Boulevard, Suite 2-750
P. O. Box 02988
Detroit, Michigan 48202-2988

Re: Regents of the University of Michigan -and-
Graduate Employees Organization, AFT, AFL-CIO

Case No. R11 D-034

Dear Ms. Okun:

Please find the original and four copies of the responsive brief submitted for filing on behalf of the Graduate Employees Organization, AFT MI, AFT, AFL-CIO.

Very truly yours,

Mark H. Cousens

/jml

enc.

cc (w/enc.): Bill Schutte
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**STATE OF MICHIGAN**
**EMPLOYMENT RELATIONS COMMISSION**
**LABOR RELATIONS DIVISION**

**REGENTS OF THE UNIVERSITY OF MICHIGAN**

Respondent, **Case No.: R11 D-034**

and

**GRADUATE EMPLOYEES ORGANIZATION, AFT MI, AFT, AFL-CIO**

Petitioner.

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# BRIEF OPPOSING MOTION TO INTERVENE


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## TABLE OF AUTHORITIES

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## Introduction

The officious application by the Attorney General should be denied as the AG lacks standing to intervene, is not entitled to intervene as of right in this proceeding as there is no "action" into which any party other than the petitioner and employer may participate; allowing intervention for the reasons proffered by the AG would cause chaos and compromise the Constitutional autonomy of the University of Michigan Board of Regents. This request should be promptly and decisively denied.

## The Facts

The Commission is considering the Petitioner's motion for reconsideration of its decision of September 14, 2011. The motion is supported by the Employer. Hence, the actual parties to the proceeding have each said that the September decision is incorrect. Now, the Commission is again faced with a third party who claims a right to interfere in a statutory process despite a lack of standing.

It is unclear who the AG claims to represent. On the one hand, he states that he, alone, may intervene. On the other hand, he asserts that he speaks for unnamed members of the bargaining unit (of uncertain number) who allegedly oppose collective bargaining for Research Assistants. The AG also contends that he speaks for some 19 executives–among hundreds employed by the University–who, likewise, oppose collective bargaining for Research Assistants (that executives would not favor collective bargaining for anyone is hardly akin to a revealed truth). The AG does not pretend to have a showing of interest from anyone, much less 10% of the bargaining unit.

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The premise of the AG's motion is that executives and "no voters" will not be represented in any fact finding process. However, that begs the question. Such persons are *not entitled* to be heard in a representation case. Executives may not be parties (although they may be witnesses); neither may "no voters" (although they, too, may be witnesses). None of the interests the AG claims to advocate are entitled to be separate parties. Accordingly, the AG is not entitled to be a separate party.

When faced with a similar motion by one Melinda Day, the Commission made clear that third parties do not have a role in representation proceedings. In its September 14 order, the Commission stated:

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

That reasoning should apply here. This motion should be denied.

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## Argument

Contrary to suggestions made in his brief, the office of the Attorney General does not have an unfettered right to enter into any proceeding and participate as if he were a party. First, the AG may only become involved in "actions." Second, the AG must meet the same standing requirements imposed on other parties. Neither requirement is met here.

A. The Right of the Attorney General to Intervene Is Not Absolute

1.

(a) The right of the AG to intervene is broad but not unlimited:

> "We recognize that the Attorney General's statutory discretion to intervene in cases 'is not unlimited.' *In re Intervention of Attorney Gen*, 326 Mich 213, 217; 40 NW2d 124 (1949). Indeed, '[c]ourts acting within their inherent powers of judicial control . . . may restrain the intervention of the attorney general' when there is a showing that such intervention would be 'clearly inimical to the public interest . . . .'" *Id.*

*People v Unger,* 278 Mich App 210, 260-261 (2008)

(b)

MCL 14.101 grants authorization to the AG to "...intervene in any *action* heretofore or hereafter commenced in any *court of the state* whenever such intervention is necessary in order to protect any right or interest of the state, or of the people of the state." MCL 14.28 is broader and states "...and may, when in his own judgment the interests of the state require it, intervene in and appear for the people of this state in any other court or tribunal, in any cause or matter, civil or criminal, in which the people of this state may be a party or interested."

MCL 14.101 is specific; it limits the right of the AG to intervene in matters pending in the courts, only. MCL 14.28 contradicts that provision, permitting intervention in any "tribunal." It is axiomatic that when statutes conflict, the specific provision overtakes the

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general. "As a general rule of statutory construction, when statutes or provisions conflict, and one is specific to the subject matter while the other is only generally applicable, the specific statute prevails." Citations omitted. *People v Smith,* 282 Mich App 191, 203 (2009)

MCL 14.101 is specific while 14.28 is general. Hence, the Commission should conclude that the AG has no statutory right to intervene in a proceeding pending before it of any type as MERC is not a "court of this state."

2.

