STATE OF MICHIGAN
IN THE SUPREME COURT

IN THE MATTER OF:

UNIVERSITY OF MICHIGAN,
Appellee Public Employer,

And

GRADUATE EMPLOYEES ORGANIZATION/AFT,
Appellee Petitioner Labor Organization,

And

STUDENTS AGAINST GSRA UNIONIZATION,
Proposed Intervenor,

And

MICHIGAN ATTORNEY GENERAL,
Appellant Proposed Intervenor.
_____/

Michigan Supreme Court No. 144535

Court of Appeals No. 307959

Michigan Employment Relations Commission No. R11 D-034

APPELLEE PUBLIC EMPLOYER UNIVERSITY OF MICHIGAN'S ANSWER TO THE MICHIGAN ATTORNEY GENERAL'S APPLICATION FOR LEAVE TO APPEAL

Submitted By:

David H. Fink (P28235)
Darryl Bressack (P67820)
FINK + ASSOCIATES LAW
Attorneys for University of Michigan
100 West Long Lake Road; Suite 111
Bloomfield Hills, Michigan 48304
(248) 971-2500
dfink@finkandassociateslaw.com

Suellyn Scarnecchia (P33105)
Christine M. Gerdes (P67649)
Attorneys for University of Michigan
503 Thompson Street
Ann Arbor, Michigan 48109

Dated: February 3, 2012

TABLE OF CONTENTS

INDEX OF AUTHORITIES iii

COUNTER-STATEMENT OF JURISDICTION v

COUNTER-STATEMENT OF QUESTIONS INVOLVED vi

RESPONSE AND OBJECTION TO THE MICHIGAN ATTORNEY GENERAL'S "STATEMENT OF ORDER APPEALED FROM AND RELIEF SOUGHT" viii

INTRODUCTION 1

COUNTER-STATEMENT OF PROCEEDINGS AND FACTS 4

ARGUMENT 10

I. STANDARD OF REVIEW 10

II. THE PROFFERED ARGUMENTS CONCERNING APPELLATE JURISDICTION ARE WITHOUT MERIT 11

A. Appellant's Interpretation of the Statutes Governing Appeals of Interlocutory Orders Would Lead to Absurd Results 11

B. The Court of Appeals Correctly Determined That It Did Not Have Jurisdiction 18

C. Appellant's Reliance on the Michigan Constitution is Unavailing 19

D. Appellant's "Exhaustion" Argument Still Mandates Application of the Inapplicable Provisions of the APA 19

E. The Attorney General Lacks Standing to Seek Interlocutory Review Because There is No Case in Controversy 21

III. INTERVENTION WAS PROPERLY DENIED BECAUSE THE ATTORNEY GENERAL'S INTERVENTION IS UNCONSTITUTIONAL 22

A. Michigan's Constitution Confers Significant Autonomy on the Board of Regents 22

B. The Attorney General's Intervention Would Impermissibly Interfere with the Regents' Autonomy 24

IV. THE ATTORNEY GENERAL'S INTERVENTION IS INIMICAL TO THE PUBLIC INTEREST AND IS UNNECESSARY 27

A. The Commission Properly Determined that the Attorney General's Intervention is Inimical to the Public Interest 27

B. Intervention as an "Adversary" is Unnecessary Because the Attorney General is Participating in the Factfinding Process 30

CONCLUSION AND RELIEF REQUESTED 33

INDEX OF AUTHORITIES

Cases

Attorney General ex rel Lockwood v Moliter, 26 Mich 444 (1873) 26
Bd of Agriculture, 226 Mich 417; 197 NW 160 (1924) 23
Bd of Control of Eastern Michigan Univ v Labor Mediation Bd,
384 Mich 561; 184 NW2d 921 (1971) 23
Christie v Bd of Regents of Univ of Mich, 364 Mich 202; 111 NW2d 30 (1961) 23
Cohen-Hatfield Industries, Inc. v State, Dep't of Treasury, Corp. Franchise Fee Div,
78 Mich App 264; 259 NW2d 452 (1977) 15
Detroit Int'l Bridge Co v Commodities Export Co, 279 Mich App 662;
760 NW2d 565 (2008) 12
Detroit v Michigan, 262 Mich App 542 (2004) 20
Federated Ins Co v Oakland Co Rd Com'n, 475 Mich 286;
715 NW2d 846 (2006) 22
Federated Publications, Inc v Bd of Trustees of Michigan State Univ., 460 Mich 75;
594 NW2d 491 (1999) ..... v, 22, 23
Harper Hosp Employees' Union v. Harper Hospital, 25 Mich App 662;
181 NW2d 566 (1970) ..... v, 18
In re Complaint of Rovas Against SBC Michigan, 482 Mich 90; 754 NW2d 259 (2008) 13
In re Public Service Comm Guidelines for Transactions Between Affiliates,
252 Mich App 254; 652 NW2d 1 (2002) 16
In re Wayne Co, No. 190660, 1997 WL 33352796 (Mich App April 11, 1997) 31
In re Wayne County, No. 190660; 1997 WL 33352796 (April 11, 1997) 11
McBride v Pontiac School Dist, 218 Mich App 113; 553 NW2d 646 (1996) ..... v, 16
McCahan v Brennan, 291 Mich App 430; 804 NW2d 906 (2011) 28
Mich Ass'n of Home Builders v Dir of Dep't of Labor & Econ. Growth,
481 Mich 496; 750 NW2d 593 (2008) 15
Michigan Ass'n of Public Employees v Michigan Employment Relations Comm,
153 Mich App 536; 396 NW2d 473 (1986) 11, 19
Michigan Educ Ass'n v Alpena Community College, 457 Mich 300;
577 NW2d 457 (1998) 10
People v Unger, 278 Mich App 210 (2008) 28
P*riority Health v Comm'r of the Office of Fin & Ins Servs,* 489 Mich 67, 73;
803 NW2d 132 (2011) 10
Regents of the Univ of Michigan v Michigan, 395 Mich 52; 235 NW2d 1 (1975) 22
Regents of the University of Michigan, 1981 MERC Lab Op 777 ..... 5, 6, 7, 31
Richardson-Merrell Inc v Koller, 472 US 424,; 105 S Ct 2757 (1985) 20
Sault Ste Marie Area Pub Sch v Michigan Educ Ass'n, 213 Mich App 176;
539 NW2d 565 (1995) 11, 31
Smith v Elias, No. 300113 (After Remand) (Mich App, Nov. 1, 2011) 15
Sprik v Regents of Univ of Michigan, 43 Mich App 178;
204 NW2d 62 (1972), *aff'd* 390 Mich 84 (1973) 28
Sterling v Regents of Univ of Michigan, 110 Mich 369; 68 NW 253 (1896) 22
Stringfellow v Concerned Neighbors in Action, 480 US 370; 107 S Ct 1177 (1987) 20

University of Michigan, 1970 MERC Lab Op 754 (1970) 30
Weems v Chrysler Corp., 448 Mich. 679; 664 NW2d 799 (1994) 14

Statutes

Administrative Procedures Act of 1969, MCL 24.201 et seq. 11
MCL 423.1 30
MCL 423.212 30
MCL 423.216 18
Public Employment Relations Act ("PERA"), MCL 423.212 et seq. 1

Other Authorities

Const 1850, art 13, § 8 22
Const 1963, art 6, § 28 11
Const. 1963 Art. VIII, § 5 23
In re Certified Question from US Dist Court for E Dist of Michigan, 465 Mich 537; 638 NW2d 409 (2002) 26
Mich. Const. 1963 Art. VIII, § 5 7

COUNTER-STATEMENT OF JURISDICTION

The Attorney General asks this Court for leave to appeal an Order of the Court of Appeals dismissing for lack of jurisdiction the Attorney General's application for leave to appeal an interlocutory order issued by the Michigan Employment Relations Commission ("MERC" or "Commission") denying the Attorney General's Motion to Intervene.

This Court does not have jurisdiction over this matter, for the same reason the Court of Appeals did not have jurisdiction over this matter. There are no interlocutory appeals of representation proceedings before MERC. MCR 7.203(B)(3); MCL 423.216(e); *Harper Hosp Employees' Union Local No. 1 v Harper Hosp,* 25 Mich App 662; 181 NW2d 566 (1970). Representation proceedings are factfinding exercises, from which interlocutory appeal is unnecessary and inefficient. As the Court of Appeals correctly decided, MCL 24.301 does not confer jurisdiction on this Court because the current proceeding before the MERC is not a contested case. MCL 24.203(3); *McBride v Pontiac School Dist (On Remand)*, 218 Mich App 105, 122; 553 NW2d 646 (1996).

Moreover, the Attorney General cannot appeal as an intervenor on behalf of the people when the named parties themselves do not seek appellate review. *Federated Ins Co v Oakland Co Rd Com'n*, 475 Mich 286, 288; 715 NW2d 846 (2006).

Furthermore, Appellant does not present the Court with any proper basis to exercise jurisdiction pursuant to MCR 7.302(B).

COUNTER-STATEMENT OF QUESTIONS INVOLVED

The Attorney General asks this Court for leave to appeal an Order of the Court of Appeals dismissing for lack of jurisdiction the Attorney General's application for leave to appeal an interlocutory order issued by the Michigan Employment Relations Commission denying the Attorney General's Motion to Intervene.

I. Did the Court of Appeals err in holding that the Administrative Procedures Act does not provide for an interlocutory appeal of an Order denying the Attorney General's motion to intervene in an investigatory administrative proceeding that is being convened for the sole purpose of determining whether the Michigan Employment Relations Commission (MERC) has jurisdiction to consider the petition for a representation election filed by the Graduate Employees Organization/AFT (GEO or Petitioner) on April 27, 2011?

Appellee University of Michigan says: No

Appellant Attorney General says: Yes

II. Should the Attorney General be granted interlocutory appeal, even though he may not obtain such appeal under the Michigan Court Rules or relevant statutes and where final review, if allowed, would provide a complete remedy?

Appellee University of Michigan says: No

Appellant Attorney General says: Yes

III. Has the Attorney General demonstrated that he has a right to intervene, even though such intervention interferes with the University of Michigan Board of Regents' constitutional autonomy and is thus inimical to the public interest?

Appellee University of Michigan says: No

Appellant Attorney General says: Yes

IV. Is the Attorney General's intervention proper, even though the Commission is conducting a non-adversarial factfinding investigation and has invited the Attorney General to participate as a non-party?

Appellee University of Michigan says: No

Appellant Attorney General says: Yes

RESPONSE AND OBJECTION TO THE MICHIGAN ATTORNEY GENERAL'S "STATEMENT OF ORDER APPEALED FROM AND RELIEF SOUGHT"

Appellant does not provide a "statement of the order" from which he seeks leave to appeal. The "Order Appealed From" is the order of the Court of Appeals dated January 25, 2012, which provides:

> The Court orders that the motion for immediate consideration, the motion to stay proceedings and the application for leave to appeal are DISMISSED for lack of jurisdiction. This Court lacks jurisdiction to entertain an appeal from an interlocutory order of the MERC. MCR 7.203(B)(3); MCL 423.216(e); *Harper Hosp Employees' Union Local No. 1 v Harper Hosp*, 25 Mich App 662; 181 NW2d 566 (1970). MCL 24.301 does not confer jurisdiction on this Court because the current proceeding before the MERC is not a contested case. MCL 24.203(3); *McBride v Pontiac School Dist (On Remand)*, 218 Mich App 105, 122; 553 NW2d 646 (1996); *Michigan Ass'n of Public Employees v Michigan Employment Relations Comm'n*, 153 Mich App 536, 549; 396 NW2d 473 (1986).

Appellant likewise does not specify any "Relief Sought" and instead indicates that "he asks this Court to grant leave to appeal and to stay further administrative proceedings below pending appeal," a prayer reiterated at the close of his Application, without any indication of what the Court should do in the granting of leave.

INTRODUCTION

The Michigan Attorney General seeks leave to appeal from an Order entered by the Michigan Court of Appeals, which denied his Application for Leave to Appeal an interlocutory order of the Michigan Employment Relations Commission ("MERC" or "Commission"), which in turn had denied his motion to intervene in a representation proceeding between the Graduate Employees Organization/AFT ("GEO" or "Petitioner") and the Public Employer, the University of Michigan ("University").

Before considering the merits of this Application, the Court must determine whether an appeal at this time is appropriate—it is not. Despite some creative arguments, Appellant is unable to offer a cogent explanation for why this Court should entertain an interlocutory appeal for which there is no legal authority. In the end, the Attorney General asks this Court to ignore the express language of the Michigan Rules of Court, two statutes and one constitutional provision to infer a right to an immediate appeal and to demand a stay – a stay which would abruptly end an administrative proceeding in which six witnesses have testified, twenty-nine exhibits have been entered and only one witness remains until the likely close of proofs. All this, when there is no plausible reason to believe that the claimed harm could not be reversed if this Court later found error below.

Underlying this case is the legal question of whether MERC should allow Graduate Student Research Assistants ("GSRAs") to vote on whether they want to be represented by GEO as their exclusive bargaining agent. The immediate issue before the Commission is extremely narrow, and the proceedings have only one purpose: to determine whether circumstances have changed enough since 1981 that Graduate Student Research Assistants GSRAs are now entitled to be treated as employees pursuant to the Public Employment Relations Act ("PERA"), MCL 423.212 et seq. The issue is **not** whether the MERC proceedings are sufficiently adversarial. In full compliance with the

mandates of PERA, adversarial proceedings are not involved, would not have been appropriate and in fact would have contravened one of the primary purposes for PERA – to **settle and avoid** disputes. See Michigan Constitution, Art. IV, § 48.

Moreover, the Attorney General's intervention in the representation proceedings below would unconstitutionally infringe on the autonomy of the University of Michigan Board of Regents. Michigan's Constitution charges the Regents with the supervision of the University of Michigan and treats them with "the dignity of fourth coordinate arms of the state government." This arrangement – which began in the 1800s only after a disastrous experiment in Legislature control of the University – has proven to be a remarkable success for the University and the State. As more than one court has acknowledged, the "University of Michigan [has] thrived under the leadership of its board of regents." The Board of Regents fulfilled its constitutionally-created role in managing the University and setting its policy, when it recognized that GSRAs are treated as employees by the University and thus should be able to hold an election on union representation.

The Attorney General opposes the Regents' decision to recognize GSRAs as employees. He argues that a vote on unionization "will have a significant impact on the University's role as an elite research institution, which would detrimentally impact the interests and rights of the State and the People of Michigan." He also argues that the Regents are effectively constraining the University from opposing the union. Not so. When the Regents make a policy or management decision within their purview, they are not "constraining" the University, they are speaking for and guiding the University.

The People have entrusted the Attorney General with the heavy burden of protecting their interests in numerous arenas. But, those same People have also entrusted the Regents with managing the University of Michigan, rather than subjecting the school to the vagaries of the Legislature or

even of the Executive. Even though the Attorney General may oppose the Regents' decision, the Constitution forbids him from intervening in a proceeding to oppose the Regents' decision in a matter that is entirely internal to the University. He cannot intervene in the representation proceedings to voice the opposition of the "constrained" University or to protect the University from supposed self-inflicted harm. He cannot intervene to substitute his judgment for that of the Regents, in order to protect the University from itself. He cannot intervene to substitute his judgment regarding the proper prosecution of a representation proceeding for that of the constitutionally-empowered party.

Moreover, the Attorney General's intervention does not find constitutional refuge in the argument that he is seeking to prevent "harm" to the public. As is made completely clear in his Application, the putative harm is limited solely to that harm the Attorney General argues the University will suffer: if the public's University is harmed, the public is harmed. But this is not the type of "harm" or state interest that the Attorney General is authorized to argue for in opposition to the Regents. Rather than serving the public interest, the Attorney General's intervention – in opposition to the Regents and the Constitution – would actually thwart the will of the public that has placed its faith in him and in the Regents.

Since the Attorney General's intervention is unconstitutional and inimical to the public interest, the Commission properly determined that he could not intervene as an adversarial party. Recognizing, however, that it was engaged in a factfinding process and that the Attorney General may have contributions to make to such a process, the Commission has solicited the Attorney General's participation, in part, to advise the Administrative Law Judge of evidence that may help her reach the correct conclusion. This approach strikes the appropriate balance between impermissible intervention and the Attorney General's stated concern that all relevant evidence may

not be presented to the fact-finder. Administrative Law Judge Julia Stern has embraced this mandate. Assistant Attorneys General have been present to observe the testimony of every witness, have had access to copies of all exhibits and have been invited to provide Judge Stern "with suggestions for additional documents they believe that the Commission should consider in making their decision or additional witnesses that should be called..." (Volume One Transcript [Rough] of Proceedings Before Administrative Law Judge Julia C. Stern, 7:31 – 8:31) (Exhibit 9). If Judge Stern determines that this proposed evidence is relevant and not cumulative, she will reopen the record and may subpoena and question the additional witnesses. (Id. at 8)

Despite the extraordinary measures taken by MERC to open these proceedings, Appellant refuses to allow the administrative process to run its course. Rather than wait to see the outcome of the process, Appellant assumes the worst and seeks emergency relief from this Court.

COUNTER-STATEMENT OF PROCEEDINGS AND FACTS

On April 27, 2011 GEO filed a Petition for Representation pursuant to Sections 12 and 13 of PERA. (Exhibit 1). The Petition sought to accrete GSRAs to the union's bargaining unit of Graduate Teaching Assistants ("TAs") and Graduate Staff Assistants ("SAs"). On May 19, 2011, the University of Michigan Board of Regents adopted a resolution that supports the recognition of GSRAs as employees. The resolution does not take a position on the Petition itself, or on whether the GSRAs should accrete to the existing unit; the Regents simply recognized the fact that GSRAs are employees.

The University and GEO then presented a Consent Election Agreement to MERC, the preliminary step in allowing the GSRA employees to determine for themselves whether they would like union representation. The Consent Election Agreement clarified that the proposed bargaining unit would not accrete to the existing unit, but would be separate.

On September 14, 2011, the Commission entered an Order denying the Petition. (Decision and Order, September 14, 2011)(Exhibit 2). The Commission discussed its 1981 Opinion in *Regents of the University of Michigan*, 1981 MERC Lab Op 777 ("1981 Opinion"). The 1981 Opinion considered whether TAs, SAs and GSRAs were "employees" under PERA. The 1981 Opinion held that the distinction between "student" and "employee" turned on whether the "work is being performed in a 'master-servant' relationship or whether the person performing the work does so as his own 'master.'" In the 1981 Opinion, the Commission held:

> TAs 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 performance; and, they are compensated based on the amount of work they provide. . . . Likewise, SAs perform regular duties of a type which benefit the University.
>
> . . . [T]he relationship between the 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 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 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 substantially more like the student in the classroom . . . . They are working for themselves.

After considering its 1981 Opinion, the Commission found that neither the Petitioner nor the University had presented any evidence regarding a change in circumstances and that the parties' agreement did not confer employee status on GSRAs. Thus the Commission held "[t]he RAs cannot be granted public employee status under PERA predicated on the record before us." (Ex. 2).

