

STATE OF MICHIGAN  
EMPLOYMENT RELATIONS COMMISSION  
LABOR RELATIONS DIVISION

In the Matter of:

UNIVERSITY OF MICHIGAN,

Respondent,

Case No. R11 D-034

-and-

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

Petitioner.

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**RESPONDENT UNIVERSITY OF MICHIGAN'S POST-HEARING BRIEF**

## TABLE OF CONTENTS

I.	INTRODUCTION .....	1
II.	APPLICABLE LAW .....	3
A.	Burden of Proof .....	3
B.	Standard Under PERA .....	5
III.	MATERIAL DIFFERENCES BETWEEN THE FACTS RELIED ON BY THE COMMISSION IN 1981 AND THE EVIDENCE IN 2012 .....	5
A.	In 2012, the University Recognizes GSRAs as Employees and Treats Them as Such .....	6
1.	In 2012, the University Formally Recognizes GSRAs as Employees and Refers to Them as Such in Internal Documents .....	6
2.	In 2012, the University Treats GSRAs as Employees by Compensating Them as Employees .....	10
3.	In 2012, the University Treats GSRAs as Employees by Providing GSRAs with Benefits that are Generally Associated with Employment .....	12
4.	In 2012, the University Treats GSRAs as Employees by Subjecting Them to Rules and Protocols Applicable to Employees .....	13
B.	In 2012, GSRAs are Directly Fulfilling a Core Mission of the University .....	16
C.	Since 1981, GSRAs Have Been Recognized as Employees Under Several Laws .....	21
IV.	IRRESPECTIVE OF THE CHANGE IN CIRCUMSTANCES, THE TREATMENT AND NATURE OF THE WORK OF GSRAS BEAR THE INDICIA OF EMPLOYMENT .....	24
A.	The University Has Formally Recognized GSRAs as Employees .....	27
B.	Internal and External University Communications Repeatedly Refer to GSRAs as Employees .....	27
C.	The Work is Being Performed for the Benefit of the University .....	28
1.	Research is a Core Mission of the University .....	29
2.	GSRA Research Directly Advances the Research Mission .....	34
3.	Data Generated During GSRA Research Is Intended to Meet the Aims of the Grant .....	36
D.	GSRAs are Controlled and Supervised in the Manner of Professional Researchers .....	40
E.	GSRAs are Provided with Compensation and Benefits Like Employees .....	44
V.	Conclusion .....	47

## I. INTRODUCTION

In the late 1970s and early 1980s—when the Commission was asked to determine whether Graduate Student Research Assistants (“GSRAs”), Graduate Student Teaching Assistants (“TAs”, now “GSIs”) and Graduate Student Staff Assistants (“SAs”) should be considered employees under PERA—the Commission rejected policy arguments about the putative harm of graduate student unionization. The doomsayers were wrong. Unionization of GSIs and SAs did not destroy the University of Michigan; instead, the University flourished over the ensuing 30 years. Ultimately, as the Commission held in 1981, the policy arguments are irrelevant; policy is the province of the Legislature, not MERC. The Commission’s role here is to call the “balls and strikes.” Do GSRAs, employed at the University of Michigan in 2012, bear the indicia of employment and has there been a change in circumstances since 1981?

In 1981, the Commission reviewed evidence regarding the work performed by GSRAs in the late 1970s and concluded that GSRAs were not public employees. But, significantly, Administrative Law Judge Shlomo Sperka described the GSRA issue as a “close question.” *Regents of the University of Michigan, 1981 MERC Lab Op 777, 808*. Today the question is not close. GSRAs will always be students, but the evidence presented in these factfinding proceedings clearly demonstrates that GSRAs perform research in the manner of employees. And, like medical interns and residents, the fact that GSRAs learn from their research assignments does not change the fact that they are doing the work of their Employer—the University.

In addressing the current representation question, the Commission asked whether there has been a “material change of circumstances” since 1981. In fact, the record shows not one, but many material changes of circumstances over the last three decades. The single most important distinction between the late 1970s and the present is that the University now recognizes that GSRAs are

employees. The University strongly supports petitioner's request for GSRAs to be considered employees under PERA. Given the facts underlying its relationship with GSRAs, the University, through its Board of Regents, has concluded that it would be factually incorrect and wrong to argue in these administrative proceedings that GSRAs are solely students.

