STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

IN THE MATTER OF:

REGENTS OF THE UNIVERSITY OF MICHIGAN,

No. R11 D-034

Respondent,

and

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

Petitioner-Labor Organization.

MICHIGAN ATTORNEY GENERAL'S REPLY TO GEO'S BRIEF OPPOSING MOTION TO INTERVENE

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INTRODUCTION

In its response to the Attorney General's motion to intervene, the Graduate Employees Organization (Organization) continues its efforts to assure that the important question at issue here is presented in an unfair and one-sided manner. In so doing, the Organization mischaracterizes the scope of the Attorney General's authority to intervene, relies on factually distinguishable and irrelevant case law, and most tellingly, fails to even attempt to show that intervention would be against the public interest. The University of Michigan's national renown as an elite research university will likely be compromised if the Commission revisits 30 years of precedent and reclassifies graduate student research assistants (GSRAs) as public employees subject to unionization. Because of the action of a majority of the University's Regents, such a result will not be contested without Attorney General intervention. Considering that this pivotal issue is of paramount significance to the State of Michigan and its People, the Attorney General is well within his authority to intervene in these proceedings on the People's behalf to ensure that all of the facts are presented through the rigors of the adversarial process. For these reasons, and the reasons stated in the Attorney General's Brief in Support of his Motion to Intervene, the Commission should permit intervention and allow the Attorney General to actively oppose the Organization's motion for reconsideration on December 13, 2011, and if further fact finding is ordered, to participate in the process before the Administrative Law Judge (ALJ).

I. The Attorney General has broad discretion to intervene in both judicial and administrative proceedings. That discretion is limited only when there is a showing that intervention is clearly inimical to the public interest.

The Organization erroneously relies on a novel argument of statutory interpretation to conclude that the Attorney General is prohibited from intervening in proceedings before the Commission. The Organization essentially advocates that because MCL 14.101 only mentions intervention in the courts and MCL 14.28 mentions intervention in both the courts and tribunals, the former should be read as a limitation on the latter. (Brief Opposing Motion to Intervene, p 3-4.) However, no court has ever concluded that MCL 14.101 and MCL 14.28 conflict. Nor has any court read the two provisions as inconsistent with each other.

The Organization's position is contrary to the broad deference and liberal construction the courts have given to the Attorney General's power to intervene. *See Kelley v Gremore*, 8 Mich App 56, 59; 153 NW2d 377 (1967). And the very case the Organization relies on – *Attorney General v Michigan Public Service Commission* – actually recognizes that the Attorney General derives his intervention powers from *both* MCL 14.101 and MCL 14.28, without any suggestion that the two statutes are in conflict. 243 Mich App 487, 496-97; 625 NW2d 16 (2000). Further, the Court of Appeals recognized that the Attorney General's powers "are not exhaustively defined by statute and constitution, but include those exercised at common law." *Id* at 497.

It is true that *Public Service Commission* confirms the Attorney General's power to intervene "in administrative proceedings against state agencies."

However, contrary to the Organization's argument, there is no suggestion whatsoever that this statement by the Court implied any limitation on the Attorney General's broad statutory right to intervene. Moreover, the precedent that *Public Service Commission* relied on did not limit that right to proceed only against state agencies; to the contrary it cited both MCL 14.101 and MCL 14.28 as consistent and broad codifications of the Attorney General's authority to intervene in any matter affecting the public interest. *Kelley v Thayer*, 65 Mich App 88, 92-93; 237 NW2d 196 (1976).

The Organization then attempts another novel argument that again flies in the face of precedent and the clear language of the statutes. It claims that the proceeding before the Commission is not an "action" as defined in MCL 14.101 and therefore the Attorney General cannot intervene. (Brief in Opposition of Motion to Intervene, p 4-5.) Again, no court has ever limited the Attorney General's discretion to intervene based on a confined reading of "action" in MCL 14.101. Moreover, MCL 14.28 allows the Attorney General to intervene in "any cause or matter" and that broad statutory language is certainly not limited to an "action." The Organization does not explain how or why a representation proceeding is not considered "any cause or matter" under MCL 14.28. Either or both of these statutes grant the Attorney General a right to intervene in matters of public interest. Most importantly, unless there is a showing that the Attorney General's intervention is *clearly contrary to the public interest*, the Attorney General should be permitted to intervene. *Gremore*, 8 Mich App at 59; *VanStock v Township of Bangor*, 61 Mich App 289, 299; 232 NW2d 387 (1975). The Organization does not attempt to make

that requisite showing in response to the Attorney General's cogent argument that the character and prestige of the University may well be jeopardized by an inappropriate or ill-considered decision here. The Attorney General's motion to intervene should thus be granted.

II. The Attorney General's standing to intervene is derived from both common and statutory law. This matter is not an appeal and involves questions of the Commission's subject matter jurisdiction that are justiciable.

The Organization next argues that the Attorney General lacks standing to intervene because there is no actual "case in controversy." (Brief in Opposition of Motion to Intervene, p 5.) However, the premise of this argument is a factually distinguishable and inapposite case, *Federated Insurance Co v Oakland County Road Commission,* 475 Mich 276; 715 NW2d 846 (2006). In *Federated,* the Supreme Court clarified that "we merely hold that the Attorney General's authority to intervene *does not include the ability to appeal a nonjusticiable case.*" *Id.* at 296 (emphasis added). The matter before the Commission is not an appeal, nor is it a judicial proceeding. Neither is this matter "nonjusticiable" as defined by *Federated* – which used the term to indicate the Court had no subject matter jurisdiction over an appeal that was not filed on time.[1] *Id* at 294. No one argues that the Commission here may not determine its own jurisdiction, and *Federated* is simply inapposite.