On October 3, 2011, GEO filed a Motion for Reconsideration. On November 30, 2011, the Michigan Attorney General filed a Motion seeking intervention and opposing GEO's Motion for Reconsideration. (Attorney General Motion to Intervene, November 20, 2011)(Exhibit 3). The

Attorney General focused on the harm he foresaw if GSRAs were permitted to engage in an election. For instance, the Attorney General claimed:

> This case has the potential to significantly damage the University of Michigan's reputation as a nationally recognized research institution, to the detriment of all Michigan citizens who support and value the University ....
>
> The University has been incredibly successful as a research institution for the past 50 years, and the Commission should decline the invitation to compromise that success and reconsider the same issue it had already decided in 1981. Because this is a matter that will impact important state interests, the Attorney General requests to intervene and oppose reconsideration ....

(Ex. 3, pp. 1-2). The Attorney General argued that the 1981 Opinion remains meritorious and that his intervention was necessary to "ensure all the relevant facts and arguments are presented to the Commission," because there was no "true adversity" between GEO and the University. (Id. at 24).

GEO opposed the Attorney General's intervention. (See GEO Brief Opposing Motion to Intervene, December 5, 2011)(Exhibit 4). GEO argued that the Attorney General did not have standing to intervene, because, among other reasons, MCL 14.101 – the statute that arguably allows Attorney General intervention in MERC proceedings – limits intervention to "actions." (Id. at 4). GEO argued that "a representation proceeding is not an action." It is a factfinding process in which [the Commission] 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." (Id.).

The University opposed the Attorney General's intervention for one primary and fundamental reason – the Attorney General's intervention is prohibited by Michigan's Constitution. (See Public Employer University of Michigan's Brief Opposing Intervention by the Attorney General, December 9, 2011)(Exhibit 5). The University noted that the Board of Regents of the University of Michigan derives its authority directly from Article VIII, Section 5, which provides:

> 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] board shall have general supervision of its institution and the control and direction of all expenditures from the institution's funds. [The] 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 ... 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.

(Id. at 3) (citing Mich. Const. 1963 Art. VIII, § 5). The "constitution protects the right of the Regents to make decisions regarding the University's operations." (Id. at 4). The Board of Regents has the authority to "make and implement judgments about the mission of the University and how to further the mission, even if the Board's judgment differs from the opinions of some of the University's executives, faculty, staff, or students, and even if such decision is unpopular in some quarters." (Id.). The Attorney General is thus constitutionally barred from intervening to "advocate for those from within the University who would have made a judgment different from the judgment made by the Regents about the merits and risks of allowing a representation election in this case." (Id.).

On December 16, 2011, the Commission entered an Order denying the Attorney General's Motion to Intervene and granting GEO's Motion for Reconsideration. (Decision and Order on Motions to Intervene and Motion for Reconsideration of Order Dismissing Petition)("Dec 16 Order")(Exhibit 6). The Commission determined that the doctrine of *res judicata* does not apply to a representation matter such as this. (Id. at 5). The Commission determined that GEO had adequately supplemented the record, after denial of the original petition, to show that it is possible that there has been a change in circumstances since the 1981 Opinion. (Id. at 6). The Commission referred the matter to a senior Administrative Law Judge to "conduct an evidentiary hearing at which [GEO] will

have the opportunity to attempt to show that there has been a substantial and material change in circumstances since [the 1981 Opinion] was issued." (Id.). The Commission held:

> Representation cases such as this are investigatory proceedings in which it is our duty to try to find the truth. Now that Petitioner has asserted facts that may indicate there has been a substantial and material change in circumstances since the 1981 decision, it is our statutory obligation to send this matter to an administrative law judge to gather facts with which we can make a final determination as to whether a question of representation may exist.

(Id. at 6).

In denying the Motion to Intervene, the Commission noted that the Attorney General's discretion to intervene is not unlimited, and should be restrained when intervention would be inimical to the public interest. (Id. at 4). The Commission reasoned that:

> We are clearly cognizant of the University's national standing and reputation as a major research institution. However, that is not a factor that we may consider in determining whether the RA's are public employees within the meaning of PERA. If the RAs are not public employees, we have no jurisdiction over their relationship with the University and the matter is at an end. If they are public employees, they are entitled, by law, to seek an election to determine whether they will bargain collectively through a representative of their choice. We cannot consider speculation as to the impact on the University by the RAs potential exercise of a statutory right; it is merely our responsibility to determine whether the RA's have the right to organize under PERA. We find opposition to the exercise of a statutory right is inimical to the public interest.
>
> ***
>
> Furthermore, the Attorney General is not seeking to intervene in order to advocate for the interest of a State agency. Rather, the Attorney General seeks intervention for the purpose of opposing a policy decision made by the Board of Regents of the University of Michigan, an autonomous State institution. Article VIII, Section 5 of the Michigan Constitution vests the University's Board of Regents with sole responsibility for the general supervision of the University. The Board of Regents adopted a resolution supporting 'the rights of University Graduate Student Research Assistants ... to determine for themselves whether they choose to organize.' It is not our role to determine whether the Regents made the correct policy decision in passing that resolution.
>
> ***

> Moreover, we are not bound by the Regents' assessment of the RAs' status under PERA. We find that it would be inappropriate to allow the Attorney General to intervene for the purpose of opposing a policy decision made by the Regents when that policy decision does not determine the results of our investigation in this matter. We find that such intervention would be unduly disruptive of the proceedings and inimical to the public interest.

(Id. at 4-5). The Order specified that the assigned administrative law judge may call any witnesses and receive any evidence, in addition to testimony and other evidence offered by the Petitioner and the University, as may be probative and relevant, and may, by subpoena, compel the production of evidence. (Id. at 7).

Administrative Law Judge Julia C. Stern was assigned to the matter and entered a Pre-Hearing Order addressing the proofs to be submitted by the Petitioner and by the University, and reserving time to "allow [ALJ Stern] to subpoena additional witnesses or documents" if she deems further proofs to be necessary. (Pre-Hearing Order at 1-2)(Exhibit 7). Before the adminstrative proceedings began, Judge Stern assured the Attorney General that she would "solicit the Attorney General's input, after the parties have presented their evidence at the hearing, as to whether there is other evidence which might be of assistance to the Commission in making its decision." (ALJ Stern Correspondence to Assistant Attorney General Kevin J. Cox, December 27, 2011)(Exhibit 8).

The hearing that Appellant would have this Court stay is well underway. As of the close of business on February 2, 2012, six witnesses have testified, the University does not expect to offer additional witnesses and GEO has only one remaining scheduled witness. Moreover, the Attorney General has **not** been excluded from the evidentiary proceedings. Assistant Attorneys General have been present to observe every witness and Judge Stern has invited the submission of suggestions for additional exhibits and witnesses from the Attorney General when the parties complete their cases. In the next phase of factfinding Judge Stern may choose to subpoena suggested witnesses. At the

outset of the proceedings on February 1, ALJ Stern explained:

> ... I have taken a very unusual step of asking two entities, that is the Michigan Attorney General's Office and an organization called Students Against GSRA Unionization, to provide me with input after the parties have presented their evidence as to whether there's other evidence that the Commission could consider.
>
> After the parties have completed putting in their evidence, which I anticipate will be no later than the end of next Monday, these entities will have three or four days to provide me with suggestions for additional documents they believe that the Commission should consider in making their decision or additional witnesses that should be called, along with an explanation of why this evidence is relevant in light of the testimony presented by the parties during this hearing.
>
> If I decide that this evidence is relevant and not cumulative, I will reopen the hearing, probably sometime in the week of February 21st, give the parties an opportunity to comment on the proposed new evidence. And if I conclude that the testimony of additional witnesses may be relevant, subpoena and question the additional witnesses myself.

Volume One Transcript [Rough] of Proceedings Before Administrative Law Judge Julia C. Stern, 7:31 – 8:31 (Exhibit 9).

ARGUMENT

I. STANDARD OF REVIEW

The appropriate standard of review for questions of statutory construction is dependent upon the source of the interpretation under review. See *Priority Health v Comm'r of the Office of Fin & Ins Servs*, 489 Mich 67, 73; 803 NW2d 132 (2011) ("Statutory interpretation is a question of law, which we review *de novo*. However, an agency's interpretation of a statute regarding matters it is charged with regulating is entitled to respectful consideration and should not be overruled without cogent reasons") The deference afforded an administrative agency as to determinations committed to its jurisdiction narrows the scope of review. See *Michigan Educ Ass'n v Alpena Community College*, 457 Mich 300, 307-308; 577 NW2d 457 (1998) ("Appellate review of a determination by an

administrative agency is limited"). Thus, reviewing a bargaining unit determination from MERC, this Court held in *Alpena Community College*:

> Const 1963, Art VI, § 28 indicates that factual determinations by the MERC are to be reviewed according to the competent, material, and substantial evidence standard. Under these circumstances, the phrase "a clear error" is properly understood as an absence of competent, material, and substantial evidence on the whole record to support the finding.

Id. at 308.

Additionally, a decision regarding intervention "is an administrative action and shall be made exclusively by the commission or its agent." Commission Rule 423.145(3). Similarly, the determination whether to hold a hearing regarding a representation question is within the Commission's discretion. *Sault Ste Marie Area Pub Sch v Michigan Educ Ass'n*, 213 Mich App 176; 539 NW2d 565 (1995). The standard of review on such decisions is limited to abuse of discretion. *Michigan Association of Public Employees v MERC*, 153 Mich App 536, 546; 396 NW2d 473 (1986) (The court of appeals will not set aside a discretionary decision by the Commission absent a showing that the commission's decision "is so perverse or palpably wrong as to expressly amount to a breach of its statutory duty"); See also *In re Wayne County*, No. 190660; 1997 WL 33352796 (April 11, 1997) ("we will not disturb a remedy imposed by the MERC unless the order constitutes a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the PERA.")

II. THE PROFFERED ARGUMENTS CONCERNING APPELLATE JURISDICTION ARE WITHOUT MERIT

A. Appellant's Interpretation of the Statutes Governing Appeals of Interlocutory Orders Would Lead to Absurd Results

The Attorney General argues that the Court of Appeals relied on an erroneous reading of the Administrative Procedures Act of 1969, MCL 24.201 et seq., ("the APA") and "factually

distinguishable case law" when determining that the Court of Appeals did not have jurisdiction to review an interlocutory order rendered in a representation proceeding before MERC. This argument rests upon a faulty interpretation of MCL 24.301. In essence, if the Attorney General is correct, a party could appeal an interlocutory ruling in a representation proceeding, but could not appeal a final decision or order. The statute provides:

> When a person has exhausted all administrative remedies available within an agency, and is aggrieved by a final decision or order in a contested case, whether such decision or order is affirmative or negative in form, the decision or order is subject to direct review by the courts as provided by law. Exhaustion of administrative remedies does not require the filing of a motion or application for rehearing or reconsideration unless the agency rules require the filing before judicial review is sought. A preliminary, procedural or intermediate agency action or ruling is not immediately reviewable, except that the court may grant leave for review of such action if review of the agency's final decision or order would not provide an adequate remedy.

The Attorney General posits that the last sentence of this paragraph must be divorced from the first two sentences, so that the first two sentences apply to contested cases, while the last sentence relates to matters that are not subject to the contested case provisions of the APA. In other words, where there is a final decision, the right of direct review would be limited to **contested cases** where the appealing party has exhausted administrative remedies; but an interlocutory appeal would be permitted in matters that are **not** contested cases, because a final decision would not be appealable.

Courts have not hesitated to reject such interpretations. Thus, in *Detroit Int'l Bridge Co v Commodities Export Co*, 279 Mich App 662; 760 NW2d 565 (2008), where the proposed "literal" interpretation of a statute would have produced consequences that would have been similar to and equally as absurd as those that would accrue from instituting the dichotomy proffered by Appellant, the Court of Appeals noted:

> [T]o paraphrase Justice Markman in *Cameron,* [*v Auto Club Ins Ass'n,* 476 Mich 55, 718 NW2d 784 (2006)]. *supra* at 80, a statute need not be applied literally if no

> reasonable lawmaker could have conceived of the ensuing result. Here, there is simply no basis on which to conclude that the Legislature intended that (1) an entity having the power to condemn would be liable for paying expenses related to an improper condemnation attempt, but (2) an entity not having the power to condemn would not be liable for paying expenses related to an improper condemnation attempt, even though that entity held itself out as having the power of condemnation. Such a result would be patently absurd and "unthinkable." *Id.* at 84 (Markman, J.) (citation and quotation marks omitted).

279 Mich. App. at 675.

Appellant presents a series of truisms of statutory construction (including the "absurd results" doctrine) and then incorrectly applies the underlying propositions to the instant case. Thus, Appellant posits that "[t]his Court requires that Michigan statutes be interpreted within their context: 'a word or phrase is given meaning by its context of setting,'"[1] and immediately adds the statement that "words and clauses will not be divorced from those which precede and those which follow." Appellant's argument immediately violates this rule – dividing the unitary paragraph of MCL 24.301 into two unrelated clauses and changing the import of the last sentence. The provision, quoted above, would thereby be transformed:

> [1] When a person has exhausted all administrative remedies available within an agency, and is aggrieved by a final decision or order in a contested case, whether such decision or order is affirmative or negative in form, the decision or order is subject to direct review by the courts as provided by law. Exhaustion of administrative remedies does not require the filing of a motion or application for rehearing or reconsideration unless the agency rules require the filing before judicial review is sought.
>
> [2] A preliminary, procedural or intermediate agency action or ruling [in any matter, including but not limited to a contested case] is not immediately reviewable, except that the court may grant leave for review of such action if [the decision or order is not subject to direct review or if] review of the agency's final decision or order would not provide an adequate remedy.

Engrafting the second clause would not only be inconsistent with the structure and import of MCL

[1] Application at 14. (*quoting In re Complaint of Rovas Against SBC Michigan*, 482 Mich 90, 102; 754 NW2d 259 (2008))

24.301, it would isolate the clause and create an anomaly by which the surrounding provisions would be enactments related to contested cases while the artificially segmented MCL 24.301[2] would be applicable to all cases.[2] The "formulation of Section 101 into two distinct parts" could not have been intended by the Legislature.

Likewise, the indication that the following section, MCL 24.302, is applicable to contested cases does not demonstrate that MCL 24.301 is dichotomous. (Application at 15). Rather, it goes to the diametrically opposed principle of construction, that "'statutory provisions must be read in the context of the entire statute, and not isolated, so as to produce a harmonious and consistent whole.'" (Application at 14) (*quoting Weems v Chrysler Corp.*, 448 Mich. 679, 698; 664 NW2d 799 (1994)). The consistent whole throughout this section of the statute relates to contested cases. Thus, the provisions starting at MCL 24.301, are gathered in a Chapter entitled "Judicial Review." Section 101, MCL .301, quoted above, is titled "Judicial review as of right or by leave." Section 102, MCL 24.302, "Judicial review; method," likewise refers to contested cases:

> Judicial review of a final decision or order in a contested case shall be by any applicable special statutory review proceeding in any court specified by statute and in accordance with the general court rules. In the absence or inadequacy thereof, judicial review shall be by a petition for review in accordance with sections 103 to 105.

And, like its immediate antecedent, it is one clause – not two – and the specification of "contested case" in the first sentence has never been held to have negated the exclusive application of the provision to contested cases – even though the second sentence does not explicitly refer to contested cases.

Section 103, MCL 24.303, specifies **where** the petition for review is to be filed – in circuit court (not in the Court of Appeals where this appeal began), and in this provision the Legislature

---

[2] At this point of its analysis, appellant begs the question – imagining that [2] is distinct from [1] because the "two clauses" do not **each** specify that application is limited to contested cases.

demonstrated that it knew how to divide a provision into clauses through the use of sub-sections.[3]

The last two sections in Judicial Review, Section 104, MCL 24.304(1)-(3) ("Petition for review; filing, time; stay; record; scope") and Section 105, MCL 24.305 ("Inadequate record; additional evidence, modification of findings, decision order") do not contain the term "contested case." However, by reference to the statutory placement and logical purpose each have been found applicable to contested cases and not to other proceedings. See, e.g., *Cohen-Hatfield Industries, Inc. v State, Dep't of Treasury, Corp Franchise Fee Div,* 78 Mich App 264; 259 NW2d 452 (1977) (Sixty-day limit contained in section 104 applies only where there has been final decision in a contested case); *Mich Ass'n of Home Builders v Dir of Dep't of Labor & Econ Growth,* 481 Mich 496, 750 NW2d 593 (2008) (Since judicial review of an administrative rule is not a contested case and is not subject to the formal procedures of the APA, the administrative record could not be expanded by a section 105 remand to an administrative agency for additional investigation or explanation).

Indeed, the Chapter preceding 24.301, beginning with MCL 24.201, makes it clear that

> (3) "Contested case" means a proceeding, including rate-making, price-fixing, and licensing, in which a determination of the legal rights, duties, or privileges of a named party is required by law to be made by an agency **after an opportunity for an evidentiary hearing**. When a hearing is held before an agency and an appeal from its decision is taken to another agency, the hearing and the appeal are considered a continuous proceeding as though before a single agency.

Thus, recently in *Smith v Elias*, No. 300113 (After Remand) (Mich App, Nov. 1, 2011), in an opinion designated for publication, the Court of Appeals explained:

> The Administrative Procedures Act (APA), MCL 24.201 et seq., provides specific procedures for the parties and agency to follow in a "contested case." MCL 24.271. A

[3] Section 103 (1) provides that "a petition for review shall be filed in the circuit court for the county where petitioner resides or has his or her principal place of business in this state, or in the circuit court for Ingham county."

> "contested case" is defined as "a proceeding . . . in which a determination of the legal rights, by law to be made by an agency after an opportunity for an evidentiary hearing." MCL 24.203(3). The Board's decision to grant or deny parole is not a "contested case," however, because a prisoner sentenced to a term of years is not entitled to a "hearing" prior to the Board's decision. *Hopkins [v. Parole Bd,,* 237 Mich App 629, 637; 604 NW2d 686 (2000)], 237 Mich App at 638. **The scope of judicial review outlined in the APA applies only to contested cases. MCL 24.301. Only in a contested case does the court determine if the agency's decision was "[n]ot supported by competent, material and substantial evidence on the whole record." MCL 24.306(1)(d). As the APA is inapplicable in this case, the circuit court improperly relied upon the APA standard of review.**

(Emphasis added.) See also *In re Public Service Comm Guidelines for Transactions Between Affiliates*, 252 Mich App 254, 267; 652 NW2d 1 (2002) ("The typical contested case proceeding involves an individual named party and a disputed set of facts—e.g., a license denial, a denial of benefits or a statutory violation—from which results an agency order that adjudicates the specific factual dispute and operates retroactively to bind the agency and the named party").

Appellant then argues that "[t]he Attorney General's extensive practical experience with administrative appeals is consistent with the notion that even uncontested cases are subject to judicial review." (Application at 15). The statement is testimonial, without any foundation, and ultimately unrelated to this matter, in which the Appellant is not arguing for judicial review *per se*, but rather seeks interlocutory appeal based upon the special statutory rights set forth for particular types of proceedings in the APA.[4] The only case cited in this argument segment is *McBride v Pontiac School Dist*, 218 Mich App 113; 553 NW2d 646 (1996), for the statement that "the APA does not solely govern 'contested cases.'" (Application at 15). In fact, the cases relied upon were **not** within the contested case provisions of the APA:

> In both the *Irving Parents* and *Rochester Bd of Ed* cases, this Court simply assumed that, because some evidentiary proceedings were conducted, the contested case

[4] The reference to "uncontested cases" itself is puzzling. While "contested cases" are addressed extensively in the APA, there is no corollary statutory category of "uncontested cases."