Recognizing some disparity in authority on the subject, in *AG v PSC,* 243 Mich App 487 (2000), the Court of Appeals confirmed the right of the AG to participate in "administrative proceedings *against state agencies*." So the AG may participate in proceedings before the Liquor Control Commission or the Public Service Commission. No case has ever held that the AG may participate in a proceeding before the Michigan Employment Relations Commission (except as counsel for a party. See, *e.g. Department of Mental Health* 11 MPER ¶ 29008).

Assuming, generally, that the AG may participate in proceedings before the Commission does not end the discussion. MCL 14.101–the only statute on which the AG can rely here (14.28 limits intervention to the courts)–also limits intervention to "actions." A representation proceeding is not an "action." It is a fact finding process in which this agency determines if an election is requested, is supported by the requisite showing of interest and whether there is a community of interest in the proposed unit.

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> "As a first step in clarifying and applying these concepts we begin with the premise, fundamental to proceedings under both PERA and the Labor Mediation Act, that representation proceedings are investigatory and not contested or adversary proceedings."

*University of Michigan*, 1970 MERC Lab Op 754, 759.

A representation proceeding is not a contested case. It is a fact finding process in which a hearing is not always required. *A.H.S. Community Services, Inc. and Michigan Department of Mental Health*, 7 MPER ¶ 25121 (1994) ( (Indeed, this case sought to proceed without a hearing and the parties each suggest that a hearing is not required.) Even a broad reading of MCL 14.101 restricts the AG to participate in "actions." This is not an action. It is an administrative process. Hence, the statutes on which the AG relies do not apply. The AG has no right to participate in an representation case.

B. The AG Lacks Standing

1.

The AG is required to have standing as a condition of intervention. He is not allowed to participate in an action simply because he wants to. The AG cannot participate in a matter out of whim; he must meet the same standing and "case in controversy" obligations imposed on the parties:

> "We are of the opinion that the statutory right of the attorney general to intervene in any action in which the State is interested (1 Comp. Laws 1929, § 187) does not give the State *any greater or different rights than are possessed by a private party who intervenes* as a litigant in a case of this character. It may be noted that it is not contended otherwise in the attorney general's brief; but the question is raised in an objection filed on behalf of the State to the order of the trial judge for the issuance of the writ."

*John Wittbold & Co v Ferndale,* 281 Mich 503 (1937). (emphasis added)

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In *Federated Ins Co v Oakland County Rd Comm'n*, 475 Mich 286 (2006) the AG sought to intervene in the Supreme Court when neither of the parties had, themselves, sought leave to appeal. Rejecting the assertion that his right to intervene was, essentially absolute, the Court stated that:

> "At issue in this case is whether the Attorney General can appeal as an intervenor in this Court on behalf of the people and a state agency when the named losing parties did not themselves seek review in this Court. Notwithstanding the Attorney General's broad statutory authority to intervene in cases, we hold that to pursue such an appeal as an intervenor *there must be a justiciable controversy*, which in this case requires an appeal by an 'aggrieved party.' Because neither of the losing parties below filed a timely appeal, and because the *Attorney General does not represent an aggrieved party* for purposes of this case, there is no longer a justiciable controversy. Under such circumstances, the Attorney General may not independently appeal the Court of Appeals judgment. We therefore dismiss this appeal."

Emphasis added.

In *Federated,* the AG lacked standing because neither party–the actual "aggrieved parties"–had sought leave to appeal to the Supreme Court. In dismissing the intervention by the AG, the Court made clear that the AG does not have the right to participate in a matter simply if it interests him. Rather, he must have standing and there must be a justiciable controversy. *Id.*, 292. See also *Mich Educ Ass'n v Superintendent of Pub Instruction*, 272 Mich App 1, 9-10 (2006) (To the extent one might read MCL 14.101 or MCL 14.28 as allowing the Attorney General to prosecute an appeal from a lower court ruling without the losing party below also appealing, and without the Attorney General himself being or representing an aggrieved party, the statutes would exceed the Legislature's authority because, except where expressly provided, this Court is not constitutionally authorized to hear nonjusticiable controversies).

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2.

(a)

The AG lacks standing because his filing was not supported by a showing of interest. R423.145(3). That rule states, in pertinent part that "An employee, group of employees, individual, or labor organization which makes a showing of interest not less than 10% of the employees within the unit claimed to be appropriate may intervene in the proceedings and attend and participate in all conferences and any hearing that may be held." The rule does not permit an individual, without support, to participate in the proceeding. *An individual may request to intervene only if the request is supported by at least 10% of the proposed bargaining unit and that person represents those persons.*

See also *Township of Redford* 6 MPER ¶ 15099 (1984) (in absence of special circumstances, intervention in representation proceeding will be permitted only when appropriate showing of interest is established either prior to or at time of hearing.).