Irrespective of the Regents' formal recognition of GSRAs as employees, the University's internal documents show that the University believes GSRAs are employees. The University repeatedly refers to GSRAs as "employees" or "graduate student employees" in numerous documents that are used for internal purposes. University documents—both internal and external—speak in the language of employment, referring to "hiring" of GSRAs, the "job" of the GSRA and the "employment" of GSRAs. By way of just a few examples: GSRAs are discussed in the faculty handbook, which refers to (and treats) GSRAs as employees; the University requires some GSRAs to complete effort certification forms, which refer to GSRAs as employees and which are only required of employees; and, an internal PowerPoint presentation prepared by a college-level HR Assistant is entitled "Hiring the Graduate Student Research Assistant" and repeatedly refers to GSRAs as employees, explaining that the difference between a GSRA and other graduate students is that an employment relationship exists when there is an expectation of effort or outcome in exchange for pay, as opposed to when the work is done purely for academic progress. (Exhibit 25).

The documents referring to GSRAs as employees are consistent with the manner in which GSRAs are treated. The University entrusts GSRAs with the benefits and responsibilities of employment. When many GSRAs are hired, they are provided with offers of employment which stipulate that the offer is contingent on documentary evidence of work eligibility and satisfactory contribution to the required research. GSRAs are entitled to sick leave and receive health benefits which are generally perquisites of employees. GSRAs are evaluated, in part, on the progress they

make in performing research. And, GSRA's are subject to rules and restrictions that apply to employees, but not to non-employed students: they take an oath of loyalty to the Constitution of the United States and they are subject to rules in the University's Standard Practice Guide which do not apply to non-employed students.

In part, the 1981 Order was based upon the conclusion that "[a]lthough the value of the RA's research to the University is real it is clearly also more indirect than that of teaching 30% of the undergraduate courses." (1981 Order at 785-786). After thirty years, that finding is no longer valid. The 1981 Commission based its Order on the existence of approximately 340 GSRA's, working in a research program with a budget of less than \$130 million. Not long after Judge Sperka completed his report, the Bayh-Dole Act passed Congress. Since then, for many different reasons, research has taken on new dimensions at the University of Michigan. Today, more than 2000 GSRA's do the important work necessary to support a program that has become the largest sponsored research enterprise at any public university in America, with a budget of more than \$1.236 billion. And, while operating expenditures for Instruction and for Research have both increased dramatically over the last three decades, the increased focus on research has resulted in a narrowing of the difference between these two categories. So, in 1981, operating expenses for instruction exceeded expenditures for research by more than 65%, but, by 2011, research expenditures were only about 16 percent less than expenditures for instruction. (Provost Hanlon Testimony; Volume 2 at 44:3-45:15). There is nothing "indirect" about the value of research to the University of Michigan.

## **II. APPLICABLE LAW**

### **A. Burden of Proof**

The Commission correctly determined that the doctrines of *res judicata* and collateral estoppel do not apply to this matter. (Decision and Order on Motions to Intervene and Motion for

Reconsideration of Order Dismissing Petition at 5 (“December 16 Order”). As stated in the December 16 Order, “[r]epresentation proceedings are nonadversary, information gathering procedures, as distinguished from contested, adjudicatory unfair labor practice cases...[P]reclusion doctrines such as res judicata and collateral estoppels 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.” (Citing *Eastern Michigan Univ*, 1999 MERC Lab Op 550, 560; 13 MPER 310 17 (1999)). Moreover, *res judicata* is not a jurisdictional bar; it is an affirmative defense that the University has not raised.

Even though the preclusion doctrines do not apply, the Commission concluded that Petitioner has “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.”