> provisions of the APA must apply. Such reasoning is erroneous; the statute grants the State Board of Education discretion to conduct such hearings as it deems necessary. No statute requires a hearing, and merely because the State Board of Education has chosen to better inform itself before rendering a decision does not change these proceedings into a contested case. *Wayne Co Prosecutor v Parole Bd,* 210 Mich. App. 148, 153; 532 N.W.2d 899 (1995).
>
> Accordingly, the proceedings before the State Board of Education not being a contested case, and no hearing being required by statute, in accordance with *the J & P Market* doctrine, *supra*, judicial review is limited to a determination whether the decision is authorized by law, and if so authorized the decision may be challenged only on grounds that it is arbitrary and capricious or an abuse of administrative discretion, in effect, that the administrative agency exceeded its legal authority, acted in some manner *ultra vires*, violated the constitution, or relied on proscribed considerations in making a discretionary determination. *J & P Market, Inc, supra.* No such determinations of administrative misfeasance can be viably made on this record.

218 Mich. App. 113, 121-122; 553 NW2d at 650.

As discussed in the next section, Appellant misinterprets the types of judicial review available for various different actions of an administrative agency. The existence of a form of judicial review other than that found in the APA is not at issue – Appellant claims a particular statutory and procedural advantage—interlocutory appeal—that is unique to that statute. If another form of review was applicable, it was not the form the Appellant sought or the form that the relief he sought required. It is of course too late to raise such previously unused arguments – which are, in any event, unavailing

Of course, if the APA were actually applicable, relief should have been sought in the circuit court pursuant to MCL 24.303(1) which provides:

> Except as provided in subsection (2), a petition for review shall be filed in the circuit court for the county where petitioner resides or has his or her principal place of business in this state, or in the circuit court for Ingham county. MCL 24.303(1).

Instead, Appellant initiated his appeal in the Court of Appeals.

B. The Court of Appeals Correctly Determined That It Did Not Have Jurisdiction

Appellant challenges the Court of Appeals' order of dismissal by attempting to distinguish the authorities cited by the Court. Even if Appellant's appeal were meritorious, the fundamental conclusion would remain: Appellant never identifies any basis by which he properly invoked the jurisdiction of this Court or the Court of Appeals.

Appellant still relies upon his argument, that his right to an interlocutory appeal was based upon the "non-contested case provision" which is somehow found in the middle of the contested case provisions of the APA. Such a provision cannot be bootstrapped to MCR 7.203(B)(4), which allows an appeal from any other order appealable to the Court of Appeals. Whether the court incorrectly cited to MCR 7.203(B)(3) or the Appellant incorrectly relied upon MCR 7.203(B)(4) is of no importance. Neither prong of the argument creates jurisdiction from whole cloth.

Appellant then argues that the Court of Appeal's citation to MCL 423.216(e) was improper, because it is inapplicable. Properly read, it appears that is precisely the point being made by the Court of Appeals – that while a form of appeal is statutorily provided by PERA, at MCL 423.216(e), that provision is **not** a basis for assertion of an interlocutory appeal from the denial of a motion for intervention.

Appellant next tries to distinguish *Harper Hosp Employees' Union v. Harper Hospital*, 25 Mich App 662; 181 NW2d 566 (1970), since that was a PERA-based appeal – while Appellant relied instead upon MCL 24.301. That reliance again, however, remains misplaced, because, even if

Appellant could rely upon that section, any such appeal would have to be brought in the circuit court.[5]

Finally, Appellant returns to the shift of argument which inheres from the misreading of *McBride, supra.* The existence of *some* form of appeal under certain circumstances did not create a "non-contested case" appeal under the APA. Nor did it make either of the other forms of appeal in administrative law cases (1) appropriate or (2) pleaded, *nunc pro tunc.* Appellant's extension of that argument to *Michigan Ass'n of Public Employees v Michigan Employment Relations Comm,* 153 Mich App 536, 549; 396 NW2d 473 (1986) does not support Appellant's reliance upon either case.

C. **Appellant's Reliance on the Michigan Constitution is Unavailing**

The Attorney General also seeks support in Article 6, Section 28 of the 1963 Constitution of the State of Michigan. (Application at 19) The Constitution does insure (to those with standing) the right to appeal "decisions, findings, rulings and orders of any administrative officer or agency," but that right is explicitly limited to final decisions, findings, rulings and orders. It has no relevance to this interlocutory application.

D. **Appellant's "Exhaustion" Argument Still Mandates Application of the Inapplicable Provisions of the APA**

Appellant's last jurisdiction argument again erroneously relies upon MCL 24.301. Moreover, even if the statute were read as Appellant argues, it would leave him filing in the wrong court; and,

---

[5] Similarly, if appellant were to attempt to rely upon MCL 600.631, his appeal would not be to the Courts of Appeal, as the statute provides:

> An appeal shall lie from any order, decision, or opinion of any state board, commission, or agency, authorized under the laws of this state to promulgate rules from which an appeal or other judicial review has not otherwise been provided for by law, **to the circuit court of the county of which the appellant is a resident or to the circuit court of Ingham county,** which court shall have and exercise jurisdiction with respect thereto as in nonjury cases. Such appeals shall be made in accordance with the rules of the supreme court.

even if he were in the right court, his argument that the delay would destroy a "meaningful" remedy (1) ignores the actual input he has been given in the extant proceedings; and (2) does not constitute a basis for relief, since it is based upon at least three levels of speculation: (a) that the Commission will determine that GSRAs are employees; (b) that the ensuing election will result in the Union being certified; and (c) that the "unionization" of GSRAs will result in serious (but unspecified) harm, despite the well-reasoned and fully disclosed rationale publicly stated by the Regents.

While the proceedings are **not** a contested case subject to the APA, making interlocutory review impossible, assuming *arguendo* that the Attorney General could seek appeal, he would have to demonstrate that "review of the agency's final decision or order would not provide an adequate remedy." MCL 24.301. Similarly, MCR 7.205(B)(1) provides that "if the order appealed from is interlocutory," the appellant must "set[] forth facts showing how the appellant would suffer substantial harm by awaiting final judgment before taking an appeal." The aim is to prevent piecemeal appeals, because "appealing trial court decisions piecemeal is exactly what our Supreme Court attempted to eliminate through the 'final judgment' rule." *Detroit v Michigan*, 262 Mich App 542, 545 (2004). The rule is based on important considerations of judicial administration and "promotes efficient judicial administration while at the same time emphasizing the deference appellate courts owe to the district judge's decisions on the many questions of law and fact that arise before judgment." *Richardson-Merrell Inc v Koller*, 472 US 424, 430; 105 S Ct 2757 (1985). Piecemeal appeals "also burden appellate courts by requiring immediate consideration of issues that may become moot or irrelevant by the end of trial." *Stringfellow v Concerned Neighbors in Action*, 480 US 370, 380; 107 S Ct 1177 (1987).

The Attorney General argues repeatedly that the order denying his intervention is "final for the limited purpose of the Attorney General's intervention." Of course, that argument would apply

to virtually every interlocutory appeal; every order is final for the limited purpose of that order. An order barring introduction of evidence is final as to that evidence; an order allowing a challenged juror to sit is final as to that juror. The "finality" of any interim order does not change the basic principle that, if our courts are to operate efficiently, most appeals must wait until some "final" disposition below.

Predicting how this case will ultimately play out is an exercise in pure speculation. Perhaps the Commission will decide that GSRAs are employees under PERA; perhaps not, rendering the Attorney General's concerns moot. Granting this interlocutory appeal instead of awaiting a final decision will waste the resources of this Court and of the parties. Even if the Attorney General were correct both with respect to his right to intervene and with respect to the hypothesized "one-sided" presentation of facts leading the Commission to find that GSRAs are employees under PERA, this Court or the Court of Appeals would have the power to remand this matter to the Commission for further proceedings with the involvement of the Attorney General. Thus, if the Attorney General does have appellate rights, those rights will not be prejudiced by allowing the administrative process to reach its conclusion.

E. The Attorney General Lacks Standing to Seek Interlocutory Review Because There is No Case in Controversy

Although it is unclear on whose behalf the Attorney General sought to intervene, he either did so on behalf of the People, members of the University or members of the proposed bargaining unit. Since these constituencies do not have a right to an appeal and since neither the University nor GEO have sought an appeal, the Attorney General does not have standing to pursue an appeal.

The Attorney General cannot appeal as an intervenor on behalf of the people when the named parties themselves do not seek appellate review. *Federated Ins Co v Oakland Co Rd Com'n*, 475

Mich 286, 288; 715 NW2d 846 (2006). The intervention statutes – MCL 14.101 and MCL 14.28 – "purport to provide the Attorney General with the authority to prosecute, defend, and intervene in certain 'actions.'" *Id.* But, an appeal is not an "action" unless a losing party timely seeks appeal. *Id.* As this Court noted in *Federated Ins*, to the extent one might read the intervention statutes "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." *Id.*

III. INTERVENTION WAS PROPERLY DENIED BECAUSE THE ATTORNEY GENERAL'S INTERVENTION IS UNCONSTITUTIONAL

A. Michigan's Constitution Confers Significant Autonomy on the Board of Regents

"Long ago, the Legislature controlled and managed our first public university, The University of Michigan." *Federated Publications, Inc v Bd of Trustees of Michigan State Univ.*, 460 Mich 75, 84; 594 NW2d 491 (1999) (citing *Regents of the Univ of Michigan v Michigan,* 395 Mich 52, 63; 235 NW2d 1 (1975)). "This experiment failed, prompting extensive debate regarding the future of the university at the Constitutional Convention of 1850." *Id.* (citing *Sterling v Regents of Univ of Michigan,* 110 Mich 369, 374-378; 68 NW 253 (1896)). Thus, members of the Constitutional Convention drafted, and the people ratified, Const 1850, art 13, § 8, which placed control of the University in an elected board. *Sterling* at 377-380. The Constitutional provision grants the Board of Regents "the general supervision of the university, and the direction and control of all expenditures...." *Fed Pubs* at 85-86. "The University of Michigan thrived under the leadership of its board of regents." *Id.* at 86.

Thus, voters ratified this provision in 1909 and 1963, when the precept was applied to additional Michigan universities. The 1963 Constitution holds:

> 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.

Mich Const. 1963 Art. VIII, § 5.

The people of Michigan have chosen to bestow on their state universities, "the dignity of fourth coordinate arms of the state government." *Christie v Bd of Regents of Univ of Mich*, 364 Mich 202, 209; 111 NW2d 30 (1961). Therefore, Michigan courts have "jealously guarded" the autonomy of its universities. *Bd of Control of Eastern Michigan Univ v Labor Mediation Bd,* 384 Mich 561, 565; 184 NW2d 921 (1971). Although universities are not exempt from all regulation, regulation that infringes "on the university's educational or financial autonomy must ... yield to the university's constitutional power." *Fed Pubs* at 88. "Although a university is subject to [PERA] the regulation cannot extend into the university's sphere of educational authority ...." *Id.* Similarly, although the Legislature "may attach conditions to an appropriation, the conditions cannot invade university autonomy." *Id.* (citing *Bd of Agriculture,* 226 Mich 417, 425; 197 NW 160 (1924)). Given the constitutional authority to supervise the institution generally, this Court determined that applying the Open Meetings Act to an internal function of "the governing boards of our public universities" (e.g.

non-public sessions of a presidential search committee) is "beyond the realm of legislative authority." *Fed Pubs* at 89.

B. The Attorney General's Intervention Would Impermissibly Interfere with the Regents' Autonomy

The Regents – under whose leadership the University has thrived and become a pre-eminent center of higher learning - have determined that the University will be best-served by recognizing that GSRAs are employees fully capable of deciding whether to organize. The Regents balanced the interests of all University stakeholders, and ultimately decided to act in what they determined to be the University's best interests.

Once the Regents determine University policy, that policy is established. Those who disagree with a lawful policy decision do not have the right to challenge the Regents in a court of law; their resort is to the electoral process. Despite this, the Attorney General seeks to intervene to advocate for those who oppose the Regents' policy decision. The Attorney General asserts that his presence is necessary to ensure that "the interests of the many GSRAs and faculty leadership who do not want public employee status and unionization" are considered. (Application, p. 3). But, these individuals do not have the authority to challenge the Regents' decision – which no one claims is unlawful. Since these individuals do not have standing, the Attorney General does not have standing to advocate on their behalf.

More to the point, the Attorney General seeks to intervene for a specific purpose—a purpose in direct contravention of a policy decision of the Regents. The Commission correctly determined that "the Attorney General is not seeking to intervene in order to advocate for the interest of a State agency. Rather, the Attorney General seeks intervention for the purpose of opposing a policy decision made by the Board of Regents of the University of Michigan, an autonomous State

institution." (Dec 16 Order at 5)(Ex. 6). The Attorney General argues that unionization of GSRAs is contrary to the best interests of the University and the State. The Attorney General, substituting his judgment for the determination of the Regents, states that unionization "would compromise the established excellence of the graduate students" at the University and that "[t]he excellence of the University will be seriously jeopardized if its status as a research institution, with the funding that status brings, is undermined." (Application, 6). He argues that "this case has the potential to significantly damage the University of Michigan's reputation as a nationally recognized research institution, to the detriment of all Michigan citizens ..." (Attorney General Motion to Intervene, November 20, 2011, pp. 1-2). The Attorney General supports his demand for intervention by asserting that – in the absence of "true adversity" between the University and GEO - his presence is necessary to "ensure all the relevant facts and arguments are presented to the Commission."

The Michigan Attorney General is elected by the citizens of this State, who are well-served by his advocacy. However, his advocacy has limits – including those found here. Even assuming *arguendo* that only the Attorney General could ensure that the "relevant facts and arguments" are presented to the Commission, the sole reason he wants to present those "relevant facts and arguments" is to oppose the Regents' policy decision. His rejection of the autonomy of the Regents is reflected in his explanation that "any proceeding that may affect the University's ability to continue to attract research funding ... implicates a number of state interests." But, if GSRAs choose to seek union representation, any effect that this may have on Michigan citizens would be wholly-derivative of its effect on the University. Even if the Attorney General were correct that unionization could be harmful, Michigan citizens would not be directly harmed; their harm could only come from the putative decline in the stature of the University. Conversely, if the Attorney General is wrong and the Regents are correct, Michigan citizens would only benefit because the

University itself first benefited. In other words, the Attorney General does not seek to intervene to avert harm to Michigan's citizens; he intervenes because he believes the University itself will be harmed. This intervention is precisely the type of intervention that Michigan citizens disallowed when they placed governance of the University solely within the domain of its Regents. The Attorney General may not intervene to prevent the University from inflicting "harm" upon itself, when that supposed harm is actually a policy decision made by the Regents.

The Attorney General cannot represent what he believes to be the University's interests, in opposition to the Regents. Therefore, the Attorney General frames the issue as an intervention to protect the State's interest in having a world-class University. But, such a State interest cannot be divorced from its predicate: the petition by GEO and the Regents' resolution. Because the Attorney General has no authority to protect a State interest that is, in reality, an interest of the University, the Attorney General does not have standing to pursue his claims. *See e.g. In re Certified Question from US Dist Court for E Dist of Michigan*, 465 Mich 537, 545-48; 638 NW2d 409 (2002) (citing *Attorney General ex rel Lockwood v Moliter,* 26 Mich 444, 447 (1873)) ("although the Attorney General has the authority to intervene in and to initiate litigation on behalf of the state, such authority is limited to matters of state interest.") Moreover, since the Regents have a constitutional right to set policy for the University, it follows that the right to defend that policy also belongs to them. Thus, even if the Attorney General's sole basis for intervention is to ensure that there is an "adversarial" process, intervention would be improper. The only reason for the Attorney General to argue for such a process would be to protect the University from the supposed harm of unionization – advocacy that exceeds the Attorney General's portfolio. As the Commission noted, a "Commission proceeding is not the proper forum for the Attorney General to debate the correctness of a policy decision made by an autonomous State institution." (Dec 16 Order at 5)(Ex. 6). The Regents – and the Regents alone –

have the right to defend their policy decisions and to litigate on behalf of the University. The Attorney General cannot second guess the Regents' chosen litigation strategy and cannot substitute his judgment as to the prosecution of GEO's petition for theirs.[6]

Allowing intervention by the Attorney General over the Regents' opposition would create a dangerous precedent that could significantly erode the constitutional mandate to the boards of Michigan universities. Every significant Regential policy decision affects the administration, the faculty, students and citizens throughout the State. If the Attorney General is allowed to intervene here, future attorneys general might seek to block a university's decision to expend funds to upgrade its business school, to hire a politically-controversial president, to spend more on undergraduate education or to teach politically-unpopular courses.

IV. THE ATTORNEY GENERAL'S INTERVENTION IS INIMICAL TO THE PUBLIC INTEREST AND IS UNNECESSARY

A. The Commission Properly Determined that the Attorney General's Intervention is Inimical to the Public Interest

The Commission correctly determined that it was faced with the rare instance where there was no choice but to deny intervention because intervention would be inimical to the public interest. . (Dec 16 Order at 5) ("We find that such intervention would be unduly disruptive of the proceedings and inimical to the public interest.") This finding is fully supported by the fact that the Attorney General's intervention is unconstitutional.

The Attorney General takes exception to this holding. He argues that the Commission "afforded no deference to [his] legitimate decision to intervene in an otherwise one-sided hearing the result of which may have a significant impact on the State and the People of Michigan." (Application

[6] The Attorney General does not seek intervention because the proceedings may have an impact on other MERC decisions. The Commission's decision here would have no precedential effect beyond the University of Michigan.

at 21). But, the Attorney General's discretion to intervene is not unlimited and is properly "restrained where such intervention is clearly inimical to the public interest." *Id.* (*citing People v Unger*, 278 Mich App 210, 260-61 (2008)). The Attorney General incorrectly asserts that he has the mandate to advocate for the University (or its administration or for members of the public affected by University decisions), because the public has an interest in the University. Generally, the Attorney General's advocacy for the University – and the public's interest in the University – is important to the State. In fact, the University often invites precisely that relationship. *See e.g. Sprik v Regents of Univ of Michigan*, 43 Mich App 178, 184; 204 NW2d 62 (1972), *aff'd* 390 Mich 84 (1973) (Finding that since claims against the Regents are claims against the state, the Attorney General had the power to appoint a special assistant to represent the Regents.); *and see McCahan v Brennan*, 291 Mich App 430, 431; 804 NW2d 906 (2011)(In which a Special Assistant Attorney General represented the University of Michigan Regents.) But, where there is a conflict between the Regents and the Attorney General relating to a University matter – or a matter that only affects the public because it first affects the University – the public has determined that the Regents represent their interest. The Attorney General simply does not have discretion to intervene to advocate for a position contrary to the University's. His intervention would thus be inimical to the Constitution and the public interest.

