STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

THE UNIVERSITY OF MICHIGAN,

Public Employer,

and   Case No. R11 D-034

GRADUATE EMPLOYEES ORGANIZATION/AFT,

Petitioner-Labor Organization,

and

MELINDA DAY,

Intervenor,

and

STUDENTS AGAINST GSRA UNIONIZATION,

Intervenor.
_______________________________________/

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BRIEF IN SUPPORT OF MOTION TO INTERVENE AND IN OPPOSITION TO MOTION FOR RECONSIDERATION

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JURISDICTIONAL STATEMENT

The Commission lacks subject-matter jurisdiction in the instant case. The Commission has essentially reached this conclusion twice before: once in 1981, and again in September of this year. *Regents of the Univ of Michigan and Graduate Employees Org*, 1981 MERC Labor Op 777; September 14, 2011 Decision and Order. The Commission has never ruled otherwise.

The key holding in both rulings was that graduate student research assistants at the University of Michigan are not public employees under the Public Employment Relations Act. The Commission has subject-matter jurisdiction over public employees only. *Lansing v Carl Schlegel, Inc*, 257 Mich App 627 (2003); *Prisoners' Labor Union at Marquette v Dep't of Corrections*, 61 Mich App 328 (1975).

STATEMENT OF QUESTIONS INVOLVED

I. Does the organization Students Against GSRA Unionization meet the requirement for intervention in the instant case?

University of Michigan's answer:	Unknown.
Graduate Employees Organization/AFT's answer:	Unknown.
Students Against GSRA Unionization's answer:	Yes.

II. Should the Michigan Employment Relations Commission reconsider its dismissal of the representation petition of a union seeking to organize people whom the Commission has already ruled are not public employees?

University of Michigan's answer:	No.
Graduate Employees Organization/AFT's answer:	Yes.
Students Against GSRA Unionization'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)[1] at state universities are not public employees and therefore cannot participate in mandatory collective bargaining under the Public Employment Relations Act (PERA). This fact was originally recognized by the Commission itself in 1981, in *Regents of the University of Michigan and Graduate Employees Organization*, 1981 MERC Labor Op 777.

In April of this year, the union that lost the 1981 case — the Graduate Employees Organization/AFT (GEO) — returned to the Commission seeking again to have RAs organized as public employees against the same "employer," the University of Michigan. In an order issued in September of this year, The Commission refused to disturb its 1981 ruling. September 14, 2011 Decision and Order. The GEO now seeks reconsideration of that September order.

The legal treatment of graduate students at public universities in Michigan has been unswerving for the last thirty years: two kinds 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 the same 1981 Commission decision that held that RAs at Michigan's public universities are not public employees.

The 1981 dispute 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 of the graduate student appointment."

[1] In the university's current nomenclature, RAs are "GSRAs" (graduate student research assistants). For ease of reference, Intervenor will refer to such an assistant as an RA, the title that the Commission adopted in its 1981 ruling.

Graduate Employees Org, 1981 MERC Labor Op at 791. The record revealed that graduate students were split into three categories: (1) graduate student teaching assistants (TAs), whose duties consisted primarily of teaching some 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) (RAs), who generally "perform[ed] research under the supervision of the faculty member who [was] the primary researcher of a research grant." *Id*.[2]

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

The Commission explained why RAs are not public employees:

> 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 . . . undergraduate courses. RA's . . . are working for themselves.

Id. at 785-86.

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

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

On April 27, 2011, the GEO filed a representation petition with the Commission. As in 1981, the GEO sought to represent RAs at the University of Michigan. The claimed unit size was 2,200.

At a May 19, 2011 meeting of the University of Michigan Board of 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 (last visited October 31, 2011).[3] With this resolution, the controlling board of the University of Michigan declared that contrary to the Commission's holding, RAs are public employees who can engage in mandatory collective bargaining under PERA.

On July 28, 2011, Melinda Day filed a motion to intervene and to dismiss the GEO's representation petition for lack of subject-matter jurisdiction. The brief in support of that motion discussed the jurisdictional impact of the Commission's 1981 decision and the application of res judicata. On August 3, 2011, the union filed a motion to deny the intervention. This motion and the accompanying brief did not cite a single court case or Commission decision, and the brief did not address the Commission's 1981 decision, res judicata, or jurisdiction. Instead, the brief focused on Day's and her law firm's motives for seeking to intervene.