Since the preclusion doctrines do not and cannot apply, there is no statutory or case law basis for requiring Petitioner to prove a material change in circumstances or application of a “heavy burden” to those proofs.<sup>1</sup> The Michigan Supreme Court has held that “[t]he proof required in an administrative proceeding . . . is the same as that required in a civil judicial proceeding: a preponderance of the evidence.” *Aquilina v General Motors Corporation*, 403 Mich 206, 210-11 (1978). Thus, the Petitioner should only be required to show, by a preponderance of the evidence,

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<sup>1</sup> Since a heightened burden does not attach to decertification (MERC R.141), it is difficult to see why a “heavy burden” should attach to the present inquiry.

that, today, GSRAs are employees under PERA. If Petitioner meets this burden—as the University believes it has—then, irrespective of any change in circumstances, the Commission should find that GSRAs are employees pursuant to PERA.

Ultimately, the burden placed on Petitioner is immaterial here. Under any standard, it is clear that there are numerous material differences between the facts relied on in the 1981 Order and the facts in evidence in 2012.

#### **B. Standard Under PERA**

Under PERA, a “public employee” is a “person holding a position by appointment or employment in the government of this state, in the government of 1 or more of the political subdivisions of this state, in the public school service, in a public or special district, in the service of an authority, commission, or board, or in any other branch of the public service.” MCL 423.201. PERA does not further define “employee,” but MERC has consistently held that students can be employees and has been affirmed in this by the Supreme Court. See e.g. *Regents of Univ of Michigan v Michigan Employment Relations Comm*, 389 Mich 96, 112; 204 NW2d 218, 225 (1973).

### **III. MATERIAL DIFFERENCES BETWEEN THE FACTS RELIED ON BY THE COMMISSION IN 1981 AND THE EVIDENCE IN 2012**

In its December 16 Order, the Commission held that Petitioner must demonstrate by substantial, competent evidence, such material change in circumstances since the 1981 Order as to warrant a finding that some or all of the GSRAs are University employees. Through stipulations, exhibits and testimony, Petitioner has shown many material changes in circumstances, each one supporting a finding that GSRAs are employees.

**A. In 2012, the University Recognizes GSRAs as Employees and Treats Them as Such**

**1. In 2012, the University Formally Recognizes GSRAs as Employees and Refers to Them as Such in Internal Documents**

The recognition of GSRAs as employees by the Regents of the University of Michigan represents a crucial difference between circumstances in 1981 and today. In the late 1970s, the University did not acknowledge that GSRAs were employees and opposed the Union’s bid to have them treated as such. In fact, during the proceedings leading to the 1981 Order, the University also opposed the efforts of Graduate Student Teaching Assistants and Graduate Student Staff Assistants to be recognized as employees under PERA. Now, the University fully supports the GSRAs’ right to be treated as employees. But, even before the formal action of the Board of Regents, the University repeatedly referred to GSRAs as employees in its public and internal statements.

<b>Material Differences Between the Facts Relied on by the Commission in 1981 and the Evidence in 2012</b>	
<b>THE UNIVERSITY NOW FORMALLY RECOGNIZES GSRAs AS EMPLOYEES AND FREQUENTLY REFERS TO THEM AS EMPLOYEES</b>	
In 1981, the University opposed the recognition of GSRAs as employees under PERA.	In 2012, the University fully supports the right of GSRAs to vote to determine whether they want to be represented by an exclusive bargaining agent.
In 1981, the University did not recognize GSRAs as employees and opposed the GSRAs’ bid before MERC to be	In 2012, the University recognizes GSRAs as employees in numerous contexts—including these proceedings. On May 19, 2011, the Regents of the University of Michigan adopted the following resolution:  Resolved, that consistent with the University of Michigan’s proud history of strong, positive, and mutually productive labor relations, the Board of Regents supports the rights of University Graduate Research Assistants, whom we recognize as employees, to determine for themselves whether they choose to organize.