The Attorney General argues that "[w]hile it is true that the Attorney General has expressed concern about the negative impact GSRA unionization may have on the University and the State as a whole, the Attorney General's Motion and Brief in Support make it clear that the Attorney General's intervention is to ensure a full, complete, and balanced presentation of the facts and arguments." (Application at 24). In fact, the Attorney General argued that: "[t]his case has the potential to significantly damage the University of Michigan's reputation as a nationally recognized research

institution, to the detriment of all Michigan citizens ... and that the Commission should decline the invitation to compromise that success and reconsider the same issue it had already decided in 1981." (Motion to Intervene at 1)(Ex. 3). The Attorney General's argument for the necessity of an adversarial process – ensuring a "full, complete, and balanced presentation" – was premised on his contention that the absence of such a process would harm the public by leading to GSRA unionization. The Commission noted that it was "clearly cognizant of the University's national standing and reputation as a major research institution. However, [the alleged impact of GSRA unionization] is not a factor that we may consider in determining whether the RA's are public employees within the meaning of PERA." (Dec 16 Order at 4)(Ex. 6). The Commission was faced with a single factual determination, not a policy decision: whether GSRAs are employees under PERA. The Legislature has determined the public policy – if GSRAs are employees under PERA, they have the right to seek union representation. If they are not employees, they do not have that right. Thus, the Commission was correct when it held "we cannot consider speculation as to the impact on the University by the RAs (sic) potential exercise of a statutory right; it is merely our responsibility to determine whether the RA's (sic) have the right to organize under PERA. We find opposition to the exercise of a statutory right is inimical to the public interest." (Id.). Arguments against unionization itself or its impact on the University and the public have no place in a Commission proceeding – those arguments are for the Legislature.[7]

[7] Because he does not represent a valid State interest, the Attorney General cannot intervene. He does not represent a party in interest. He does not represent the Commission, the University or the union. He does not represent University administrators, faculty members, or graduate students. Even if he did, those individuals do not have standing to interfere in a representation proceeding. Management or employees cannot intervene. Individuals in a valid bargaining unit also do not have that right – if they are opposed to unionization, they have the right to vote.

B. Intervention as an "Adversary" is Unnecessary Because the Attorney General is Participating in the Factfinding Process

The Attorney General argues that he must intervene to ensure the best interests of the public are served because the "interests and rights of the consumers and the people of the state, while not direct parties thereto, should always be considered, respected and protected ...." in Commission proceedings. Setting aside the fact that the best interests of the people are being considered by the Commission, the Attorney General mistakenly cites MCL 423.1 to suggest that representation proceedings must consider the "interests and rights of the consumers and the people of the state." Actually, MCL 423.1 states that the Commission must consider the people and consumers of Michigan regarding the "prevention or prompt settlement of labor disputes." The provision cited is not applicable to a representation proceeding under PERA, where the Commission's only goal is to make a factual determination, the legal effects of which have already been decided by the People.

Along those same lines, the Attorney General argues that his intervention is necessary to ensure that the proceedings are adequately "adversarial." But, this misconstrues the very nature of the proceedings. As the Commission has made clear, the proceedings are not in the manner of a contested case – they are representation proceedings. The review "is an investigatory and not an adversarial proceeding." (December 16 Order at 4)(Ex. 6) (citing *University of Michigan,* 1970 MERC Lab Op 754, 759 (1970) and MCL 423.212.)[8] Since this is not a contested case, which, for purposes of the APA, "is a proceeding in which a determination of the legal rights, duties, or

[8] The Court of Appeals has resolved the theoretical tension between Section 12, of PERA which gives the Commission discretion not to hold an evidentiary hearing precedent to issuing a finding on a representation issue and the APA's requirement of a hearing precedent to an administrative agency decision on the merits of an issue. Section 12, of PERA, "which specifically grants the MERC discretion to hold a hearing on a unit clarification petition should be regarded as an exception to the general requirement that administrative agencies generally hold a hearing prior to rendering a decision in a contested matter." *In re Wayne Co*, No. 190660, 1997 WL 33352796 (Mich Ct App April 11, 1997) (citations omitted).

privilege of a named party is required by law to be made after *an opportunity for an evidentiary hearing*,"[9] the proceedings are "not subject to the APA requirement that a decision be made only after the parties have been afforded an opportunity for an evidentiary hearing." *See e.g. In re Wayne Co*, 1997 WL 33352796 (finding that a petition for unit clarification is not a contested case for purposes of the APA).[10] Because representation proceedings are "investigatory and not contested or adversary proceedings"[11] the Attorney General's argument that he needs to intervene to serve as an "adversary" in the University's stead, is without merit. No "adversary" is needed in a representation proceeding.

PERA compels the Commission to determine whether GSRAs are, in fact, employees, within the meaning of the Act. Since the Commission has determined that a representation proceeding is warranted, its determination is to be driven by the facts and the law, not by policy perspectives and not by the preferences of the graduate students, the Deans or the faculty. The Commission has stated that the only issue under review is whether there has been a "material change in circumstances" since the 1981 ruling in Regents of the University of Michigan, 1981 MERC Lab Op 777, which would warrant a determination that some or all GSRAs are employees under PERA. (December 16 Order)(Ex. 6). Have the facts of the relationship between the University and the GSRAs changed? Has the law changed? Has the benefit to the University from the work changed? The Attorney General has not suggested that he is exclusively privy to facts which would answer these questions. All relevant facts are available to the Union, the University and the Administrative Law Judge,

---

[9] *In re Wayne Co*, No. 190660, 1997 WL 33352796 (Mich Ct App April 11, 1997).

[10] Section 12 of PERA "gives the MERC the discretion to determine whether to hold a hearing regarding a representation question, as do the administrative rules." *Sault Ste Marie Area Pub Sch v Michigan Ed Ass'n*, 213 Mich App at 182.

[11] *Sault Ste Marie Area Pub Sch v Michigan Ed Ass'n*, 213 Mich App at 181.

irrespective of the Attorney General's participation. The Attorney General has not demonstrated that he would add anything to the Commission's factfinding process.

In any event, although the Commission did not allow the Attorney General to intervene as an adversary, the Commission ensured that the factfinding process would be robust. The Commission did not limit the Administrative Law Judge to the record to be presented by the Union and the University:

> The administrative law judge may call any witnesses and receive any evidence, in addition to testimony and other evidence offered by the Petitioner and the University, as may be probative and relevant, and may, by subpoena, compel the production of evidence.

(December 16 Order at 7)(Ex. 6). In keeping with this instruction, Administrative Law Judge Julia C. Stern entered a Pre-Hearing Order which addressed the proofs to be submitted by the Petitioner and by the University, but which also reserved time to "allow [ALJ Stern] to subpoena additional witnesses or documents" if she deems further proofs to be necessary. (Pre-Hearing Order at 1-2). Judge Stern specifically advised the Attorney General that she will:

> solicit the Attorney General's input, after the parties have presented their evidence at the hearing, as to whether there is other evidence which might be of assistance to the Commission in making its decision.

(ALJ Stern Correspondence to Assistant Attorney General Kevin J. Cox, December 27, 2011) (Ex. 8). On the first day of the hearings, ALJ Stern made absolutely clear that the Attorney General would be able to provide the evidence he argues is missing from the proceedings. She stated clearly on the record:

> After the parties have completed putting in their evidence, which I anticipate will be no later than the end of next Monday, these entities will have three or four days to provide me with suggestions for additional documents they believe that the Commission should consider in making their decision or additional witnesses that should be called, along with an explanation of why this evidence is relevant in light of the testimony presented by the parties during this hearing.

> If I decide that this evidence is relevant and not cumulative, I will reopen the hearing, probably sometime in the week of February 21st, give the parties an opportunity to comment on the proposed new evidence. And if I conclude that the testimony of additional witnesses may be relevant, subpoena and question the additional witnesses myself.

Exhibit 9.

Thus, even though the Attorney General may not participate in the proceedings as an adversary – there are no "adversaries" in a factfinding investigation - he has been invited to advise the Commission of evidence he believes should be considered in the factfinding process.

CONCLUSION AND RELIEF REQUESTED

The University of Michigan respectfully requests that this Court summarily deny the Michigan Attorney General's Application for Leave to Appeal.

If this Court were to grant the Application, the University of Michigan respectfully requests that the Court exercise its power to enter an Order AFFIRMING the Court of Appeals and AFFIRMING the Michigan Employment Relations Commission's denial of the Attorney General's Motion to Intervene.

Respectfully submitted,

FINK + ASSOCIATES LAW

By: _____

DAVID H. FINK (P28235)
DARRYL BRESSACK (P67820)
Attorneys for University of Michigan
100 West Long Lake Rd.; Suite 111
Bloomfield Hills, MI 48304
(248) 971-2500
dfink@finkandassociates.com

Suellyn Scarnecchia (P33105)
Christine M. Gerdes (P67649)
Attorneys for University of Michigan
503 Thompson Street
Ann Arbor, Michigan 48109

PROOF OF SERVICE

I hereby certify that on February 3, 2012, I served the foregoing paper upon Assistant Attorneys General Kevin J. Cox, and Dan V. Artaev, via electronic mail. They have both consented to accept service of the foregoing paper via such means.

I declare under the penalty of perjury that the statements made above are true to the best of my knowledge, information, and belief.

Dated: February 3, 2012

Darryl Bressack

INDEX OF EXHIBITS

Exhibit 1: Petition for Representation Proceedings

Exhibit 2: Decision and Order Dismissing Petition and Denying Motion to Intervene, dated September 14, 2011

Exhibit 3: Michigan Attorney General's Motion to Intervene, dated November 30, 2011

Exhibit 4: Petitioner's Brief Opposing Motion to Intervene, dated December 5, 2011

Exhibit 5: Public Employer University of Michigan's Brief Opposing Intervention by the Attorney General, dated December 9, 2011

Exhibit 6: Decision and Order on Motions to Intervene and Motion for Reconsideration of Order Dismissing Petition, dated December 16, 2011

Exhibit 7: Pre-Hearing Order, dated January 6, 2012

Exhibit 8: Letter from Judge Stern to Assistant Attorney General Kevin J. Cox, dated December 27, 2011

Exhibit 9: Volume One Transcript [Rough] of Proceedings Before Administrative Law Judge Julia C. Stern, 7:31 – 8:31

EXHIBIT 1

NOTICE OF HEARING

PLEASE TAKE NOTICE that a public hearing will be conducted by the Michigan Employment Relations Commission in the above matter **if a consent agreement is not reached.** A copy of the petition has been previously served on the parties. The hearing will be **scheduled by the State Office of Administrative Hearings and Rules within approximately 30-60 days from submission to SOAHR.**

The employer, labor organization or person representing or claiming to represent any of the employees of the employer in the collective bargaining unit described in the petition may appear in person or by representative and give testimony and evidence in support of its claims.

All parties are required to bring with them for examination any contract, correspondence, and documents between the labor organization or person representing any of the employees of the employer relating to the representation of the employer's employees.

The employer is required to have for examination a list of employees, arranged alphabetically, together with their classifications in the proposed collective bargaining unit taken from the most recent payroll.

STATE OF MICHIGAN
RICK SNYDER, GOVERNOR

DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
STEVEN H. HILFINGER, DIRECTOR

EMPLOYMENT RELATIONS COMMISSION
Cadillac Place, Suite 2-750
3026 W. Grand Boulevard, PO Box 02988
Detroit, Michigan 48202-2988
(313) 456-3510
FAX (313) 456-3511

Case No. **R11 D-034** **05/02/2011**
Date Filed **04/27/2011**
County **Washtenaw**

University of Michigan
Academic Human Resources
1009 Greene Street
Ann Arbor, MI 48109-1432

Graduate Employees Organization/AFT
ATTN: Mr. Jon Curtiss
1689 Plymouth Road
Ann Arbor, MI 48105-1825

University of Michigan
Attn: Mr. David Masson, Attorney
503 Thompson Street #5010
Ann Arbor, MI 48109

To All Parties:

Attached hereto is a copy of a petition that has been filed with the Michigan Employment Relations Commission by the petitioner requesting that it be certified as the exclusive bargaining representative for the employees designated in the bargaining unit described in the petition. The parties are hereby notified that a conference concerning this matter has been scheduled as follows:

DATE: **May 13, 2011** **TIME: 11:00 AM**
LOCATION: **Telephone conference call to be initiated by the undersigned (Please notify this office of contact persons and phone numbers prior to date of call.)**

The employer is requested to furnish the following information by return mail:

1. The names and addresses of any other interested labor organizations or other interested parties who should be apprised of this proceeding.
2. Copies of any presently existing or recently expired contracts covering the employees involved in the petition as well as any correspondence or other documents which may have a bearing on the representation question.
3. An alphabetical list of employees and their classification as of the filing date of the enclosed petition. This list is for the confidential use of this office in making an administrative check of the petitioner's and/or intervenor's showing of interest to sustain the petition. In the absence of this list, we may proceed to make a determination solely on the basis of the information supplied by the petitioner.

A hearing has been scheduled contingent upon the necessary showing of interest. (Notice Enclosed) However, it is possible to resolve the representation question without a formal hearing by means of an agreement for consent election.

Very truly yours,

Denise Hinneburg

Denise Hinneburg
Election Officer
313-456-3524

Authority: PA 380 of 1965, as amended

PETITION FOR REPRESENTATION PROCEEDINGS

MICHIGAN DEPARTMENT OF ENERGY, LABOR & ECONOMIC GROWTH
EMPLOYMENT RELATIONS COMMISSION (MERC) LABOR RELATIONS DIVISION

Completion: Mandatory
Penalty: Case will not be opened if this form is not used.

INSTRUCTIONS: Submit an **original** and **4 copies** of this Petition to: Employment Relations Commission, Cadillac Place, 3026 W. Grand Boulevard, Suite 2-750, PO Box 02988 Detroit MI 48202-2988. (Use additional sheets if necessary.)

DO NOT WRITE IN THIS SPACE

Case Number:	Date Filed:
RII D-034	4/27/11

1. Purpose of this Petition: (Check only the one box which is appropriate.)

A. ☒ **RC — CERTIFICATION OF REPRESENTATIVE** — A majority of the employees in the unit wish to be represented for purposes of collective bargaining by Petitioner, and Petitioner desires to be certified as representative of the employees for purposes of collective bargaining. (An original showing of interest by 30% or more of the employees in the unit must accompany this form or be submitted within 48 hours of filing.)

B. ☐ **RM — REPRESENTATION (EMPLOYER)** — One or more individuals or labor organizations have presented a claim to Petitioner to be recognized as the representative of employees of Petitioner.

C. ☐ **RD — DECERTIFICATION** — A majority of the employees in the unit claim that the certified or currently recognized bargaining representative is no longer their representative. (An original showing of interest by 30% or more of the employees in the unit must accompany this form or be submitted within 48 hours of filing.)

D. ☐ **SD — SELF-DETERMINATION** — Multiple units represented by the same labor organization and same employer seek to be represented in one unit. (No showing of interest required.)

E. ☐ **UC — UNIT CLARIFICATION** — A labor organization is currently recognized by the employer, but Petitioner seeks clarification of placement of certain positions. (A petition for unit clarification does not raise a question concerning representation and cannot be used where an RC or RM petition is appropriate.)

2. Name and Address of Employer: University of Michigan / Academic Human Resources /1009 Greene St / Ann Arbor MI 48109-1432

3. Type of Employer: (Check appropriate box:) ☒ Governmental ☐ Private Telephone No. (734) 763-8938

4. Description of Claimed Bargaining Unit Involved: (Attach additional sheets if necessary.) For UC petition, describe current bargaining unit and attach specific description of proposed clarification.

INCLUDED: [See attached.]

EXCLUDED:

5. Approximate Number of Employees in Unit: 2,200

6. Date of Demand for Recognition: PETITION to SERVE

Date Employer Declined Recognition:

7. **Name** and **Address** of any Other Labor Organizations or Parties that May Claim an Interest in Representing the Employees Described in Item 4 Above (If NONE, so state):

Date of Recognition or Certification:

Date of Claim: (Required only if RM Petition)

RECEIVED
2011 APR 27 PM 3 12
STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMM.
DETROIT OFFICE

8. Date of Expiration of Current Contract, if any: Month: Day: Year:

I HAVE READ THE ABOVE PETITION AND IT IS TRUE TO THE BEST OF MY KNOWLEDGE AND BELIEF.

Petitioner and Affiliation: Graduate Employees Organization / AFT

Title: Organizer

Name of Representative or Person Filing Petition

Signature: [signature] Printed: Jon Curtiss

Email: jcurtiss@aftmichigan.org

Telephone No.: (734) 358-7004

Address: 1689 Plymouth Rd / Ann Arbor, MI 48105-1825

Fax No.: (313) 393-2236

The Department of Energy, Labor & Economic Growth will not discriminate against any individual or group because of race, sex, religion, age, national origin, color, marital status, disability or political beliefs. If you need assistance with reading, writing, hearing, etc., under the Americans with Disabilities Act, you may make your needs known to this agency.

BER_____ (1/11)

Description of employees to be accreted to existing GEO bargaining unit:

Included:

Graduate Student Research Assistants.

A Graduate Student Research Assistant (GSRA) is a graduate student who is employed to conduct or assist in the conducting of research of a scholarly nature which benefits the University, a faculty member, academic staff supervisor, granting agency, or any other agent or unit of the University. Duties of GSRAs may include, but are not limited to, the gathering and analyses of data, the development of theoretical analyses and models, the production or publication of scholarly journals and research reports, and the maintenance of laboratories and equipment. Research conducted by such an Employee may be academically relevant to his or her academic program and may also benefit the Employee and be used in his/her dissertation or other academic work.

Excluded:

1. Graduate students who are compensated to conduct or assist in the conducting of research of a scholarly nature which meets both of the following conditions:
    a. does not benefit the University, a faculty member, academic staff supervisor, granting agency, or any other agent or unit of the University; and
    b. is used in his/her dissertation or other personal academic product.
2. Supervisors
3. Confidential employees
4. All other employees.

EXHIBIT 2

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,
Petitioner-Labor Organization,

-and-

MELINDA DAY,
Intervenor.
_____/

APPEARANCES:

Christine M. Gerdes, Associate General Counsel, for the Public Employer

Mark H. Cousens, for the Labor Organization

Mackinac Center Legal Foundation, by Patrick J. Wright, for the Intervenor

DECISION AND ORDER DISMISSING PETITION AND DENYING MOTION TO INTERVENE

Pursuant to Sections 12 and 13 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.212 and MCL 423.213, this matter came before the Michigan Employment Relations Commission on a petition for a representation election filed by the Graduate Employees Organization/AFT (GEO or Union). Subsequently, a Motion to Intervene and for Summary Disposition was filed by Melinda Day. Based on the pleadings and briefs filed by the parties on or before August 8, 2011, the Commission finds as follows:

Facts:

On April 27, 2011, the GEO filed a Petition for Representation Proceedings seeking an election among graduate student research assistants (RAs). The GEO seeks to accrete RAs to its existing bargaining unit of graduate teaching assistants (TAs) and

graduate student staff assistants (SAs) at the University of Michigan (U of M or Employer). The petition describes the RAs that Petitioner proposes to include in, and those it intends to exclude from, the bargaining unit as follows:

> A graduate student research assistant (GSRA) is a graduate student who is employed to conduct or assist in the conducting of research of a scholarly nature which benefits the University, a faculty member, academic staff supervisor, granting agency, or any other agent or unit of the University. Duties of GSRAs may include, but are not limited to, the gathering and analyses of data, the development of theoretical analyses and models, the production or publication of scholarly journals and research reports, and the maintenance of laboratories and equipment. Research conducted by such an employee may be academically relevant to his or her academic program and may also benefit the employee and be used in his/her dissertation or other academic work.
>
> Excluded are:
> 1. Graduate students who are compensated to conduct or assist in the conducting of research of a scholarly nature which meets both of the following conditions:
>   a. does not benefit the University, a faculty member, academic staff supervisor, granting agency, or any other agent or unit of the university; and
>   b. is used in his/her dissertation or other personal academic product.
> 2. Supervisors
> 3. Confidential employees
> 4. All other employees.