On September 14, 2011, the Commission unanimously dismissed the GEO's representation petition. The Commission noted that its 1981 decision necessarily raised a jurisdictional question regarding the representation petition submitted in April 2011:

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

> Usually, we do not inquire into the nature of an employment relationship or the legality of a bargaining unit when we have a Consent Election Agreement signed by the parties. However, this is not the usual case because the issue of the Commission's jurisdiction is squarely before us in light of our previous decision involving these same parties. To decide this issue, we have no information that would allow us to reach a conclusion contrary to the one reached in 1981, that RAs are not employees under PERA.

September 14, 2011 Decision and Order at 3-4. The Commission then explained that an employer and union could not collude to manufacture jurisdiction:

> Our jurisdiction derives from statutory authority and does not extend to individuals who are not employees of a public employer. The Commission's jurisdiction cannot be expanded by an agreement. . . . We cannot find that RAs are employees based solely upon an agreement between the parties. Absent a showing of substantial and material change of circumstance, we are bound by our previous decision.
>
> . . .
>
> Having previously determined that RAs are not employees entitled to the benefits and protection of PERA, we decline to declare that they have become employees based on the Employer's change of heart and present willingness to recognize them as such. The RAs cannot be granted public employee status under PERA predicated on the record before us.

Id. at 4. While the Commission accepted Intervenor Day's legal arguments as to jurisdiction, it interpreted R. 423.145(3) to mean that she could not intervene. September 14, 2011 Decision and Order at 4-5. The Commission also indicated a willingness to participate in some sort of *ultra vires*, nonbinding election between the union and the University should they wish one. *Id*. at 4.

On October 3, 2011, the union filed a motion requesting that the Commission reconsider its September 14, 2011 rejection of the GEO's representation petition. In this motion, the GEO finally addressed the impact of the Commission's 1981 decision, briefly claimed that the University was not improperly attempting to confer jurisdiction, and tried to introduce some "new" facts that it claims should prevent application of the doctrine of res judicata.

Some of these factual claims were introduced in the GEO's reconsideration brief, and others were in an attached affidavit sworn to by an RA. The union claims the following are new facts:

1) The University receives $1,500,000,000 in research grants;[4]

2) RAs are "essential to the research goals of the University";[5]

3) The University "acknowledges" that the Family Medical Leave Act applies to RAs, meaning they must be employees;[6]

4) RAs have taxes and FICA deducted from their stipends;[7]

5) RAs are required to take an employment oath;[8] and

6) One RA (of the 2,200) is working on projects "that are unrelated to his academic interests" and a second RA "is working on a project which will be used in part for his

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[4] Brief in Support of Motion for Reconsideration at 2. However, the attached affidavit says $1.14 billion. October 3, 2011 Affidavit of Andrea M. Jokisaari at ¶ B. 5.

[5] Brief in Support of Motion for Reconsideration at 3.

[6] Brief in Support of Motion for Reconsideration at 9.

The union cites an "**Academic** Human Resources" (emphasis added) web page, http://www.hr.umich.edu/acadhr/grads/gsra/benefits.html#vacation (last visited October 31, 2011), but fails to provide the text from the university website. This text states:

> Leaves of Absence from an academic program are academic issues handled locally by each academic unit.
>
> In general, due to the limited term nature of [RA] appointments, no leaves of absence are available during the course of the appointment period. However, if an individual has been appointed by the University, in any capacity, for 12 months or more and has worked at least 1250 hours during the 12 months immediately proceeding [sic] the request for leave, a federally mandated Family Medical Leave may be available. In no case can an FMLA leave extend beyond the previously-processed appointment end date. The University complies fully with the Family Medical Leave Act.

[7] October 3, 2011 Affidavit of Andrea M. Jokisaari at ¶ C. 7.

[8] Brief in Support of Motion for Reconsideration at 9.

The oath requirement can be found at http://spg.umich.edu/pdf/201.17.pdf (last visited October 31, 2011). That web page does not indicate whether RAs must take the oath. Regardless, the oath requirement is not new. The web page indicates that the policy requiring the oath was last revised in 1978, three years before the 1981 decision. Hence, the union could have cited the oath requirement in 1981.

academic interests but will also be published in scholarly journals unrelated to his area of study."[9]

Intervenor Students Against GSRA Unionization is filing the instant motion seeking to intervene in this action and have the Commission deny the union's motion for reconsideration.