considered employees.	(Stipulation No. 2).
The 1981 Order does not explain why the University did not recognize GSRA as employees.	<p>In 2012, the University has publicly explained why it recognizes GSRA as employees. Regent Denise Ilitch wrote on behalf of the other Regents who supported the decision:</p> <p>We took this action because GSRA are employees as well as students. As employees, they provide significant benefit to the University, and they have legal rights including collective bargaining rights, if they so choose. Proof of their employee status includes:</p> <ol style="list-style-type: none"> <li>1) They receive W-2s;</li> <li>2) In its own materials, including its faculty handbook, the University refers to these individuals as employees;</li> <li>3) Post-doctoral fellows who often do the same work as GSRA are considered employees by the Administration; and</li> <li>4) Their salaries are identical to those of the graduate student instructors, who are members of the Graduate Employees Organization.</li> </ol> <p>(Regents’ Statement Regarding GSRA Resolution) (Exhibit 21).</p>
The 1981 Order does not explain why the University opposed the Union’s arguments that GSRA are employees.	<p>In 2012, the Regents have explained the University’s position in this litigation by stating that “[b]ased on the hard evidence, it would have been factually incorrect and wrong to have University attorneys argue in an administrative proceeding that these employees are solely students.” (Regents’ Statement Regarding GSRA Resolution) (Exhibit 21).</p>
There is no finding in the 1981 Order that the University either internally or publicly referred to GSRA as employees.	<p>In 2012, many University internal documents and public communications identify GSRA as employees. For example:</p> <ul style="list-style-type: none"> <li>• GSRA are often presented with the terms of their employment via “offer letters” (See Stipulation No. 16(h)), which include references to “specific duties and schedules” and which refer to graduate course work required “during the term(s) of <b>employment.</b>” Sample offer letters are posted on the Academic Human Resources (“Academic HR”) website. (Exhibit 1(d)) (emphasis added).</li> </ul>

- The faculty handbook refers to GSRAAs as “Graduate Student Employees” and discusses procedures for “any unit that expects to **employ** a Graduate Student Research Assistant.” That handbook refers faculty to certain pages on the University’s Academic HR website (Exhibit 1 of this record) which “may be helpful to faculty who expect to **hire** a graduate student research assistant.” (Exhibit 22) (emphasis added).
- The University’s Benefits Office posts a chart of benefits offered to graduate students in various different categories. (Exhibit 23). Referring to the Life Insurance plan (a benefit not extended to graduate students funded by fellowships) the chart explains that GSRAAs will be immediately enrolled “once their **job** has been entered into M-Pathways.” (Id. at 2-3). Benefits Enrollment is then described for “newly **hired**” GSRAAs. (Id. at 4). In describing COBRA protection, the Benefits Office says the continuation of coverage applies “[i]f you are a GSI, GSSA or GSRA and you terminate **employment**...” (Id. at 5). The same document assures GSRAAs as follows:
 

If you are a GEO member or a GSRA and if you are participating in any U-M benefit plans during the winter term (Term II) and you will be **re-employed** for the following fall term (Term I) with a one-quarter or greater **employment** fraction, benefits may continue during the spring/summer term (Term III). (Id. at 6).
- A College of Literature, Science, and the Arts (“LS&A”) PowerPoint presentation titled, “Hiring the Graduate Student Research Assistant” states as follows:
 

“Whenever there is an expectation of a certain effort level or outcome in exchange for pay, an employment relationship exists—especially for, but not limited to, work supported by a grant.” (Exhibit 25, slide 3) (emphasis in original).
- The LS&A presentation describes how a GSRA can be terminated as an **employee** via the Layoff and Termination form. (Exhibit 25) (emphasis added).
- Under University Standard Practice Guide (“SPG”) 501.10 “[t]he University [to comply with OMB Circular A-21] requires effort certification by certain **employees**.” SPG 501.10 explains that certified effort reports “must assure sponsors that funds are properly expended for **the salaries and wages of employees** working on the projects that sponsors fund.” Those reports must identify effort “performed by an **employee**.” The document continues with a list of circumstances in which “**Employees** must certify effort...” and, finally, requires that “**Employees** signing the Effort Certification Report attest to and verify the accuracy of information contained in the report.” (Exhibit 6) (emphasis added).