On May 19, 2011, the University of Michigan's Board of Regents, by a vote of six to two, adopted a resolution supporting the right of RAs to determine for themselves whether to organize into a union. The resolution also stated that the Regents recognized the RAs as "employees." The Employer and the Union have presented a Consent Election Agreement to us for approval in order that the parties may proceed with an election and possible certification of the GEO as the RAs' representative in bargaining under PERA.

Melinda Day is a member of the proposed bargaining unit and seeks to intervene in this proceeding under Rule 145(3) of the General Rules of the Michigan Employment Relations Commission, 2002 AACS, R 423.145(3). She also requests that the representation petition be dismissed for lack of subject matter jurisdiction. The Union filed a motion in opposition to Day's motion to intervene on August 3, 2011.[1]

[1] On the same date, the Employer and the Union executed the Consent Election Agreement, which further defines the proposed bargaining unit and clarifies that it would be a separate unit of RAs rather than an accretion to the existing unit represented by the GEO.

Discussion and Conclusions of Law:

The Petition for Representation Proceedings

In a 1981 unfair labor practice case involving these same parties, the Commission determined the employment status of approximately 2,000 graduate students who had appointments as graduate student assistants. There, the Commission reviewed the nature of the employment of each of the three types of graduate student assistants: the TAs, who teach certain undergraduate courses; the SAs, who counsel undergraduates, advise them on course selections, and provide other professional and quasi-professional support services; and the RAs, who perform research under the supervision of a faculty member who is the primary researcher of a research grant. The Commission majority concluded that the TAs and SAs were employees under PERA, but the RAs were not. *Regents of the University of Michigan*, 1981 MERC Lab Op 777. Their conclusion relied, in part, on the decision in *Regents of the Univ of Michigan and Univ of Michigan Interns-Residents Assn*, 1971 MERC Lab Op 270, in which the Commission explained that the key to determining whether medical residents were employees was whether the "work is being performed in a 'master-servant' relationship or whether the person performing the work does so as his own 'master.'" In the 1981 case, the Commission majority explained at 1981 MERC Lab Op 785 -786:

> TAs 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 performance; and, they are compensated based on the amount of work they provide. . . . Likewise, SAs perform regular duties of a type which benefit the University.
>
> . . . [T]he relationship between the 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 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 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 substantially more like the student in the classroom . . . . They are working for themselves.

In the instant proceeding, a petition was filed seeking an election to determine whether RAs should be accreted to the unit from which they were excluded in 1981. In support of its petition, the GEO has submitted a copy of the resolution by which the U of M Regents recognize RAs as "employees." Subsequently, the parties signed a Consent Election Agreement that embodies that recognition and seeks our approval of the formation of a separate unit of RAs. 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.

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. Just as independent contractor status cannot be conferred upon an employee by agreement between the employee and an employer, employee status cannot be conferred by agreement upon one who is not an employee under the law. *Cf. Detroit Judicial Council*, 2000 MERC Lab Op 7; 13 MPER 31021 (2000) (no exceptions). We cannot find that RAs are employees based solely upon an agreement between the parties. Absent a showing of a substantial and material change of circumstance, we are bound by our previous decision.

Because Commission jurisdiction cannot be conferred by an agreement between the parties, a certification based upon the Petition that is before us would be vulnerable if challenged in the future. Were we to hold an election and certify the accretion of RAs to the existing unit of TAs and SAs or a separate unit of RAs, the certification would be subject to challenge in the event of a change of sentiment by the Employer as a result of change in the composition of the Employer's governing body or because of conflict between the Employer and the Union. If an unfair labor practice were charged after the parties, believing themselves to be in a legitimate collective bargaining relationship, had embarked on a series of transactions, questions about the Commission's jurisdiction over this matter could call into question the legitimacy of those transactions. On the record before us, we are not willing to allow the parties to proceed at their peril.

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. However, if the parties agree that we should do so, we are willing to conduct an election as a service to the parties, and tabulate the results of that election without certifying representative status under PERA. The parties also remain free to utilize the services of the American Arbitration Association, or any other agency of their choosing, to conduct such an election.

The Motion to Intervene

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.

ORDER

The petition for representation election filed by the Graduate Employees Organization/AFT, in this matter is hereby dismissed. The Motion to Intervene filed by Melinda Day is denied.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Edward D. Callaghan, Commission Chair

Nino E. Green, Commission Member

Christine A. Derdarian, Commission Member

Dated: SEP 14 2011

EXHIBIT 3

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 MOTION TO INTERVENE

Christine M. Gerdes (P67649)
Suellyn Scarnecchia (P33105)
Attorneys for the University of Michigan
503 Thompson Street
Ann Arbor, MI 48109
(734) 647-1392

Mark H. Cousens (P12273)
Attorney for GEO, AFT, AFL-CIO
2621 Evergreen Road, Suite 110
Southfield, MI 48076
(248) 355-2150

Bill Schuette
Attorney General – Intervener

Richard A. Bandstra (P31928)
Chief Legal Counsel

Kevin J. Cox (P36925)
Dan V. Artaev (P74495)
Assistant Attorneys General
Michigan Department of Attorney General
3030 West Grand Boulevard
Detroit, MI 48202
(313) 456-0080

Bill Schuette, in his official capacity as Attorney General of Michigan, seeks to intervene in this case under MCL 14.101 and MCL 14.28 because, in his judgment, it involves matters of significant public interest, and in support states the following:

1. On December 13, 2011, the Commission is expected to vote on whether to direct an Administrative Law Judge (ALJ) to conduct a factual inquiry into whether Graduate Student Research Assistants (GSRAs) at the University of Michigan are "employees" of the University.
2. This case has the potential to significantly damage the University of Michigan's reputation as a nationally recognized research institution, to the detriment of all Michigan citizens who support and value the University as one of our country's elite leading institutions of higher education.
3. Considering the significant impact of the University on the entire State of Michigan as a center of scholarship that creates jobs, generates substantial tax revenue, and attracts millions of dollars in research grants, any proceeding that may negatively affect the University's competitiveness is a matter of public interest.
4. The University has been incredibly successful as a research institution for the past 30 years, and the Commission should decline the invitation to compromise that success and reconsider the same issue it had already decided in 1981. Because this is a matter that will impact important

state interests, the Attorney General requests to intervene and oppose reconsideration at the December 13, 2011 Commission meeting.

5. In the alternative, if the Commission grants the motion for reconsideration and orders an ALJ to conduct fact finding, the Attorney General requests to intervene to ensure all of the facts are presented through the benefit of the full adversarial process.

6. In 1981, the Commission addressed the same issue of whether GSRAs are employees subject to unionization, and after factually intensive inquiry by the ALJ, the Commission adopted his recommended decision that the GSRAs were students and not employees of the University. *Regents of the University of Michigan*, 1981 MERC Lab Op 777.

7. In April 2011, the Graduate Employees' Organization (Organization) filed a petition with the Commission seeking certification as the exclusive representative for the GSRAs. The University's Board of Regents passed a resolution recognizing the GSRAs to be employees. The Commission issued an opinion on September 14, 2011 that rejected the petition, correctly determining that the logic and result of the 1981 decision still applied, there having been no material change in the facts and circumstances surrounding the GSRAs' work.

8. The Organization sought reconsideration, arguing that the Commission needed to consider all of the facts. The University's response, constrained by the Regents' majority resolution, did not actively oppose

it, but detailed that the facts today appear to be virtually identical to those in 1981. The Commission is expected to vote on whether to grant the motion and if it does, it will order an ALJ to conduct a factual inquiry into whether the GSRAs are employees.

9. At least nineteen current and former deans and faculty of the University have expressed concern that potential unionization will compromise the integrity of the mentor-mentee relationship essential to a successful and prestigious doctoral program. The imposition of a third party into the educational process could make the University less attractive as a research institution and compromise its ability to attract the top students, top researchers, and significant private and public research funding. (Letter of Deans to Provost, June 24, 2011, *available at http://www.mackinac.org/archives/2011/deansletter.pdf.*)

10. The record shows that there is a significant number of GSRAs opposed to being classified as employees subject to unionization.

11. Neither the deans and faculty, nor the GSRAs opposed to classification as employees of the University subject to unionization will be represented before the Commission or the ALJ or otherwise be able to present the facts. Whether or not the Commission grants the motion for reconsideration or the ALJ overturns the Commission's 1981 decision, this matter has serious implications for the University as a major research institution, and consequentially for all of Michigan's citizens.

12. Absent the intervention of the Attorney General on behalf of the people of Michigan, the Commission and the ALJ will hear only one position – that the GSRAs are employees of the University. Unlike in 1981, the University is constrained from opposing this position because of the Regents' majority vote. Both sides being in agreement on the pivotal issue, there would be no adversarial process to develop the record whatsoever at any hearing.

13. The University of Michigan is a major research institution, ranking second in the nation in terms of total research expenditures. (Response to Petitioner's Motion for Reconsideration, University of Michigan, Oct 17, 2011, p 4.) External funding supports a large majority of GSRA studies – with total research funding exceeding $1.14 billion in fiscal year 2010. (Office of the Vice President for Research, Quick Facts, *http://research.umich.edu/quick-facts*.)

14. The University of Michigan is an essential component of the University Research Corridor – a coalition between the University of Michigan, Michigan State University, and Wayne State University that has generated an "economic impact" of $14.8 billion in 2009 for the State of Michigan. (2010 Empowering Michigan Report, *available at http://urcmich.org/economic/2010/2010econimpact-report.pdf*.) Even as state funding support dropped, Michigan's research universities remained the largest cluster in the U.S. in terms of enrollment, and they

ranked third in terms of high-tech degrees. (*Id.*) The research corridor has continued to provide a significant fiscal impact on Michigan – for example, over 550,000 research alumni live in Michigan, collectively earning about $26 billion; generating over $400 million in state tax revenue for 2009. (*Id.*) Any proceeding that may affect the University's ability to continue to attract research funding and play an integral role as a member of the University Research Corridor implicates a number of state interests.

15. The excellence of the University, in so many ways, will be seriously jeopardized if its status as a research institution, with the funding that status brings, is undermined.

16. Attorney General Bill Schuette is the chief law enforcement officer for the State of Michigan and has a duty to ensure that the laws of the state are followed. Const 1963, art 5, §§ 3, 21.

17. When the Attorney General determines, in his own judgment, that the interests of the state require intervention, he may "intervene in and appear for the people of this state in any other court or tribunal, in any cause or matter, civil or criminal." MCL 14.28; *see also* MCL 14.101.

18. Courts give great deference to the Attorney General's unconditional statutory right to intervene in matters of state interest. *Kelley v Gremore*, 8 Mich App 56, 59; 153 NW2d 377 (1967).

19. In absence of a showing that the Attorney General's intervention is clearly contrary to the public interest, the Attorney General should be permitted to intervene. *Id.*; *VanStock v Township of Bangor*, 61 Mich App 289, 299; 232 NW2d 387 (1975).

20. The Attorney General may intervene in administrative proceedings at any stage. *Kelley v Thayer*, 65 Mich App 88, 92-93; 237 NW2d 196 (1976).

21. The Attorney General has determined, in his judgment, that intervention in this matter is necessary to protect significant state interests. These proceedings will directly affect the State and a number of citizens who are students, professors, or are otherwise affiliated with the University of Michigan. The State, and correspondingly the taxpayers of this State, expend a significant amount of money for University funding, and more specifically, the funding of research at the University. The results of this proceeding may have a significant impact on the University's ability to compete as a major research university and thus may affect both the economy of the State, and the general well-being of all of the citizens and residents of the State.

22. Given the absence of adversity on the issue of whether GSRAs are employees between the Organization and the University – the only two parties to this proceeding – the GSRA students and faculty opposing

GSRA employee status will not be able to present facts and cross-examine witnesses.

23. Attorney General intervention is proper when significant matters of state interest and public policy are involved, and when a proceeding may affect unrepresented parties. *Syrkowski v Appleyard*, 122 Mich App 506, 513; 333 NW2d 90 (1983), *rev'd on other grounds* 420 Mich 367; 362 NW2d 211 (1985). That is exactly the case here.

24. As intervener, the Attorney General will ensure all the relevant facts and arguments are presented to the Commission and the ALJ in the absence of true adversity between the Organization and the University. The position that GSRAs are not employees of the University is consistent with the Commission's findings in 1981, and is still meritorious in 2011. Considering the significance of the GSRA employment issue to the taxpayer-funded University, the State, and the People of the State of Michigan, it is clear that the Attorney General's decision to intervene cannot be inimical to the public interest.

25. The Attorney General has properly determined that these proceedings involve matters of great state interest and that intervention is in the best interest of all of Michigan's citizens. The Attorney General's intervention will assure a balanced presentation of all of the necessary facts that the Commission and the ALJ will need to make a well-informed decision on the important issue under consideration. The

Commission should defer to the Attorney General's judgment and allow intervention.

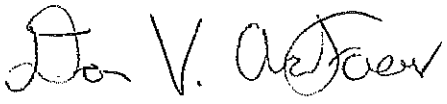
For these reasons, the Attorney General respectfully requests the Commission grant his motion to intervene, enter a notice of intervention into the official record of the captioned case, and afford him full party status in these proceedings for all purposes.

Under Commission Rule 161(4), 2002 AACS, R 423.161(4), the Attorney General respectfully requests oral argument.

Respectfully submitted,

Bill Schuette
Attorney General

Richard A. Bandstra (P31928)
Chief Legal Counsel



Kevin J. Cox (P36925)
Dan V. Artaev (P74495)
Assistant Attorneys General

Michigan Dep't of Attorney General
3030 West Grand Boulevard
Detroit, MI 48202
(313) 456-0080

Dated: November 30, 2011

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 BRIEF IN SUPPORT OF MOTION TO INTERVENE

Christine M. Gerdes (P67649)
Suellyn Scarnecchia (P33105)
Attorneys for the University of Michigan
503 Thompson Street
Ann Arbor, MI 48109
(734) 647-1392

Mark H. Cousens (P12273)
Attorney for GEO, AFT, AFL-CIO
2621 Evergreen Road, Suite 110
Southfield, MI 48076
(248) 355-2150

Bill Schuette
Attorney General – Intervener

Richard A. Bandstra (P31928)
Chief Legal Counsel

Kevin J. Cox (P36925)
Dan V. Artaev (P74495)
Assistant Attorneys General
Michigan Department of Attorney General
3030 West Grand Boulevard
Detroit, MI 48202
(313) 456-0080

INTRODUCTION

Bill Schuette, in his official capacity as Attorney General of Michigan, seeks to intervene in this case because, in his judgment, it involves matters of significant public interest. Specifically, this case has the potential to significantly damage the University of Michigan's reputation as a nationally recognized research institution, to the detriment of all Michigan citizens who support and value the University as one of our country's elite leading institutions of higher education. Considering the significant impact of the University on the entire State of Michigan as a center of scholarship that creates jobs, generates substantial tax revenue, and attracts millions of dollars in research grants, any proceeding that may negatively affect the University's competitiveness is certainly a matter of the utmost public interest. The University has been incredibly successful as a research institution for the past 30 years, and the Commission should decline the invitation to compromise that success and reconsider the same issue it had already decided in 1981. No material facts have changed that warrant reconsideration. Under the law applicable here, this motion to intervene should be granted, to first permit the Attorney General to argue against reconsideration at the December 13, 2011 meeting, and if the Commission orders fact finding, to ensure all of the facts are presented at that proceeding.

SUMMARY OF ARGUMENT

On December 13, 2011, the Commission is expected to vote on whether to direct an Administrative Law Judge (ALJ) to conduct a factual inquiry into whether Graduate Student Research Assistants (GSRAs) at the University of Michigan are

"employees" of the University. The Graduate Employees' Organization (Organization) seeks approval to be certified as the exclusive representative of the GSRAs and a majority of the University's Regents passed a resolution recognizing the GSRAs as employees, thus implicitly endorsing the Organization's petition. In the absence of an employment relationship, the Commission lacks jurisdiction. Despite this agreement between the Organization and the University employer, the Commission initially rejected the petition. It determined that the logic and result of the 1981 decision still applied, there having been no material change in the facts and circumstances surrounding the GSRAs' work. Noting that the decision on whether the GSRAs are employees is a legal one, not to be made by an agreement of the parties, the Commission ruled that GSRAs are not employees within the Commission's jurisdiction.

The Organization sought reconsideration, arguing that the Commission failed to consider all of the facts. The University, understandably constrained by the Regents' majority resolution, did not directly oppose the motion. Instead, the University's response detailed that the facts today appear to be virtually identical to those that were the basis for the Commission's 1981 decision. At its November 2011 meeting, the Commission decided to vote in December on whether to grant the motion and order the ALJ to determine whether the GSRAs are now employees of the University and, thus, whether the Commission has jurisdiction to certify the Organization as the exclusive bargaining representative.

The record shows that there is a significant number of GSRAs opposed to being classified as employees subject to unionization. Additionally, 19 current and former deans of the University publicly expressed significant concern with the Organization's unionization efforts, arguing that if GSRAs are employees, and vote to unionize, this would severely compromise the University's ability to attract top students and faculty and, consequently, place at risk significant private and public research funding. Neither the GSRAs opposed to employment status, nor the dissenting deans and faculty are represented in this proceeding.

The Attorney General opposes the Organization's motion for reconsideration. The deans, faculty, and the dissenting GSRAs, all have persuasively articulated why reclassifying GSRAs as employees subject to unionization could impede the University's competitiveness as an elite research institution. For the past 30 years, GSRAs have been considered students, and without a third party intervention into the mentor-mentee relationship, the University, along with its graduate programs, has thrived. There has been no change in material facts that would compel revisiting the 1981 decision and risk substantially harming the University's ability to attract the best and the brightest graduate students and faculty in the nation. The Commission correctly decided on September 14 that it was without jurisdiction to grant the Organization's petition for election certification. The Attorney General urges the Commission to make the right decision once again and deny the Organization's motion for reconsideration, and to allow intervention to present this position to the Commission at its December 13 meeting.

If the Commission grants the Organization's motion, absent intervention of the Attorney General on behalf of the people of Michigan, the ALJ will hear only one position – that the GSRAs are employees of the University. The University is constrained from opposing that position because of the Regents' majority vote. Both sides being in agreement on the pivotal issue, there would be no adversarial process whatsoever. That would severely compromise the ALJ's ability to make a fair, well-informed and unbiased determination of the facts.

The Attorney General moves to intervene to prevent a decision of such importance to the State from being made without the benefit of the full adversarial process. The Commission originally denied the Organization's motion on the grounds that the 1981 decision still controls – and there is ample evidence to support that conclusion. The views of the unrepresented GSRAs, the deans, and the University faculty against granting GSRAs employment status are meritorious and must be presented. The result of the ALJ's decision will no doubt have meaningful implications for Michigan's taxpayers and the economy of the State. The State has a vital interest that the entire record is developed through the rigors of a true adversarial process.