ARGUMENT

I. Intervenor Students Against GSRA Unionization meets the requirement to intervene.

R. 423.145(3) allows a group of the purported employees to intervene in a representation petition proceeding if that group represents more than 10% of the bargaining "unit claimed to be appropriate." Intervenor Students Against GSRA Unionization is comprised of University of Michigan RAs and has 371 members,[10] a figure that exceeds 10% of the GEO's proposed representation unit of 2,200 University of Michigan RAs. Thus, Intervenor Students Against GSRA Unionization meets one of the R. 423.145(3) tests that permit a party to intervene in a representation petition matter before the Commission.

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

R. 423.167, in pertinent part, states:

> Generally, and without restricting the discretion of the commission, a motion for reconsideration which merely presents the same issues ruled on by the commission, either expressly or by reasonable implication, will not be granted.

In the September order, the Commission held that its 1981 decision was still controlling and that the 1981 ruling deprived the Commission of jurisdiction in the instant case.

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[9] October 3, 2011 Affidavit of Andrea M. Jokisaari at ¶ C. 12.

[10] November 1, 2011 Affidavit of Adam Duzik.

To the extent the Commission was applying res judicata, that doctrine does not always prevent reconsideration: "Res 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). In the union's motion for reconsideration, however, the union does not argue that there has been a change in the law that alters the legal principles. In pages 5-9 of that motion, the union does discuss the law of independent contractors and employees, but provides no indication that the law has changed since 1981 in a manner that alters the legal principles in the instant case. For example, the common law test for distinguishing employees from independent contractors existed in 1981, and the Commission still held that RAs were not public employees. Further, the RAs who joined Intervenor Students Against GSRA Unionization do not admit to being either independent contractors or public employees; rather, they contend they are not employees or contractors of any kind and that they belong in another category altogether – students. The question of whether RAs are students or public employees is precisely the one presented to the Commission in 1981.

On pages 9-11 of the union's Brief in Support of Motion for Reconsideration, the union claims that the Commission should defer to what it characterizes as the University of Michigan Regents' May 19 "express *determination of fact*" that GSRAs are "public employees." The union claims that the Regents have the power to determine facts related to the University under Const 1963 art 8, § 5, which states that the Board of Regents "shall have general supervision of its institution and the control and direction of all expenditures from the institution's funds."

Yet this constitutional provision says nothing about the Regents' ability to produce binding factual findings. Second, and far more important, the union's argument was specifically

rejected in *Regents of University of Michigan v MERC*, 389 Mich 96, 107-09 (1973). In that case, the Michigan Supreme Court found unpersuasive the argument that the University of Michigan Board of Regents under Const 1963 art 8, § 5 could make its own determination concerning who constituted a public employee at that school.[11]

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).[12] As described above, however, the 1981 fact-finding was extremely thorough. Indeed, almost all of the union's current facts were addressed in 1981. Consider in turn the union's factual claims as listed above, beginning on page 5. No specific amount of research funding was discussed in the 1981 decision, but the factual findings established by the ALJ and adopted by the Commission explicitly acknowledged that research was a critical component of the university's work:

> A large number of grant sources contribute very large sums to research efforts conducted within the context of the University. . . . The size of this funding equals a significant fraction of the [University]'s budget. The availability of this funding eases the burden of the University since faculty research is one of the missions of a research university. . . . The availability of these outside funds to support research within the [U]niversity has led to the growth of the [U]niversity as a major research center.

Graduate Employees Org, 1981 MERC Labor Op 777, 808. Following this statement, the ALJ considered the argument that the union is making in its reconsideration motion: "In this context, one may argue that the research assistant is but a cog in the wheel of this vast enterprise, and that when he accepts an appointment as an R.A., the obligation of performing the research described

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[11] It seems odd that a union that became the mandatory collective bargaining agent for University of Michigan TAs over the objections of the University would now claim that the University's determination regarding public employment status should be binding.