	<ul style="list-style-type: none"> <li>• A document titled “Effort Reporting Procedures—End of Term Process” found on the website for Department of Chemical Engineering refers to GSRAs as employees, who must complete a mandatory quiz and review their “Effort Certification Report” for accuracy. This document directs “[g]raduate students (i.e. GSI, GSRA, GSSI)” to certify effort and explains that online certification is only possible for “an active University <b>employee.</b>” The entry of the data in the Wolverine Access system requires the GSRA to select “<b>EMPLOYEE BUSINESS</b>” and to then access a folder entitled “<b>Employment Information.</b>” (Exhibit 29) (bold emphasis added) (capitalization in original).</li> <li>• The University of Michigan Financial Operations website includes a page entitled “Underlying Principles and Definitions in Effort Reporting.” That website explains as follows: <p style="margin-left: 40px;">“University effort certified...reflects only the activities that the <b>employee</b> is paid for in her/his base compensation rate.” (emphasis added).</p> </li> </ul> <p>The web page refers to the individuals whose effort is certified as “employees” no fewer than six times. (Exhibit 8).<sup>2</sup></p>
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In 1981, Judge Sperka struggled with the status of GSRAs and, in the face of strong opposition from the Employer—the Regents of the University of Michigan—found that the classification of GSRAs was “a close question.” (1981 Order at p. 808). The formal recognition today by the Regents that GSRAs should be recognized as employees under PERA, standing alone, is a material difference that should tip the scales in favor of GSRA employee status; the many references to GSRAs as “employees,” with “jobs,” who are “hired,” “employed,” and “re-employed,” leave no doubt that the University deems GSRAs to be employees.

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<sup>2</sup> In its pre-hearing brief, the University referenced a website page which states that the Faculty and Staff Assistance Program “offers a number of services designed to help staff, faculty, and their immediate family members with personal difficulties encountered at both work and home. A student, **who is also a University employee** (i.e., a GSI/GSSA/GSRA) is eligible for assistance from FASAP.” (Exhibit A) (found at <http://www.sph.umich.edu/diversity/process.html>) (last accessed Feb. 28, 2012). The page was not offered into evidence.

**2. In 2012, the University Treats GSRAs as Employees by Compensating Them as Employees**

The evidence presented during these proceedings demonstrates that GSRAs are hired and paid in the manner of employees, not of students.

<b>Material Differences Between the Facts Relied on by the Commission in 1981 and the Evidence in 2012</b>	
<b>THE UNIVERSITY NOW HIRES AND COMPENSATES GSRAs AS EMPLOYEES</b>	
<p>In 1981, evidence was presented demonstrating that all GSA appointments (GSI, GSSA and GSRA) begin with an application for financial aid. “Appointments are made through the departments, usually after a student’s application for admission to a graduate program is accompanied by an application for financial support. GSA appointments are one form of financial aid.” (1981 Order at 780).</p>	<p>In 2012, the selection of GSRAs is not initiated by a request for financial aid. As explained by Provost Philip James Hanlon, “It is no longer necessary for students to identify themselves through an application process.” (Volume 2 at 57:10-57:11) Instead, as part of the competition to lure the best graduate students, a “full funding model” has developed in recent years. (Id. at 56-59).</p>
<p>The 1981 Order reports that the compensation of GRSAs is subject to federal income tax, but does not identify any difference in the tax treatment of GSRAs and graduate students receiving fellowship funding. (1981 Order at 780 and 795).</p>	<p>The record in 2012 shows that GSRAs are subject to federal income tax withholding, but that students receiving fellowship funds are not subject to such withholding. (Stipulation No. 16) (See also Stephen Raiman Testimony, Volume 4 at 105:19-106:5).</p>
<p>The 1981 Order does not reference any requirement for GSRAs to certify their immigration status. The</p>	<p>In 2012, GSRAs are required to complete a federally-required Form I-9, Employment Eligibility Verification or, in the alternative, to present a visa establishing authorization to work. (Stipulation No. 16(a)) (See also Exhibit 1(c)). A Form I-9 is only</p>

<p>federal requirement to obtain Form I-9 Employment Eligibility Verification did not become effective until November 6, 1986.</p>	<p>required for employees—it is not required for students.</p>
<p>The 1981 Order does not indicate whether an offer letter was provided to prospective GSRAs.</p>	<p>In 2012, GSRAs are often presented with an offer letter that conditions employment on:</p> <ul style="list-style-type: none"> <li>• Satisfactory documentary evidence of work eligibility in the U.S.</li> <li>• Satisfactory contributions to the involved research.</li> <li>• Continued satisfactory performance in your academic program.</li> </ul> <p>(Exhibit 1(d)).</p>

**3. In 2012, the University Treats GSRA as Employees by Providing GSRA with Benefits that are Generally Associated with Employment**

In the 1981 Order and the findings of ALJ Sperka, there is no more than a cursory mention of benefits provided to GSRA. The record in 2012 establishes that GSRA are provided with numerous benefits generally provided to employees.