The Attorney General is vested with broad discretion to intervene in any action where he determines, in his judgment, that a State interest is involved. Although this discretion is not unlimited, a court or administrative body should defer to the Attorney General's decision to intervene absent a clear showing that the intervention is inimical to the interests of the State. Here, the Attorney General

seeks to ensure that all of the relevant facts are articulated before the ALJ, with both sides of the question represented on an equal footing. The University of Michigan is a crucial component of the Michigan economy, a recipient of significant taxpayer funding, and a flagship for the state's education and academic research endeavors. As the record here already demonstrates, all of that is placed at risk if the factual questions surrounding the employee status question are not properly considered in an adversarial process.

The Attorney General respectfully urges the Commission reject the Organization's motion for reconsideration, and requests the Commission to grant this motion to intervene both to oppose reconsideration, and in the alternative, if reconsideration is granted, to participate in the hearing before the ALJ.

STATEMENT OF FACTS

I. Procedural History

On April 27, 2011, the Organization filed a petition with the Commission, seeking an election to be certified as the exclusive representative of GSRAs of the University of Michigan. (Decision and Order Dismissing Petition and Denying Motion to Intervene, p 1, MERC, Sept 14, 2011.) The University's Board of Regents subsequently passed a resolution recognizing the GSRAs as employees under the Public Employment Relations Act (Act), implicitly endorsing the Organization's petition. (MERC Decision and Order p 2.) On June 24, 2011, 19 current and former deans wrote a letter to the provost:

> [T]o express our *deep and collective concern about the potential negative impacts that would result from unionization* of the University's graduate student research assistants (GSRAs). We believe that such *a union would put at risk the excellence of our university and the success of our graduate student assistants.*
>
> Research assistantships provide graduate students with opportunities to develop their research skills while working in a lab or on a project under faculty supervision. As students assist with various aspects of scholarly work, they gain in their capacity for independent research. This is an important part of their academic training. *A union would be a third party intervening in the educational program, in the middle between faculty mentors and their students. This would compromise the essential nature of doctoral preparation.*
>
> We note those graduate student research assistants are not unionized at the peer institutions against whom the University competes for faculty and graduate students. The Board of Regents in their public statements at the June 16, 2011 meeting included a list of other public institutions at which research assistants are unionized; although they are fine institutions, none of them competes in research at the same level as Michigan. *It would be a great loss to the state and the nation if our research efforts were to decline to the quality seen at lesser universities. We worry that a GSRA union would make Michigan an outlier when the best and brightest graduate students compare research opportunities, and when we work to recruit excellent research faculty. A vast majority of the faculty members with whom we have spoken do not support GSRA unionization because of the potential negative impact on their one-on-one relationships with students and the University's competitive position among its peers.*
>
> (Letter of Deans to Provost, June 24, 2011, *available at http://www.mackinac.org/archives/2011/deansletter.pdf*, Attached as Exhibit A) (emphasis added).

In September 2011, this Commission rejected the Organization's petition, correctly reasoning that GSRAs are not public employees and thus are outside the Commission's jurisdiction. The Commission had made the same finding in 1981

and, in absence of materially different circumstances, the Commission was bound by the prior decision. (MERC Decision and Order, p 4.)

The Organization moved for reconsideration, responding that the facts have indeed changed regarding the role of the GSRAs at the institution, and those facts, together with the fact that the Organization and the University's Regents agree that GSRAs are employees, warrant reconsideration. The Organization's motion relies on a single affidavit, and argues in essence that because research has grown in volume and importance to the University, and that the GSRAs are an integral part of this research, they are employees of the University. Furthermore, the motion tries to reargue the facts that were established in 1981, erroneously relies on the economic reality test that is used to distinguish independent contractors from employees, and finally contends that the Regents' majority decision is a binding stipulation of fact. None of these grounds present a compelling case for reconsideration, and given the potential negative impact on the interests of the State of Michigan that are involved, the Attorney General moves to intervene to oppose reconsideration.

Constrained from directly opposing reconsideration by the majority Regents' vote, the University merely set forth facts seeming to show that none of the operative facts have changed since the Commission last considered the question in 1981. (Response to Motion for Reconsideration, Oct 17, 2011, filed with affidavits of David C. Munson, Dean of Engineering, and Terrence J. McDonald, Dean of the College of Literature, Science and Arts.) The University has clarified its position

that consistent with the Regents' resolution, it supports the GSRAs rights to vote on unionization. (Supplemental Response of Public Employer University of Michigan, Nov 4, 2011.) The record also shows that while a significant percentage of GSRAs have expressed opposition to employment status and possible unionization, there is no party to the proceeding to represent the view that GSRAs are not employees. (*See* Brief in Support of Motion to Intervene and in Opposition to Motion for Reconsideration, Nov 1, 2011.) Stephen Raiman, a member of Students Against GSRA Unionization, stated "[w]e believe our research and our lives as students are between ourselves and our departments and our advisors. We don't believe that a third party should be interfering in that." Goldsmith, Rayza & Williams, Kaitlin, *MERC to Reconsider GSRAs' Positions as Employees*, The Michigan Daily, Nov 8, 2011.

On December 13, 2011, the Commission will vote on whether to grant the motion for reconsideration and to the matter to an ALJ for fact finding. The ALJ will be charged with revisiting an issue that has been settled in Michigan since 1981 – whether GSRAs are employees for the purpose of collective bargaining. Importantly, in 1981 the University and the union presented opposing viewpoints in a full adversarial process. This time, the University is constrained to be in agreement with, or at least not to actively oppose, the Organization.

II. The University of Michigan is a major research university, a large employer, and a vital part of the Michigan economy.

The University of Michigan is undoubtedly a major research institution, ranking second in the nation in terms of total research expenditures. (Response to Petitioner's Motion for Reconsideration, University of Michigan, Oct 17, 2011, p 4.) External funding supports a large majority of GSRA studies – with total research funding exceeding $1.14 billion in fiscal year 2010. (Office of the Vice President for Research, Quick Facts, *http://research.umich.edu/quick-facts.*) The University of Michigan is thus an essential component of the University Research Corridor – a coalition between the University of Michigan, Michigan State University, and Wayne State University that has generated an "economic impact" of $14.8 billion in 2009 for the State of Michigan. (2010 Empowering Michigan Report, *available at http://urcmich.org/economic/2010/2010econimpact-report.pdf.*) Even as state funding support dropped, Michigan's research universities remained the largest cluster in the U.S. in terms of enrollment, and they ranked third in terms of high-tech degrees. (*Id.*) The research corridor has continued to provide a significant fiscal impact on Michigan – for example, over 550,000 research alumni live in Michigan, collectively earning about $26 billion; generating over $400 million in state tax revenue for 2009. (*Id.*) Obviously, given these numbers, any proceeding that may affect the University's ability to continue to attract research funding and play an integral role as a member of the University Research Corridor implicates a number of state interests.

The excellence of the University, in so many ways, will be seriously jeopardized if its status as a research institution, with the funding that status brings, is undermined. All of Michigan's taxpayers, and certainly the University's thousands of alumni, are rightfully proud of this outstanding public university. Each of us will lose something if an incorrect determination of the facts underlying this dispute is rendered, without the benefit of the usual adversarial process. The Attorney General has correctly judged that the public interest is implicated both in the Commission's decision whether to grant the motion for reconsideration, and if so, the fact finding process before the ALJ. Accordingly, the motion for intervention should be granted.

ARGUMENT

I. The Attorney General has broad discretion to intervene at any stage of any administrative proceeding when he deems in his own judgment that it is in the best interests of the State and the People to do so. Intervention should only be denied when a showing is made that it is clearly against the public interest to allow intervention.

Attorney General Bill Schuette is the chief law enforcement officer for the State of Michigan and has a duty to ensure that the laws of the state are followed. *See* Const 1963, art 5, §§ 3, 21. When the Attorney General determines, in his own judgment, that the interests of the state require intervention, he may "intervene in and appear for the people of this state in any other court or tribunal, in any cause or matter, civil or criminal." MCL 14.28; *see also* MCL 14.101. Courts give great deference to the Attorney General's unconditional statutory right to intervene in matters of state interest. *Kelley v Gremore*, 8 Mich App 56, 59; 153 NW2d 377

(1967). 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. *Id.*; *VanStock v Township of Bangor*, 61 Mich App 289, 299; 232 NW2d 387 (1975). The Attorney General may intervene in administrative proceedings at any stage. *Kelley v Thayer*, 65 Mich App 88, 92-93; 237 NW2d 196 (1976).

The Attorney General has determined, in his judgment, that intervention in this matter is necessary to protect significant state interests. Intervention is necessary at the December 13 hearing to oppose the motion for reconsideration. If the Commission does grant the motion, the Attorney General moves to intervene in the fact finding to ensure all the facts are presented through the adversarial process. These proceedings will directly affect the State and a number of citizens who are students, professors, or otherwise affiliated with the University of Michigan. The State, and correspondingly the taxpayers of this State, expend a significant amount of money for University funding, and more specifically, the funding of research at the University. The results of this proceeding could have a significant impact on the University's ability to function as a major research university; thus, this proceeding could negatively impact both the economy of the State, and the general well-being of all of the citizens and residents of the State.

If the Commission does order further fact finding, the Attorney General, as an intervening party, will ensure all the relevant facts and arguments are marshaled and presented to the ALJ. That will not occur absent intervention, the University being constrained not to actively oppose the Organization. Considering

the significance of the GSRA employee issue to the taxpayer-funded University, the State, and the People of the State of Michigan, it is clear that the Attorney General's decision to intervene is not contrary to the public interest. Accordingly, under the law summarized above, the Commission should defer to the Attorney General's judgment, allow him to present his opposition to reconsideration at the December 13 meeting, and grant his motion.

II. **It is in the state's interest that the facts favorable to unrepresented parties - students opposed to being determined employees subject to unionization and faculty who think that will undermine the University - be heard by the Commission before voting on the motion for reconsideration or the ALJ. Without intervention by the Attorney General, those opposing the Organization's efforts will be without a voice. Assuring a proper adversarial process is certainly not inimical to the public interest, and this motion should be granted.**

The Commission's decision on the issue of reconsideration regarding the GSRAs' status as employees implicates a number of important state interests. There are over 2,000 GSRAs, making them the largest group of graduate students within the University. According to affidavits, more than 17 percent of those students actively oppose employee status. (Brief in Support of Motion to Intervene and in Opposition to Motion for Reconsideration, Nov 1, 2011, Affidavit of Adam Duzik.) Moreover, according to the Letter of the Deans to the Provost and the affidavits submitted with the University's Response to the Motion for Reconsideration, GSRA unionization will likely have a substantial negative impact on the University's ability to attract top researchers and to procure significant research funding. (Letter of Deans to Provost, June 24, 2011, *available at*

http://www.mackinac.org/archives/2011/deansletter.pdf, Attached as Exhibit A.) Any proceeding that may have an impact on the University's competitiveness and status as an elite institution is in the interest of the entire State and it cannot be inimical to the state interest to have the factual record developed fully through a truly adversarial process. The University has developed into a nationally renowned research institution over the past 30 years without union presence in the educational relationship between elite students and elite faculty. The University, its students, and the State of Michigan as a whole have greatly benefitted as a result – and the Commission should decline to compromise that potential for success. It is of the utmost public interest that all the relevant facts and positions are presented against reconsideration on December 13, and if the matter is sent to an ALJ for further fact finding, in that proceeding as well.

A. A significant number of graduate students and faculty disagree with the Regents' position that GSRAs are employees subject to unionization. Currently, neither party to this proceeding represents this view. The Attorney General must be allowed to intervene to ensure that all the relevant facts and arguments are presented on a matter of such public significance.

Attorney General intervention is proper when significant matters of state interest and public policy are involved, and when a proceeding may affect unrepresented parties. *Syrkowski v Appleyard*, 122 Mich App 506, 513; 333 NW2d 90 (1983), *rev'd on other grounds* 420 Mich 367; 362 NW2d 211 (1985) (noting that intervention was proper to represent the unrepresented child's interests on the issue of entry of petitioner's name on birth certificate as natural and legal father of

a child to be born to a surrogate mother who had been artificially inseminated with the sperm of petitioner). That is exactly the case here. The Regents' vote to recognize the GSRAs as employees and the Organization's statements made in the letter accompanying the motion for reconsideration show that the Organization and the University will not be truly adverse parties before either the Commission or the ALJ. And there is no other party to represent the voice of the dissenting students and faculty in the proceeding. In the absence of any party opposed to the union viewpoint on the GSRAs' "employee" status, the fact-finding process will be, at best, one-sided and incomplete; at worst, the lack of an adversarial process will result in a biased outcome.

The Attorney General's intervention will ensure that all of the facts will be heard. It will assure that those facts are presented in a manner that is fair to all those at the University and across the state who will be impacted by the Commission's decision. The Attorney General seeks intervention to represent the voice of those who will otherwise be silenced; the Commission should grant this motion.

B. Considering GSRAs to be employees subject to unionization may severely compromise the University's status as a leading research institution, employer, and center for higher education, such compromise would impact the entire state. The Attorney General must be allowed to intervene to ensure that all of the relevant facts and argument are presented on a matter of such public significance.

Besides the GSRAs' concerns about being considered employees subject to unionization, the University's faculty has outlined the serious negative implications

that unionization will have on the University's status as a leading research institution. The June letter from the deans to the provost expressed their "deep and collective concern about the potential negative impacts that would result from unionization of the University's [GSRAs]." (Letter of Deans to Provost, June 24, 2011, *available at http://www.mackinac.org/archives/2011/deansletter.pdf*, Attached as Exhibit A.) Vital mentor-mentee relationships and the "essential nature of doctoral preparation" will be compromised if a third party (union) intervenes in the educational program. (*Id.*) One of the deans' central points is that GSRAs at high caliber research institutious with which the University competes are *not* unionized, and a "GSRA union would make Michigan an outlier when the best and brightest graduate students compare research opportunities, and when we work to recruit excellent research faculty." (*Id.*) The faculty also voiced their opposition to GSRA unionization "because of the potential negative inpact of their one-on-one relationships with students and the University's competitive position among its peers." (*Id.*)

Again, both of the parties to the proceeding – the Organization and the University – are in agreement that GSRAs are employees. (Letter of Mark H. Cousens, attorney for the Organization, to Commission in support of motion for reconsideration, Nov 4, 2011.) Without a party adverse to the view that GSRAs are employees, no one represents the position of the University deans, the vast majority of the faculty and hundreds of GSRAs. If the Commission does grant the motion for reconsideration, the ALJ will be deprived of the benefit of a true adversarial

process, and the ALJ's decision will be hampered by a one-sided presentation of the facts. The Attorney General's intervention would ensure that all the relevant facts are properly heard, a critical consideration on this issue of extraordinary significance for all of Michigan.

C. None of the grounds presented in the Organization's motion for reconsideration are compelling. They fail to present any issues different from those already ruled on by the Commission. In absence of materially different facts, the motion must be denied.

The Commission's rule on motions for reconsideration states that "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." 2002 AACS, R 423.167. The Organization's motion for reconsideration does not present anything of significance that is different from the issues already ruled on by the Commission both in 1981 and at the September 14, 2011 meeting.

The Organization fails to show sufficient "material change in circumstance" to warrant the Commission's departure from its 1981 decision. Its motion essentially reiterates the same substantive facts that were considered by the ALJ in 1981 and points to no substantive change in the "master-servant relationship" that was key to the 1981 decision. (Decision and Order Dismissing Petition and Denying Motion to Intervene, p 3, MERC, Sept 14, 2011.) The Organization's factual support consists of a single affidavit that cites extensively to the University website. Naturally, the facts surrounding GSRA appointments are somewhat different today than they were in 1981 given the growth of the University as a research institution

and a center of higher learning. However, the Organization fails to point to any one material fact that has changed or was not considered by the ALJ in 1981 and thus warrants reconsideration.

In 1981, the ALJ already acknowledged that research was a significant part of the University and recognized it as a major university center. *Regents of the University of Michigan*, 1981 MERC Lab Op 777, 808. Federal treatment of students was also not considered to be determinative in 1981. *See Id.*, at 780. The employment oath was also something that existed at the time of the 1981 decision. Nor is the description of GSRAs as employees on various University websites sufficient to create employment status. As the Commission noted in its September 14, 2011, decision, "[the Commission's] jurisdiction cannot be conferred by an agreement between the parties." (Decision and Order Dismissing Petition and Denying Motion to Intervene, p 4, MERC, Sept 14, 2011.) Neither has there been a change in law to warrant revisiting this issue.

The issues brought up in the Organization's motion for reconsideration have been presented to the Commission and have already been ruled upon. No compelling material circumstances have changed – the motion for reconsideration should therefore be denied.

CONCLUSION AND RELIEF REQUESTED

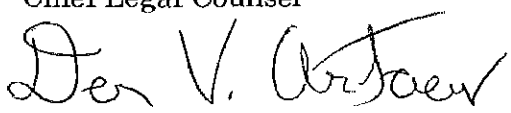
The Attorney General has unconditional statutory authority to intervene in matters involving a state interest, and this authority is only limited in cases where there is a showing that intervention is clearly contrary to the public interest. There are significant matters of public interest involved here, and the Attorney General should be allowed to intervene both to argue against reconsideration on December 13, and to ensure that all of the facts are presented in a full adversarial proceeding if the Commission does order further fact finding in front of an ALJ. The University of Michigan is a major research university that competes with other elite universities in the country for the best and the brightest students and faculty, along with significant research funding. The issue of whether GSRAs are employees and subject to unionization is one with far reaching implications for the entire State of Michigan and its people. However, the two parties expected to participate in the proceedings – the Organization and the University – are in agreement that GSRAs are employees, and thus there can be no true adversarial process without Attorney General intervention. The Attorney General has properly determined that these proceedings involve matters of great state interest and that intervention is in the best interest of all of Michigan's citizens. The Attorney General's intervention will assure a balanced presentation of all of the necessary facts that both the Commission and the ALJ will need to make a well-informed decision on the merits of the important issue under consideration.

For these reasons, 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,

Bill Schuette
Attorney General

Richard A. Bandstra (P31928)
Chief Legal Counsel



Kevin J. Cox (P36925)
Dan V. Artaev (P74495)
Assistant Attorneys General

Michigan Dep't of Attorney General
3030 West Grand Boulevard
Detroit, MI 48202
(313) 456-0080

Dated: November 30, 2011

EXHIBIT 4

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.