[12] The union claims res judicata does not apply, because only a party may assert it. However, both Intervenor Day and Intervenor Students Against GSRA Unionization assert that the doctrine applies. Moreover, even if it did not apply, the union would still have to show why the 1981 decision would not be controlling now. After all, the arguments to overcome stare decisis largely mirror those to overcome application of res judicata. Hence, a change in the law or in the material facts would generally be required before a later case would overrule precedent.

makes him an employee." *Id*. at 808-09. The ALJ then rejected this view. *Id.* at 811-12. So the union's contention about the important academic and financial role of research at the University of Michigan is nothing new.

The Family Medical Leave Act does postdate 1981, having become law in 1993. Nevertheless, while the University indicates that the law "may" apply, it does not state that RAs are necessarily eligible. And fundamentally, federal treatment of graduate students does not control a question of state law.

This point is proved by the Commission's treatment of federal tax status in the 1981 decision. In the 1981 decision, there is considerable discussion of the federal tax status of graduate students. For instance, the Commission stated "Generally, [graduate students'] earnings are subject to federal income tax. . . . " *Graduate Employees Org*, 1981 MERC Labor Op at 780. Despite recognizing that RAs had to pay federal income taxes, the Commission still held that RAs were not public employees. Thus, federal treatment is not controlling, nor is there anything new to consider in the RAs' federal tax status.

The question of the oath is also inapposite. As indicated in footnote 8, the oath in question existed at least as early as 1978. There is nothing about this issue that could not have been raised in 1981.

The union's last fact is that at least one of the 2,200 RAs is not working in an area "directly related to their academic interest" — an attempt to attack one of the grounds on which the Commission made its 1981 holding that RAs are students. But consider what the union is asking. Changing the status of 99.95% of RAs because of the degree status of one individual is sheer folly on its face. Further, this issue was also addressed in 1981:

> A great deal of testimony was taken as to whether or not RA work was necessarily 'relevant' to the student's own studies. . . . Despite this conflict of

> testimony, it is clear that in virtually all cases, the RA appointment reflects and closely tracks the student's academic discipline and interests.

Id. at 801. In other words, the Commission has already accepted that a few RAs might be working on projects unrelated to their academic interest, and the Commission found this fact insufficient to support a finding that all RAs were public employees.

Finally, the union states that various university websites describe RAs as employees. This may be true, but the university's somewhat confused language concerning RAs is nothing new. In 1981, the Commission noted that on occasion, the university used such terms as " 'hire,' 'fire,' and so forth," which the Commission stated "may strike a jarring note," but were ultimately not dispositive. *Id*. at 805. Further, if web postings were relevant, Intervenor would contend that various university websites essentially characterizing RAs as students prove them to be students and not employees, despite the claims of the union and the Board of Regents. Take, for example, the Academic Human Resources web page "What is a Graduate Student Research Assistantship?"[13] The page states:

> A Graduate Student Research Assistantship (G.S.R.A.) is 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.

The union has not shown any material change in the facts or the law since the Commission's 1981 decision. Therefore, there are no grounds for undoing the work involved in the weeks of hearings, thousands of pages of exhibits, and hundreds of pages of briefing that were part of that decision. The Commission should reject the union's present motion for reconsideration.

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[13] http://www.hr.umich.edu/acadhr/grads/gsra/what.html (last visited October 31, 2011).

RELIEF REQUESTED

Intervenor Students Against GSRA Unionization requests that the Commission grant this motion to intervene and deny the union's motion for reconsideration of the September 14, 2011 Decision and Order, which dismissed the representation petition for lack of jurisdiction.

Respectfully Submitted,

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Dated: November 1, 2011

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EMPLOYMENT RELATIONS COMMISSION
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Affidavit of Adam Duzik

STATE OF MICHIGAN)
)ss
COUNTY OF WASHTENAW)

1. My name is Adam Duzik. I am a graduate student research assistant at the University of Michigan.

2. I make this affidavit based upon personal knowledge, and I am competent to testify to the matters presented.
3. I am president of Students Against GSRA Unionization, a group of University of Michigan graduate student research assistants. The group has 371 members. Membership was generated by prospective members' response to emails soliciting research assistants who are opposed to the Graduate Employees Organization/AFT's attempt to organize University of Michigan graduate student research assistants into a compulsory union.

____
Adam Duzik
President
Students Against GSRA Unionization

Subscribed and sworn to before me
this ____________ day
of November 2011

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