<b>Material Differences Between the Facts Relied on by the Commission in 1981 and the Evidence in 2012</b>	
<b>IN 2012, THE UNIVERSITY PROVIDES GSRA WITH EMPLOYEE BENEFITS, MANY OF WHICH ARE NOT PROVIDED TO NON-EMPLOYEE GRADUATE STUDENTS</b>	
<p>In the 1981 Order and the findings of ALJ Sperka, there is only a cursory mention of the benefits provided to GSRA. (1981 Order at 800).</p>	<p>In 2012 GSRA are offered numerous employee benefits, including:</p> <ul style="list-style-type: none"> <li>• Health Insurance;</li> <li>• Dental Insurance;</li> <li>• Vision Coverage;</li> <li>• University Optional, and Dependent Group Term Life Insurance;</li> <li>• Travel Accident Insurance;</li> <li>• Tuition Waivers;</li> <li>• Sick leave, not to exceed 3 weeks in a 12 month period.</li> <li>• Continued compensation during class recess or holidays;</li> <li>• Dependent Care Flexible Spending Accounts;</li> <li>• Health Care Flexible Spending Accounts;</li> <li>• Tax-Deferred Supplemental Retirement Accounts;</li> <li>• A Legal Services Plan;</li> <li>• Unpaid leaves of absence under the Family and Medical Leave Act of 1993 (“FMLA”) provided all statutory requirements are met;</li> <li>• COBRA benefits.</li> <li>• Continuation of benefits during non-enrolled spring/summer term if participating in any U-M benefit plans during the winter term, and will be re-employed for the following fall term with a one-quarter or greater employment fraction.</li> </ul> <p>(See Stipulation Nos. 14, 15, First Supplemental Stipulation No. 2, Exhibit 1(e), and Exhibit 23).</p>
	<p>In 2012, GSRA are granted certain benefits that <u>are not</u> offered to graduate students who are primarily funded through scholarships or fellowships and to “GSIs/GSSAs with less than a 25% appointment, including:</p>

	<ul style="list-style-type: none"> <li>• Health Care Flexible Spending Accounts;</li> <li>• Dependent Care Flexible Spending Accounts;</li> <li>• Tax-Deferred Supplemental Retirement Accounts;</li> <li>• Unpaid leaves of absence under the Family and Medical Leave Act of 1993;</li> <li>• University Optional, and Dependent Group Term Life Insurance</li> <li>• Travel Accident Insurance. (First Supplemental Stipulation, No. 1) (See also Exhibit 23).</li> </ul> <p>The benefits offered to benefit-eligible fellowship holders can be compared to the benefits available to GSRAs by reviewing the webpages of the University of Michigan Benefits Office, reproduced in Exhibit 23.</p>
	<p>In 2012, GSRA benefits are identical to those of GSIs and GSSAs, except that GSRAs are eligible for certain benefits based on different appointment fractions and do not have the option of selecting a health plan other than one titled “GradCare, .” (Exhibit 23).</p>
	<p>In 2012, GSRAs are offered certain benefits that were not offered at the time of the 1981 litigation, either because the benefits were not available under the extant law or because the University chose not to provide the benefit, including:</p> <ul style="list-style-type: none"> <li>• COBRA;</li> <li>• Health Care Flexible Spending Accounts;</li> <li>• Dependent Care Flexible Spending Accounts;</li> <li>• Tax-Deferred Supplemental Retirement Accounts;</li> <li>• Unpaid leaves of absence under the Family and Medical Leave Act. (First Supplemental Stipulation, No. 2).</li> </ul>

**4. In 2012, the University Treats GSRAs as Employees by Subjecting Them to Rules and Protocols Applicable to Employees**

As GSRAs have become University employees, the University has chosen to subject GSRAs to certain rules and policies only applicable to employees.