Christine Gerdes (P67649)
Associate General Counsel
University of Michigan
503 Thompson St # 5010
Fleming Admin Bldg
Ann Arbor, MI 48109
T: (734) 764-0304
F: (734) 763-5648

Mark H. Cousens (P12273)
Attorney for Graduate Employees Organization, AFT, AFL-CIO
26261 Evergreen Road, Suite 110
Southfield, Michigan 48076
T: (248) 355-2150
F: (248) 355-2170

BRIEF OPPOSING MOTION TO INTERVENE

MARK H. COUSENS
ATTORNEY
26261 EVERGREEN ROAD
SUITE 110
SOUTHFIELD, MICHIGAN 48076
PHONE (248) 355-2150
FAX (248) 355-2170

MARK H. COUSENS
ATTORNEY
26261 EVERGREEN ROAD
SUITE 110
SOUTHFIELD, MICHIGAN 48076
PHONE (248) 355-2150
FAX (248) 355-2170

TABLE OF AUTHORITIES

Michigan Constitution of 1963

Art VIII, § 5 10

Michigan Statutes

MCL 14.101 3-6

MCL 14.28 ..... 3, 4, 6

Cases Decided by the Michigan Courts

AG v PSC, 243 Mich App 487 (2000) 4

Federated Ins Co v Oakland County Rd Comm'n, 475 Mich 286 (2006) 6

John Wittbold & Co v Ferndale, 281 Mich 503 (1937) 5

Mich Educ Ass'n v Superintendent of Pub Instruction, 272 Mich App 1 (2006) 6

People v Smith, 282 Mich App 191 (2009) 4

People v Unger, 278 Mich App 210 (2008) 3

MERC Rules

R423.145 7

Rule 423.145(3) 2

MERC Cases

City of Detroit Fire Department, 9 MPER ¶ 27011 (1995) 8

Department of Mental Health 11 MPER ¶ 29008 4

Michigan Department of Mental Health, 7 MPER ¶ 25121 (1994) 5

Township of Redford 6 MPER ¶ 15099 (1984) 7

University of Michigan, 1970 MERC Lab Op 754 5

MARK H. COUSENS
ATTORNEY
26261 EVERGREEN ROAD
SUITE 110
SOUTHFIELD, MICHIGAN 48076
PHONE (248) 355-2150
FAX (248) 355-2170

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.

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.

MARK H. COUSENS
ATTORNEY
26261 EVERGREEN ROAD
SUITE 110
SOUTHFIELD, MICHIGAN 48076
PHONE (248) 355-2150
FAX (248) 355-2170

MARK H. COUSENS
ATTORNEY
26261 EVERGREEN ROAD
SUITE 110
SOUTHFIELD, MICHIGAN 48076
PHONE (248) 355-2150
FAX (248) 355-2170

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

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.

MARK H. COUSENS
ATTORNEY
26261 EVERGREEN ROAD
SUITE 110
SOUTHFIELD, MICHIGAN 48076
PHONE (248) 355-2150
FAX (248) 355-2170

> "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)

MARK H. COUSENS
ATTORNEY
26261 EVERGREEN ROAD
SUITE 110
SOUTHFIELD, MICHIGAN 48076
PHONE (248) 355-2150
FAX (248) 355-2170

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).

CLARK H. COUSENS
ATTORNEY
26261 EVERGREEN ROAD
SUITE 110
SOUTHFIELD, MICHIGAN 48076
PHONE (248) 355-2150
FAX (248) 355-2170

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

MARK H. COUSENS
ATTORNEY
26261 EVERGREEN ROAD
SUITE 110
SOUTHFIELD, MICHIGAN 48076
PHONE (248) 355-2150
FAX (248) 355-2170

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

MARK H. COUSENS
ATTORNEY
26261 EVERGREEN ROAD
SUITE 110
SOUTHFIELD, MICHIGAN 48076
PHONE (248) 355-2150
FAX (248) 355-2170

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.

MARK H. COUSENS
ATTORNEY
26261 EVERGREEN ROAD
SUITE 110
SOUTHFIELD, MICHIGAN 48076
PHONE (248) 355-2150
FAX (248) 355-2170

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.

MARK H. COUSENS
ATTORNEY
26261 EVERGREEN ROAD
SUITE 110
SOUTHFIELD, MICHIGAN 48076
PHONE (248) 355-2150
FAX (248) 355-2170

Conclusion

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

MARK H. COUSENS (P12273)
Attorney for the Petitioner
26261 Evergreen Road, Ste. 110
Southfield, MI 48076
(248) 355-2150

December 5, 2011

MARK H. COUSENS
ATTORNEY
26261 EVERGREEN ROAD
SUITE 110
SOUTHFIELD, MICHIGAN 48076
PHONE (248) 355-2150
FAX (248) 355-2170

EXHIBIT 5

STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

UNIVERSITY OF MICHIGAN,
Public Employer,

-and-

Case No. R11 D-034

GRADUATE EMPLOYEES ORGANIZATION/AFT MI, AFT, AFL-CIO
Petitioner-Labor Organization,

-and-

STUDENTS AGAINST GSRA UNIONIZATION,
Intervenor,

-and-

BILL SCHUETTE, ATTORNEY GENERAL,
Intervenor.

Christine M. Gerdes (P67649)
Suellyn Scarnecchia (P33105)
Attorneys for University of Michigan
503 Thompson Street
Ann Arbor, Michigan 48109-1340
(734) 647-1392

Mark H. Cousens (P12273)
Attorney for GEO, AFT MI, AFT, AFL-CIO
26261 Evergreen Road, Suite 110
Southfield, MI 48076
(248) 355-2150

Patrick J. Wright (P54052)
Attorney for Intervenor Students Against GSRA Unionization
Mackinac Center Legal Foundation
140 West Main Street
Midland, MI 48640
(989) 631-0900

Richard Bandstra (P31928)
Kevin J. Cox (P36925)
Dan V. Artaev (P74495)
Assistant Attorneys General
Attorneys for Bill Schuette, Attorney General
Michigan Department of Attorney General
3030 West Grand Boulevard
Detroit, MI 48202
(313) 456-0080

PUBLIC EMPLOYER UNIVERSITY OF MICHIGAN'S BRIEF OPPOSING INTERVENTION BY THE ATTORNEY GENERAL

A. Introduction

The Public Employer University of Michigan (hereinafter "University") opposes the intervention of the Attorney General into the instant representation proceeding because such intervention is inconsistent with the University's constitutional autonomy under Mich. Const. 1963 Art. VIII, § 5.

B. Procedural History

On April 27, 2011, the Graduate Employees Organization, AFT MI, AFT, AFL-CIO (hereinafter "Union) filed a Petition for Representation Proceedings seeking an election to become certified as the exclusive representative of graduate student research assistants (GSRAs) under the Public Employment Relations Act ("PERA"), MCL 423.201 *et seq.* On September 14, 2011, the Michigan Employment Relations Commission (hereinafter the "Commission") issued its Decision and Order dismissing the Union's petition. On October 3, 2011, the Union filed a Motion for Reconsideration. The University filed a Response to Petitioner's Motion for Reconsideration on October 17, 2011. On November 1, 2011, Students Against GSRA Unionization (hereinafter "SAGU") filed a Motion to Intervene and to Deny

Petitioner's Motion for Reconsideration. On November 3, 2011, the Union filed a response to SAGU's Motion to Intervene and Deny Petitioner's Motion for Reconsideration. On November 4, 2011, the University filed a Supplemental Response of Public Employer University of Michigan. At its regularly scheduled meeting on November 8, 2011, the Commission discussed, but did not act on, the Union's Motion for Reconsideration and SAGU's Motion to Intervene. On November 30, 2011, Attorney General Bill Schuette filed a Motion to Intervene. On December 5, 2011, the Union filed a Brief Opposing [the Attorney General's] Motion to Intervene. On December 6, 2011, SAGU filed a Brief in Response to Attorney General's Motion to Intervene. On December 7, 2011, the Attorney General filed a Reply to GEO's Brief Opposing Motion to Intervene.

C. Intervention by the Attorney General Violates the Michigan Constitution

The Board of Regents of the University of Michigan derives its authority directly from the Michigan Constitution. Article VIII, Section 5 provides:

> 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] board shall have general supervision of its institution and the control and direction of all expenditures from the institution's funds. [The] 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... 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.

Mich. Const. 1963 Art. VIII, § 5.

The University's Board of Regents is constitutionally charged with, and solely responsible for, the "general supervision" of the University. The constitution protects the right of the Regents to make decisions regarding the University's operations.

Under this provision and relevant case law, the Board of Regents has the authority to make and implement judgments about the mission of the University and how to further the mission, even if the Board's judgment differs from the opinions of some of the University's executives, faculty, staff, or students, and even if such decision is unpopular in some quarters. Here, the Attorney General seeks to advocate for those from within the University who would have made a judgment different from the judgment made by the Regents about the merits and risks of allowing a representation election in this case. Therefore, the Attorney General's Motion to Intervene unconstitutionally seeks to interfere with the Regents' "absolute management of the University...." *Federated Publications, Inc v Bd of Trustees of Mich State Univ*, 460 Mich 75, 87; 594 NW2d 491 (1999) (quoting *State Bd of Agriculture v Auditor General*, 226 Mich 417, 424; 197 NW 160 (1924)).

The University can, and will, represent its interests effectively as it has done consistently over its long and storied history.

D. Conclusion

For these reasons, the University opposes the Attorney General's Motion to Intervene.

Christine M. Gerdes (P67649)
Suellyn Scarnecchia (P33105)
Attorneys for the University of Michigan
503 Thompson Street
5010 Fleming Administration Building
Ann Arbor, MI 48109-1340
(734) 647-1392

December 9, 2011

EXHIBIT 6

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,
Petitioner-Labor Organization,

-and-

STUDENTS AGAINST GSRA UNIONIZATION,
Proposed Intervenor,

-and-

MICHIGAN ATTORNEY GENERAL,
Proposed Intervenor.
_____/

APPEARANCES:

Christine M. Gerdes, Associate General Counsel, for the Public Employer

Mark H. Cousens, for the Labor Organization

Mackinac Center Legal Foundation by Patrick J. Wright, for Proposed Intervenor Students Against GSRA Unionization

Bill Schuette, Michigan Attorney General; Richard A. Bandstra, Chief Legal Counsel; and Kevin J. Cox and Dan V. Artaev, Assistant Attorneys General for Proposed Intervenor Michigan Attorney General

DECISION AND ORDER ON MOTIONS TO INTERVENE
AND
MOTION FOR RECONSIDERATION OF ORDER DISMISSING PETITION

Pursuant to Sections 12 and 13 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.212 and MCL 423.213, this matter came before the Michigan Employment Relations Commission on a petition for a representation election filed by the

Graduate Employees Organization/AFT (GEO or Petitioner) on April 27, 2011. On July 28, 2011, a Motion to Intervene and for Summary Disposition was filed by Melinda Day. In a Decision and Order issued on September 14, 2011, we dismissed the petition for a representation election and denied Day's motion.

On October 3, 2011, the GEO filed a Motion for Reconsideration of our decision to dismiss its petition for a representation election, accompanied by an affidavit attesting to certain facts that were not previously before us.[1] The University of Michigan (University) filed its Response to Petitioner's Motion for Reconsideration, accompanied by two affidavits, on October 17, 2011. On November 1, 2011, a Motion to Intervene and to Deny Petitioner's Motion for Reconsideration, accompanied by an affidavit and a brief, was filed by Melinda Day's attorney on behalf of an entity identified as Students Against GSRA Unionization. Petitioner (on November 4, November 9, and November 16, 2011) and the University (on November 4) each filed supplemental pleadings objecting to the motion to intervene and supporting the motion for reconsideration. On November 30, 2011, we received a motion from the Michigan Attorney General seeking to intervene in this matter and opposing reconsideration of our September 14, 2011 decision. The Attorney General's motion included a request for oral argument. Petitioner filed a brief in opposition to the Attorney General's motion to intervene on December 5, 2011, and Proposed Intervenor Students Against GSRA Unionization, filed its Brief in Response to Attorney General's Motion to Intervene on December 6, 2011. On December 7, 2011, we received the Attorney General's reply to Petitioner's brief and a letter from Petitioner objecting to the December 6, 2011 brief submitted by Students against GSRA Unionization. On December 9, 2011, we received the University's brief opposing intervention by the Attorney General. Later the same day, we received Petitioner's objection to our receipt of the Attorney General's reply to Petitioner's brief in opposition to the Attorney General's motion to intervene, and shortly thereafter, the Attorney General's reply to the University's brief opposing intervention by the Attorney General.

As indicated below, Proposed Intervenor, Students Against GSRA Unionization, has no standing in this matter. Therefore, their Brief in Response to Attorney General's Motion to Intervene will not be considered. Further, we find that oral argument will not materially assist us in this matter and, therefore, deny the Attorney General's request to argue before us. The General Rules of the Michigan Employment Relations Commission, 2002 AACS, R 423.101 - 423.484 do not provide for the filing of reply briefs. Although such briefs may be considered in the absence of objections, we have received an objection to receipt of the Attorney General's reply brief and, therefore, will not consider it. We have reviewed the remaining filings in accordance with the Commission Rules and after giving each filing appropriate consideration, we are persuaded that the issues raised by the petition for a representation election should be referred to a senior administrative law judge for an expedited evidentiary hearing, and that both motions to intervene should be denied.

Procedural History:

On April 27, 2011, the GEO filed a Petition for Representation Proceedings seeking an

[1] Our decision to dismiss the petition seeking an election occurred at a meeting of the Commission on August 8, 2011. No hearing on the facts preceded that decision.

election among Graduate Student Research Assistants (RAs) at the University of Michigan. On May 19, 2011, the University of Michigan's Board of Regents, by a vote of six to two, adopted a resolution that purported to recognize RAs as employees and to support allowing the RAs to determine whether to organize into a union. Thereafter, a Consent Election Agreement was presented to us for approval in order that the parties might proceed to an election and possible certification of the GEO as the RAs' representative in collective bargaining under PERA.

Subsequently, Melinda Day, a member of the proposed bargaining unit, sought to intervene in this proceeding under Rule 145(3) of the General Rules of the Michigan Employment Relations Commission, 2002 AACS, R 423.145(3). She also asked that the representation petition be dismissed for lack of subject matter jurisdiction. The Petitioner filed a motion in opposition to Day's motion to intervene.

On September 14, 2011, we denied the motion to intervene and dismissed the petition for a representation election. While Commission Rule 423.145(3) provides that an employee, group of employees, individual, or labor organization may intervene in an election proceeding, Day had not offered any evidence that members of the proposed unit supported her petition to intervene; she further lacked standing to participate in these proceedings.

Based on our decision in *Regents of the University of Michigan*, 1981 MERC Lab Op 777, in which we held that RAs are not employees entitled to the benefits and protection of PERA, we declined to conclude that they have become employees based on the University's recent willingness to recognize them as such. We reasoned:

> "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."

Discussion and Conclusions of Law:

The Motions to Intervene

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 states 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. The affidavit filed in support of the motion to intervene submitted on behalf of Students Against GSRA Unionization simply states that the group has 371 members. There is no assertion as to how many of this number support the motion to intervene and no authorization cards accompanied that motion. Furthermore, intervention in an election proceeding is only granted when, upon a proper showing of interest, a rival to the labor organization seeking representative status wishes to be included on an election ballot. See

Commission Rule 145(3). The group known as Students Against GSRA Unionization does not seek placement on a ballot. Rather, it seeks to intervene in this proceeding for the purpose of expressing its opposition to our conducting an election, a purpose that it lacks standing to pursue in a representation proceeding. For those reasons, we must deny its Motion to Intervene and for Summary Disposition.

The Attorney General seeks to intervene under MCL 14.28. That statute provides:

> The attorney general shall prosecute and defend all actions in the supreme court, in which the state shall be interested, or a party; he may, in his discretion, designate one of the assistant attorneys general to be known as the solicitor general, who, under his direction, shall have charge of such causes in the supreme court and shall perform such other duties as may be assigned to him; and the attorney general shall also, when requested by the governor, or either branch of the legislature, 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.

The right of the Attorney General to intervene is not unlimited and should be restrained where such intervention is clearly inimical to the public interest. *People v Unger*, 278 Mich App 210, 260-61 (2008) citing *In re Intervention of Attorney Gen,* 326 Mich 213, 217 (1949). See also *Federated Ins Co v Oakland Co Rd Comm*, 475 Mich 286 (2006), where the Attorney General was prohibited from intervening to prosecute an appeal from a lower court ruling that had not been appealed by the losing party.

The Attorney General argues that unionization of the University's RAs "may negatively affect" the University's reputation and competitiveness. We are clearly cognizant of the University's national standing and reputation as a major research institution. However, that is not a factor that we may consider in determining whether the RA's are public employees within the meaning of PERA. If the RAs are not public employees, we have no jurisdiction over their relationship with the University and the matter is at an end. If they are public employees, they are entitled, by law, to seek an election to determine whether they will bargain collectively through a representative of their choice. We cannot consider speculation as to the impact on the University by the RAs potential exercise of a statutory right; it is merely our responsibility to determine whether the RA's have the right to organize under PERA. We find opposition to the exercise of a statutory right is inimical to the public interest.

Although there is no dispute between Petitioner and the University over whether an election should be authorized in this matter, we must determine whether, in light of the Commission decision in *Regents of the University of Michigan*, 1981 MERC Lab Op 777, we have jurisdiction to do so. Thus, we must find whether there has been a material and substantial change of circumstances since the 1981 decision that would justify our further review of the RA's status. Such a review is an investigatory and not an adversarial proceeding. *University of Michigan*, 1970 MERC Lab Op 754, 759. MCL 423.212. We must carry out our statutory

responsibility without interference from non-parties opposed to the very rights provided to public employees by PERA.

Furthermore, the Attorney General is not seeking to intervene in order to advocate for the interest of a State agency. Rather, the Attorney General seeks intervention for the purpose of opposing a policy decision made by the Board of Regents of the University of Michigan, an autonomous State institution. Article VIII, Section 5 of the Michigan Constitution vests the University's Board of Regents with sole responsibility for the general supervision of the University. The Board of Regents adopted a resolution supporting "the rights of University Graduate Student Research Assistants, . . . to determine for themselves whether they choose to organize." It is not our role to determine whether the Regents made the correct policy decision in passing that resolution. A Commission proceeding is not the proper forum for the Attorney General to debate the correctness of a policy decision made by an autonomous State institution, which is not determinative of the decision that we will make in this matter. Moreover, we are not bound by the Regents' assessment of the RAs' status under PERA. We find that it would be inappropriate to allow the Attorney General to intervene for the purpose of opposing a policy decision made by the Regents when that policy decision does not determine the results of our investigation in this matter. We find that such intervention would be unduly disruptive of the proceedings and inimical to the public interest. Accordingly, we deny the Attorney General's motion to intervene.

The Petition for Representation Proceedings

In 1981, the Commission determined that RAs were not employees covered by PERA. *Regents of the University of Michigan*, 1981 MERC Lab Op 777. The petition, here, seeks an election to determine whether RAs should be accreted to the unit from which they were excluded in 1981. In support of its petition, the GEO submitted a copy of a resolution by which the University of Michigan Regents has recognized RAs as "employees." As we observed in our September 14, 2011 decision in this matter:

> 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. Just as independent contractor status cannot be conferred upon an employee by agreement between the employee and an employer, employee status cannot be conferred by agreement upon one who is not an employee under the law. *Cf. Detroit Judicial Council*, 2000 MERC Lab Op 7; 13 MPER 31021 (2000) (no exceptions). We cannot find that RAs are employees based solely upon an agreement between the parties. Absent a showing of a substantial and material change of circumstance, we are bound by our previous decision.