The AG does not proffer a showing of interest. He purports to represent himself. Individuals may not interfere with representation proceedings without a showing of interest. Hence, the AG lacks standing for lack of showing of interest.

(b).

The AG lacks standing because the persons whose interest he allegedly advocates (executives and "no voters") lack standing in a representation proceeding.

This is a representation case. As such, there are two parties–an employer and a petitioning labor organization. Those are the sole participants. The Commission's rules make clear that intervention in a representation case requires a showing of interest. R423.145. An

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intervenor must present not less than a 10% showing to be heard. The AG does not present any tangible support.

A party without standing may not intervene in a MERC proceeding. *City of Detroit Fire Department*, 9 MPER ¶ 27011 (1995). (As an individual employee and member of the bargaining unit, it is clear that Charging Party has no standing in the first place to raise such issues, since the bargaining obligation under PERA is owed by the collective bargaining representative to the employer and vice versa, and not to individual employees.)

The AG purports to represent persons who would have no interest in the proceedings were they to appear in person. First, the AG claims that the view of executives should be heard. Second, he claims that the view of "no voters" should be heard. Neither view would be relevant were it offered. The sole question in a unit dispute is community of interest. Individual members of the proposed bargaining unit cannot argue that there should not be an election; their right is to vote "no union." Executives cannot be heard at all. Hence, the AG lacks standing because the persons he purports to represent would not have standing.

C. Permitting Intervention Would Cause Chaos

1.

The motion here is submitted by the Attorney General but, if granted, would open the possibility of other persons intervening in representation cases without a showing of interest. The AG asserts that he wants to present argument on behalf of persons opposed to collective bargaining for Research Assistants. Granting this request would open the door to others; similar objections raised by parties without a showing of interest.

There are nay-sayers in every representation case. Individuals may object to the unit description, the inclusion of some jobs and exclusion of others. Some individuals who oppose

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public employees being represented for collective bargaining may object merely to the holding of an election. Allowing such persons to participate *as parties* would turn fact finding proceedings into platforms for airing of polemics. It would open the door to the sharing of every view no matter how irrelevant or how obstructionist.

2.

The AG claims that any hearing here would not investigate all facts. First, it is uncertain how the AG knows what evidence will be presented by the parties or requested by the Administrative Law Judge. His assertion is utter speculation. Second, a third party cannot decide, for the other parties or the Commission, what information might be useful.

The concept of third parties climbing into representation cases is anathema to the notion of a prompt election based on the free choice of employees in an appropriate unit. Intervention would permit undue delay for the sole purpose of destroying the interest of persons wishing to be represented. It also is directly contrary to the concept behind section 9 of the Act, MCL 423.209, which grants to public employees the right to organize. The AG purports to represent persons who have no right to oppose collective bargaining. He is asking to give voice to persons whose views either cannot be considered (executives) or will be considered in a free and fair vote ("no voters"). It is patently absurd to permit this officious intermeddling.

D. Intervention Compromises the Constitutional Authority of the University Regents

The premise of the motion to intervene is that the University of Michigan is not capable of governing itself. The AG asserts that there are those who disagree with the policy adopted by the University Regents. That claim presupposes that the Regents are not authorized to make such policy; that whenever someone disagrees with policy the AG, or someone else, may challenge the Regents' decisions.

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The Constitution grants to the Regents the sole authority to govern the University:

> "The regents of the University of Michigan and their successors in office shall constitute a body corporate known as the Regents of the University of Michigan; the trustees of Michigan State University and their successors in office shall constitute a body corporate known as the Board of Trustees of Michigan State University; the governors of Wayne State University and their successors in office shall constitute a body corporate known as the Board of Governors of Wayne State University. Each board shall have general supervision of its institution and the control and direction of all expenditures from the institution's funds. Each board shall, as often as necessary, elect a president of the institution under its supervision. He shall be the principal executive officer of the institution, be ex-officio a member of the board without the right to vote and preside at meetings of the board. The board of each institution shall consist of eight members who shall hold office for terms of eight years and who shall be elected as provided by law. The governor shall fill board vacancies by appointment. Each appointee shall hold office until a successor has been nominated and elected as provided by law."

Const. Art. VIII, § 5

For reasons known only to him, the AG has decided that the actions of the Regents are unacceptable; that they are not to be trusted in assessing the nature of the work performed by their employees.

This invades the unique and exclusive authority of the Regents to the "general supervision" of the University. It is an insult to the people who elected these individuals and entrusted them with that task. It is outrageous that one elected State officer thinks that his authority supersedes that of another.

The motion by the AG seeks to exercise authority that is granted exclusively to the Regents pursuant to Article VIII, section 5 of the Constitution.

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## Conclusion

The motion for intervention by the Attorney General should be decisively denied.

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