<b>Material Differences Between the Facts Relied on by the Commission in 1981 and the Evidence in 2012</b>  <b>IN 2012, THE UNIVERSITY APPLIES CERTAIN EMPLOYEE RULES AND POLICIES TO GSRAS, WHICH DO NOT, BY THEIR STATED TERMS, APPLY TO NON-EMPLOYED STUDENTS</b>	
<p>The 1981 Order does not reference University policies which treat GSRAs as employees.</p>	<p>In 2012, GSRAs are subject to several Standard Practice Guides (“SPG”) applicable to employees:</p> <ul style="list-style-type: none"> <li>• GSRAs are subject to SPG 303.3 (Stipulation No. 16(d)), “Procedures for Investigating Allegations of Misconduct in the Pursuit of Scholarship and Research.” (Exhibit 4). <ul style="list-style-type: none"> <li>○ The procedures outlined in SPG 303.3 apply “to all instructional faculty, primary researchers, and other staff members, including without limitation <b>graduate student research assistants</b>, graduate student teaching assistants, graduate student staff assistants, undergraduate students employed in research or other scholarly activity, postdoctoral fellows and postdoctoral research associates, visiting faculty or staff, faculty or staff on sabbatical leave, adjunct faculty when performing University work, and faculty or staff on leave without pay.” (emphasis added).</li> <li>○ The procedures in SPG 303.3 distinguish between actions taken as a student and those taken as an employee/researcher: “[t]hese procedures apply to students only when acting in their employment or service capacity, and not as students per se.” (Exhibit 3).</li> <li>○ Research Vice President Stephen Forrest testified that the rule, as written, applies to GSRAs, but does not apply to PhD students funded by fellowships:</li> </ul> <p><b>Q:</b> Ok. Now, the policy, as it’s written, does not appear to cover PhD students who are on fellowship, but it does provide discretion to the responsible administrator to apply these terms to anybody. I that correct?</p> <p><b>A:</b> Formally, yes; that is correct. (Volume 6 at 64:14-64:19).</p> <p>Dr. Forrest then testified that, in the exercise of discretion, the policy is applied similarly to fellowship students and GSRAs:</p> </li> </ul>



	<p><b>Q:</b> So, the rule that’s stated, the black letter rule, as it’s written, draws a distinction between graduate student research assistants and graduate students on fellowship, but your policy and the way you implement your policy doesn’t differ between the two?</p> <p><b>A:</b> I think that is fair to say. Again, I cannot attest to every single instance, but this is what the intent of this is. (Volume 6 at 66:3-66:10).</p> <ul style="list-style-type: none"> <li>• GSRA’s are now subject to SPG 601.22 (Stipulation No. 16(e)), “Faculty-Student Relationships” Policy. (SPG 601.22) (Exhibit 7). <ul style="list-style-type: none"> <li>○ Other graduate students, who do not have GSRA or GSI appointments, are not covered by the policy. (Id.).</li> </ul> </li> <li>• GSRA’s are now subject to SPG 303.4 (Stipulation 16(c)), University of Michigan Technology Transfer Policy. (Exhibit 5). <ul style="list-style-type: none"> <li>○ Under the policy, the University treats intellectual property developed or created by GSRA’s in the same manner as that created by other employees. The University generally owns Intellectual Property created through the use of resources administered by the University. More specifically, pursuant to the University’s Technology Transfer Policy, the University typically will own Intellectual Property created by a GSRA, even in some circumstances if that creation occurred after the conclusion of the term of the GSRA appointment.</li> <li>○ Conversely, the University “will not generally claim ownership of Intellectual Property created by students” (a person enrolled in University courses for credit, except when that person is also an Employee). (Id. at 2).</li> <li>○ For the purposes of the University’s Technology Transfer Policy, GSRA’s are defined as Employees. (Id. at 6).</li> </ul> </li> </ul> <p>Dr. Forrest testified that, in practice, under the Technology Transfer Policy, graduate students funded by fellowships are treated as Employee Inventors. The manner in which Dr. Forrest exercises his discretion or chooses to interpret this policy with respect to fellowship students does not change the fact that GSRA’s are identified and treated as employees in SPG 303.4.</p>
<p>The 1981 Order does not reference any requirement for</p>	<p>In 2012, GSRA’s, like other University employees, are required to complete a “certificate of effort,” when performing research under federal grants (Exhibits 6, 8 and 29). In most circumstances, other graduate students conducting research—specifically those who are funded via fellowships—do not have to complete this</p>

certification of effort.	certification. (Stipulation No. 16(f)).
The 1981 Order does not state whether GSRAs were required to take an oath to support the Constitution of the United States.	In 2012, GSRAs are required to take an oath to support the Constitution of the United States that is taken by other University employees, but not by non-employed students. (Stipulation No. 16(b)).