We have carefully considered the Petitioner's motion for reconsideration and the affidavit filed with it. In its motion, Petitioner asserts that the doctrine of res judicata does not apply to a representation matter such as this. We agree with Petitioner's argument that the doctrine of res judicata does not apply to this matter. As explained in *Eastern Michigan Univ*, 1999 MERC Lab

Op 550, 560; 13 MPER 31017 (1999):

> [I]t is normally inappropriate to apply the doctrine of res judicata to a representation proceeding such as this case, barring a showing that the identical factual and legal determination is being relitigated in the subsequent proceeding.
>
> Representation proceedings are nonadversary, information gathering procedures, as distinguished from contested, adjudicatory unfair labor practice cases conducted under Chapter 4 of the Administrative Procedures Act, MCL 24.275, MSA 3.560(175). See *Lake County and Sheriff*, 1999 MERC Lab Op 107, 112. . . . [P]reclusion doctrines such as res judicata and collateral estoppel apply to administrative decisions which are adjudicatory in nature. These doctrines are not designed to apply to bargaining unit determinations that rely on the specific facts presented at a particular time, and on the statute and policies applied by the particular administrative agency. Bargaining units tend to change and evolve over time as the employer's work complement and operations change.

Prior to our September 14, 2011 decision, Petitioner did not offer evidence or specific allegations of fact to indicate that there had been a material change in the circumstances of the RAs relationship with the University in the thirty years since the decision was issued in *Regents of the University of Michigan,* 1981 MERC Lab Op 777. However, they have now submitted an affidavit attesting to facts that may provide a basis for finding that there has been a substantial material change in the RAs' status. Some of the facts attested to in the affidavit, which were not before us when we decided to dismiss the petition for election, suggest that some or all of the RAs presently may possess the necessary indicia of employment to distinguish them from the RAs who were the subject of this Commission's 1981 decision.

Representation cases such as this are investigatory proceedings in which it is our duty to try to find the truth. Now that Petitioner has asserted facts that may indicate there has been a substantial and material change in circumstances since the 1981 decision, it is our statutory obligation to send this matter to an administrative law judge to gather facts with which we can make a final determination as to whether a question of representation may exist.[2] We make no finding as to whether the RAs that Petitioner seeks to represent are employees of the University; however, the assertions in the affidavit submitted by Petitioner persuade us that this matter requires further inquiry under §12 of PERA. Therefore, this case must be referred to a senior administrative law judge to conduct an evidentiary hearing at which Petitioner will have the opportunity to attempt to show that there has been a substantial and material change in circumstances since *Regents of the University of Michigan* was issued. As indicated in our order below, it is Petitioner's burden to show that there has been such a change and it is a heavy burden to meet.

[2] If this were an adversarial proceeding, Petitioner's failure to assert sufficient facts in its initial pleading to support a finding that we have jurisdiction over this matter would result in a dismissal with prejudice. Representation cases are information gathering, rather than adversarial, proceedings.

ORDER

The Motions to Intervene filed on behalf of Students Against GSRA Unionization and by the Attorney General are denied.

The motion for reconsideration is granted, the petition for a representation election filed by the Graduate Employees Organization/AFT, is reinstated, and this matter is referred to a senior administrative law judge for an expedited evidentiary hearing. At such hearing, the Petitioner shall have the burden of proving, by substantial, competent evidence, such material change of circumstances since the decision in *Regents of the University of Michigan*, 1981 MERC Lab Op 777, as to warrant a finding that some or all of the Graduate Student Research Assistants are employees of the University of Michigan and are entitled to the protection and benefits of the Public Employment Relations Act. The Commission will require competent proof as to each category of employee to show that the facts are different from our previous decision.

We direct the administrative law judge to issue a detailed pre-hearing order regarding the disclosure of witnesses and exchange of exhibits in response to which both the Petitioner and the University shall provide relevant information and actively participate in the hearing process. The administrative law judge may call any witnesses and receive any evidence, in addition to testimony and other evidence offered by the Petitioner and the University, as may be probative and relevant, and may, by subpoena, compel the production of evidence. The administrative law judge may receive stipulations of fact from the parties, but shall not accept any stipulation as to the ultimate legal issue of employment status.

If, upon the conclusion of the hearing, the Commission determines from the factual record that some or all of the Graduate Student Research Assistants in question are employees of the University and are covered by PERA, the Commission will direct an election by secret ballot as to those positions only, in a new unit, or as an accretion to an existing unit, or take such other action as may be appropriate.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Nino E. Green, Commission Member

Christine A. Derdarian, Commission Member

Dated: DEC 16 2011

COMMISSION CHAIR CALLAGHAN, CONCURRING IN PART AND DISSENTING IN PART:

For the reasons stated in decision of the majority, I agree with that the Proposed Intervenor, Students Against GSRA Unionization, does not qualify as an intervenor under the Commission's rules and their motion to intervene should be denied. However, I disagree with the majority's decision to grant reconsideration of our September 14, 2011 decision dismissing the representation petition. I would deny the motion for reconsideration and dismiss the Attorney General's motion to intervene as moot. Since the majority is granting reconsideration, I disagree with their denial of the Attorney General's motion to intervene.

The basis for MERC's 1981 opinion, which held that RAs are not employees, but are, instead, students, holds true today. Nothing has materially changed the nature of the mentor-mentee relationship that is so critical to the research function of the University of Michigan as a world class research university. Even though the numbers of RAs and the amount of funding have increased, the essential nature of the mentor-mentee relationship between student and faculty member that is at the core of the university research function remains unaltered. However, that crucial relationship would be placed in peril if this Commission were to reverse its 1981 decision.

This is precisely why University of Michigan President Mary Sue Coleman and nineteen University department heads opposed the resolution by the University Regents declaring that the RAs are employees. In urging the Regents not to adopt the resolution, President Coleman told them that characterizing "research assistants as University employees. . . . could fundamentally alter the relationship between faculty and graduate students." President Coleman, a nationally recognized researcher, also warned, "this matching process and the collegial relationship built on it, are the keys to the recruitment of the very best faculty and staff, and essential to the quality of our graduate education overall." This view was echoed by the June 24, 2011 letter to the provost signed by nineteen current and former deans, which said in part, "We believe that such a union would put at risk the excellence of our university and the success of our graduate student assistants."

Indeed, it is for the aforementioned reasons that this Commission unanimously concluded, in September 2011, that we lack jurisdiction to grant the election petition as the matter has already been determined by our 1981 decision. We must not ignore our previous decision unless there has been a material and substantial change in circumstances that would justify a different result. Neither the petition nor Petitioner's motion for reconsideration has persuaded me that there has been "a substantial and material change of circumstance" since this Commission's 1981 decision on the question of whether the RAs are public employees as defined under PERA.

Just as nothing material has changed since 1981 to alter the prior Commission decision, so too, nothing has changed in the arguments made by Petitioner that would allow us to reconsider our September 14, 2011 decision. Rule 167 of the Commission's General Rules, 2002 MR R 423.167 governs motions for reconsideration and states in pertinent part:

> A motion for reconsideration shall state with particularity the material error claimed . . . . 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. (Emphasis added)

I have thoroughly reviewed Petitioner's motion and the affidavit filed with it. However, I find nothing in Petitioner's arguments in support of its request for reconsideration that differs significantly from the arguments in the petition. Those arguments were considered and discussed in our September 14, 2011 Decision and Order.

I have also carefully read the University's response to Petitioner's motion. While the University's response does not oppose Petitioner's motion, the two affidavits submitted with that response stress the importance of the RAs' work in the graduate students' educational process. Indeed, both affidavits make it clear that the graduate students' work as RAs is an integral part of gaining the knowledge and skills necessary for them to earn their doctorate degrees. Both affidavits confirm that the following language from *Regents of the University of Michigan*, 1981 MERC Lab Op 777, 785-78, remains true today:

> 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. . . . RAs are substantially more like the student in the classroom . . . . They are working for themselves.

Neither Petitioners' motion for reconsideration nor its supporting affidavit contains sufficient allegations to give us reasonable cause to believe that the RAs might be public employees for whom a question of representation exists. Therefore, I find no basis for ordering a hearing under §12 of PERA. Further, I find no need for the Attorney General's intervention unless reconsideration is granted.

The Motion to Intervene by the Michigan Attorney General

The Attorney General seeks to intervene under MCL 14.28. That statute provides:

> The attorney general . . . shall also, when requested by the governor, or either branch of the legislature, 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.

If I agreed with the decision to grant reconsideration in this matter, I would find the Attorney General's intervention appropriate. As discussed at our August 8, 2011 meeting, given

the parties agreement on the underlying issues, there is no case or controversy to put before an administrative law judge. At that meeting, legitimate concern was expressed over whether the University would present evidence at a hearing that might show facts exist contrary to the Regents' resolution. Petitioner has offered no arguments that might persuade me that an evidentiary hearing in this matter would fully disclose the facts necessary to accurately discern whether the RAs' relationship with the University has substantially changed since the decision in *Regents of the University of Michigan*, 1981 MERC Lab Op 777.

If I agreed with the decision to refer this matter to an administrative law judge for a hearing, I would be concerned that testimony regarding the relevant experiences of the University president, numerous deans and faculty members, and hundreds of RAs might not be presented without the Attorney General's intervention. Indeed, a decision to refer this matter for hearing would appear, to all who oppose the Regents' May 19 resolution, to be a sham if we were to permit only one side of this crucial debate to be proffered at hearing. If I had joined in the decision to refer the matter to an administrative law judge, then in the interests of fairness and due process, I would encourage the majority to grant the Attorney General's motion to intervene for the purpose of ensuring that both sides of this issue were fully and fairly examined. However, it is my opinion that we should not grant reconsideration of this matter.

Edward D. Callaghan, Commission Chair

EXHIBIT 7

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

UNIVERSITY OF MICHIGAN,
Public Employer,

Case No. R11 D-034

-and-

CORRECTED DATE OF MAILING

GRADUATE EMPLOYEES ORGANIZATION/AFT MI, AFT, AFL-CIO,
Petitioner-Labor Organization.

APPEARANCES:

Christine M. Gerdes, Associate General Counsel, and Fink and Associates, by David H. Fink and Darryl Bressack, for the Public Employer

Mark H. Cousens, for Petitioner

PRE-HEARING ORDER

On April 27, 2011 the Graduate Employees Organization/AFT MI, AFT, AFL-CIO filed a petition for representation election with the Michigan Employment Relations Commission (the Commission) seeking an election to accrete a group of Graduate Student Research Assistants (RAs) to its existing unit of graduate student employees of the University of Michigan (the University). In *Regents of the University of Michigan*, 1981 MERC Lab Op 777, the Commission held that individuals holding appointments from the University as graduate student research assistants were not employees under the Michigan Public Employment Relations Act (PERA, 1965 PA 379, as amended, MCL 423.201 et seq. On December 16, 2011, the Commission issued a Decision and Order referring the petition filed on April 27, 2011 to an administrative law judge for an evidentiary hearing to determine whether the material facts have changed since its 1981 decision to warrant a finding that some or all of the RAs are now employees under PERA and, therefore, entitled to the protection and benefits of the Act. The case was assigned for hearing to Julia C. Stern, Administrative Law Judge for the Michigan Administrative Hearing System (MAHS).

In its December 16 order, the Commission directed me to issue a detailed pre-hearing order and to conduct an expedited hearing. On January 4, 2012, I held a telephone conference with representatives of the parties. With the agreement of the parties, a notice of hearing was issued on January 5, 2012 for a hearing on February 1, 2, and 3, 2012. As discussed during the conference, additional days of hearing will be scheduled within the two weeks following February 3 to permit the University to present evidence and allow me to subpoena additional

witnesses or documents, if I decide to do so. A pre-hearing conference has also been scheduled at MAHS for January 20, 2012.

In accord with the Commission's order and my authority under the Commission's General Rules, R 423.101 et seq, I direct the parties as follows.

Petitioner

To clarify the scope of the petition and the issues to be litigated before the hearing begins, Petitioner is to supply the University and me with the following, in writing, **by the end of the close of business on Friday, January 13, 2012:**

1. An amended petition which clearly identifies the RAs excluded from proposed unit;
2. Whether Petitioner contends that there are a significant number of RAs who are engaged by the University to perform only research that will not be used to evaluate their academic progress or progress toward a terminal degree;
   a. If Petitioner does make this assertion, the approximate number and/or the approximate percentage of RAs who fall into this category; and
   b. A practical method of identifying the RAs who fall into this category if the Commission were to direct an election in this subgroup of RAs;
3. If Petitioner contends that there are other subgroups or categories of RAs who may be employees even if the majority of RAs found not to be, a description of each subgroup or category;
4. A position statement which identifies the issues remaining to be decided by the Commission and states Petitioner's position as to each issue.

To prepare for the expedited hearing and the pre-hearing conference, Petitioner is to supply the University and me with the following, in writing,

By the end of the close of business on Monday, January 16, 2012:

1. Proposed stipulations of fact for the hearing;

By the end of the close of business on Wednesday, January 18, 2012:

2. A list of witnesses to be called to testify at the hearing, their titles, and, for each witness, a brief (no more than two paragraph) summary of their expected testimony;
3. If Petitioner seeks to have affidavits admitted in lieu of testimony, samples of these affidavits;
4. Copies of proposed exhibits, including an index describing each exhibit.

My expectation is that Petitioner will provide the names of all its witnesses and copies of all of its proposed exhibits by this deadline. If Petitioner desires to call witnesses not named in its list or submit evidence it did not provide by the deadline, it must seek the University's agreement and provide me with an explanation of why it could not have

The University

The University does not oppose the petition and has taken the position that the hearing which is to be conducted is not necessary because the RAs are employees. The University's role in this proceeding, therefore, is to assist me and the Commission in developing a complete and accurate factual record. To aid me in preparing prepare for the expedited hearing and the pre-hearing conference, the University is directed to supply the Petitioner and me with the following, in writing, **by the end of the close of business on Wednesday, January 18, 2012:**

1. Proposed stipulations of fact, if any;
2. A list of witnesses the University expects to call to testify at the hearing, their titles, and, for each witness, a brief summary of their expected testimony;
3. Copies of proposed exhibits, including an index describing each exhibit; and

I understand that the University will need to add to its list of proposed witnesses and submit additional proposed exhibits after Petitioner has presented its evidence at the hearing, and it may do so upon providing Petitioner and me with written notice. The University may provide a position statement addressing the issues raised in Petitioner's position statement, but is not required to do so.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Julia C. Stern
Administrative Law Judge
Michigan Administrative Hearing System

Date: JAN 6 2012

EXHIBIT 8

RICK SNYDER
GOVERNOR

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
Michael Zimmer
EXECUTIVE DIRECTOR

STEVEN HILFINGER
DIRECTOR

December 27, 2011

Kevin J. Cox
Assistant Attorney General
Labor Division
3030 W. Grand Blvd.
Detroit, MI 48202

Re: **University of Michigan –and- Graduate Employees Organization/AFT**
Case No. R11 D-034

Dear Mr. Cox:

I received the Attorney General's request that his office participate in the January 4, 2012 conference call I have scheduled with the parties' counsel in the above matter. On December 16, 2011, the Commission issued an order denying the Attorney General's motion to intervene. Therefore, the Attorney General is not a party to this case.

The December 16, 2011 order directs Petitioner, at an evidentiary hearing, to present substantial, competent evidence of a material change in circumstances since the Commission's decision in *Regents of the University of Michigan,* 1981 MERC Lab Op 777. It is, of course, essential that the record upon which the Commission bases its decision be complete and accurate. Normally, the Employer would assume responsibility for rebutting Petitioner's evidence. As you are aware, however, concerns were raised with the Commission over whether the University could or would take on this responsibility in this particular case. The Commission's December 16, 2011 order states that the administrative law judge assigned to the case may call witnesses and compel the production of evidence in addition that offered by Petitioner and the University. As I interpret it, the Commission's order addresses the concerns raised about the University's role by placing more responsibility on the administrative law judge to develop the factual record than is usual in a Commission proceeding.

Persons who are not parties are not normally permitted to participate in pre-hearing conferences or present evidence or question witnesses at the hearing. There is nothing in the Commission's order that indicates that the Commission intended to allow the Attorney General to participate in the proceeding except as an observer at the public hearing. Therefore, the Attorney General's request to be included in the January 4 pre-hearing conference is denied. I will, however, solicit the Attorney General's input, after the parties have presented their evidence at the hearing, as to whether there is other evidence which might be of assistance to the Commission in making its decision. If I determine that this evidence is relevant and not cumulative, I will subpoena the witnesses and/or documents and schedule additional hearing dates. Any witnesses I subpoena will be questioned by me, and the University and the Petitioner will have an opportunity to cross-examine them.

If you have any questions, please feel free to ask.

Sincerely,

Julia C. Stern
Administrative Law Judge

CC: Christine M. Gerdes
Mark H. Cousens

EXHIBIT 9

STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

IN THE MATTER OF:

REGENTS OF THE UNIVERSITY OF MICHIGAN,
Public Employer

-AND-

Case Number
R11 D-034

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

VOLUME ONE

_____/

Proceedings had and testimony taken in the above-entitled matter before Administrative Law Judge JULIA C. STERN at 3026 West Grand Boulevard, Detroit, Michigan on Wednesday, February 1, 2012, commencing at approximately 9:24 a.m.

APPEARANCES:

CHRISTINE M. GERDES, ESQ.
University of Michigan
503 Thompson Street #5010
Fleming Administration Building
Ann Arbor, Michigan 48109
(Appearing on behalf of the Public Employer)

DAVID H. FINK, ESQ.
David Fink & Associates
100 West Long Lake Road, Suite 111
Bloomfield Hills, Michigan 48304
(Appearing on behalf of the Public Employer)

MARK H. COUSENS, ESQ.
26261 Evergreen Road, Suite 110
Southfield, Michigan 48076
(Appearing on behalf of the Petitioner)

- - - -

Maria E. Greenough, Reporter

present other evidence -- other evidence. I will ask questions of these witnesses myself if their testimony appears to me to be unclear.

This testimony's being recorded and will be transcribed, and the testimony and any exhibits admitted will be public record subject to disclosure under the Freedom of Information Act; however, only the parties will be presenting evidence at this hearing.

However, because the Petitioner and the University agree in this case that the GSRA -- GSRAs are employees, I have taken a very unusual step of asking two entities, that is the Michigan Attorney General's Office and an organization called Students Against GSRA Unionization, to provide me with imput after the parties have presented their evidence as to whether there's other evidence that the Commission could consider.

After the parties have completed putting in their evidence, which I anticipate will be no later than the end of next Monday, these entities will have three or four days to provide me with suggestions for additional documents they believe that the Commission should consider in making their

decision or additional witnesses that should be called, along with an explanation of why this evidence is relevant in light of the testimony presented by the parties during this hearing.

If I decide that this evidence is relevant and not cumulative, I will reopen the hearing, probably sometime in the week of February 21st, give the parties an opportunity to comment on the proposed new evidence. And if I conclude that the testimony of additional witnesses may be relevant, subpoena and question the additional witnesses myself.

Again, this hearing will not have a public comment portion. Anybody who disrupts the hearing will be asked to leave the room. As I said before we got on the record, the taking of -- because the taking of pictures and videos can be distracting, anyone I see using a camera, including a phone, without prior permission will be asked to leave the hearing.

I'll make a point on the record here that this morning -- yesterday I received a request from the Mackinac Center to film this hearing. Because the Mackinac Center did not comply with the