[1] "Once plaintiffs' deadline for filing a timely application for leave to appeal expired, *the case ceased to be a justiciable controversy.*" *Federated Ins Co*, 475 Mich at 294 (emphasis added).

There is certainly a controversy present here – for "the ultimate product of the hearing [representation proceeding] must be a record upon which the Commission may determine the merits of the case." *University of Michigan*, 1970 MERC Lab Op 754, 760. Absent the traditional adversity of interests between management and labor, the goal of a complete and balanced record will certainly be compromised if the Commission decides in favor of reconsideration. Necessarily, a biased or incomplete record will handicap this Commission and courts that may be called upon to review its decision. The process should not start with facts that are skewed and unreliable. When the ultimate decision is of such compelling interest to the State and the People of Michigan, it is the Attorney General's prerogative to intervene and ensure the decision is made with all the facts and arguments properly presented.

The Organization also implies that the Attorney General's right to intervene is no different from that of a private party. (Brief in Opposition of Motion to Intervene, p 5.) That notion directly contradicts the special statutory provisions of MCL 14.101 and 14.28 that give the Attorney General exclusive and broad intervention rights. The reliance on *John Wittbold & Co v Ferndale* is likewise misplaced – the Court does not speak of the Attorney General's right to actually intervene, but instead clarifies that *after* intervention, the Attorney General's rights are the same as those of a private party who intervenes as a litigant in this case. 281 Mich 503, 513; 275 NW 235 (1937). The Court of Appeals has since cited this provision with approval and further clarified that "the attorney general had a right to intervene here, but *thereafter*, the attorney general is subject to the inherent

power of the trial court to control the orderly flow of litigation before it, the same as any other litigant." *Kelley v Gremore*, 8 Mich App 56, 59; 153 NW2d 377 (1967).

The Organization's claim that "[t]he AG lacks standing because his filing was not supported by a showing of interest" under Commission Rule 145(3) wrongly assumes that the Attorney General is relying on that rule to intervene. (Brief in Opposition of Motion to Intervene, p 7.) The Attorney General is proceeding to intervene under MCL 14.101 and MCL 14.28, on behalf of the State and the People of Michigan, and not on behalf of any party contemplated by Rule 145(3). And that Rule certainly cannot abrogate the statutory authority granted to the Attorney General by those statutes. The Attorney General's judgment that this case involves the public interest is consistent with the "showing of interest" from at least 370 GSRAs and 19 deans who are opposed to the Organization's position on the "employee" question. (Brief in Support of Motion to Intervene, p 6, 8.)

III. The Attorney General's intervention will not result in chaos or mandate the intervention of other parties. The Attorney General uniquely represents the interests of the People of the State of Michigan and his intervention does not undermine the authority of the University Regents.

The Organization's final arguments are easily dismissed, as they rely on nothing more than conjecture. Permitting the Attorney General to intervene will not cause chaos nor will it compromise the constitutional authority of the Board of Regents as to University matters.

As previously stated, the Attorney General is intervening on behalf of the State and the People of Michigan to ensure that all the facts are presented to the

Commission considering the Organization's motion for reconsideration and if further fact-finding is ordered, in front of the ALJ. The Attorney General derives his expansive intervention powers from express legislative enactments in MCL 14.101 and MCL 14.28, as well as broad judicial interpretation of those powers. None of that applies to any other person and none of the chaotic interventions the Organization conjures up can possibly result.

The Organization insinuates that the Attorney General's intervention suggests that the University of Michigan is incapable of governing itself and that the Attorney General's intervention is an affront to the University's constitutional authority. This is nonsensical; any such argument would have to be levied against the Commission itself and the statutes that grant it the responsibility to determine the "employee" question as it applies to the University's students. But, of course, such an argument would be ludicrous and neither party advances it. The Commission has the authority to determine the important question at issue here, even though it might affect the University's governance or abrogate some of its autonomy. In fact, it was the Commission that affirmatively denied that the Regents had authority to agree to GSRAs' status as employees subject to unionization. (Decision and Order Dismissing Petition and Denying Motion to Intervene, p 4, MERC, Sept 14, 2011.) The Attorney General's intervention is merely a statutorily authorized attempt to aid the process by presenting a balanced and complete factual record to the Commission and the ALJ.

CONCLUSION

The Attorney General should be allowed to intervene in these proceedings to ensure that all of the facts and views are presented, both to the Commission and the ALJ. Intervention is appropriate under the statutes and case law because the question whether GSRAs are employees subject to unionization implicates a number of substantial state interests. That question will not be properly considered without the balance that the Attorney General can provide to assure an adversarial process.

For these reasons, and the reasons set forth in the Attorney General's Brief in Support of Intervention, the Attorney General respectfully requests the Commission grant his motion to intervene, enter a notice of intervention into the official record of the captioned case, allow him to present an argument against reconsideration on December 13, 2011, and afford him full party status in these proceedings for all purposes.

Respectfully submitted,

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Dated: December 7, 2011