**B. In 2012, GSRAs are Directly Fulfilling a Core Mission of the University**

In 1981, the Commission concluded that while TAs (now GSIs) were directly fulfilling a core mission of the University, while the benefits provided by GSRAs were “more indirect.” In 2012, GSRAs directly fulfill a core mission of the University. In his 2012 Annual Report on Research and Scholarship, Vice President for Research Stephen Forrest began with a quotation from Harlan Hatcher, the Eighth President of the University of Michigan. President Hatcher highlighted “three basic, interlocking functions” of the University: education of youth, “to collect, increase, and disseminate knowledge,” and to perform services for society “which, consistent with its education and research functions, it is peculiarly qualified to perform.” (Exhibit 9 at 2) Those three missions of the University—education, research and service—have been constant, but the way those core missions are advanced has changed dramatically over time. Research, in particular, has undergone a massive transformation since 1981.

**Material Differences Between the Facts Relied on by  
the Commission in 1981 and the Evidence in 2012**

**IN 2012, THE WORK PERFORMED BY  
GSRAS IS FOR THE BENEFIT OF THE UNIVERSITY**

<p>The 1981 Order concluded that the “the work [TAs] perform fulfills one of the central missions of the [University]” (1981 Order at 785). Conversely, the Commission concluded that GSRAs did not bear sufficient indicia of employment, in part, because “[a]lthough the value of the RA’s research to the University is real it is clearly also more indirect than that of teaching 30% of the undergraduate courses.” (1981 Order at 785-86).</p>	<p>“The University fulfills three basic, interlocking functions: to educate youth in the widest possible variety of intellectual disciplines; to collect, increase, and disseminate knowledge that bears on these disciplines; and to perform those services for society, both individually and collectively, which, consistent with its education and research functions, it is peculiarly qualified to perform.” (Annual Report on Research and Scholarship, quoting Harlan Hatcher, Eighth President of the University) (Exhibit 9).</p> <p>In 2012, it remains true that TAs (GSIs) continue to educate students, thus fulfilling one of the University’s central missions. In 2012, research, which is advanced by the work of GSRAs, is also a central mission of the University. As explained by Provost Hanlon, “One of the ... core missions of the University is to better the world through our scholarship.” (Volume 2 at 35:21-35:23). As Vice President for Research Stephen Forrest noted in his 2012 Annual Report on Research and Scholarship, the words of President Harlan Hatcher fifty years ago “continue to define the central role of research in our academic community.” (Exhibit 9 at 2). While research remains central, the means of pursuing and disseminating that research have changed dramatically since 1981. The Bayh-Dole Act “provides incentives for universities to license the results of federally funded research to help ensure that the public will benefit from its deep investment in research.” (2012 Annual Report on Research and Scholarship; Exhibit 9 at 7). “In 1980...NSF instituted a program called the engineering research centers, and they were put in place to get universities to work more hand in glove with industry.” (Dr. Forrest Testimony, Volume 6 at 82:11-82:14). While Dr. Forrest could not identify an exact timeframe, he testified that the various factors of greater federal investment in research along with “the withering of the industrial laboratories” led to universities becoming “much more a part of society than we used to be.” (Volume 6 at 82:23-82:25). Dr. Forrest’s testimony and his 2012 Annual Report provide context for the incredible growth in the University’s research program since 1981.</p>
<p>In 1981, Judge Sperka and</p>	<p>As of April 27, 2011, 2,128 individuals held GSRA appointments.</p>

MERC determined that there were approximately 340 GSRAAs at the University. <sup>3</sup>	(Stipulation No. 3).
The 1981 Order found that TAs (“GSIs”) outnumbered GSRAAs by more than four to one. (77% of GSAs were Teaching Assistants; 17% were GSRAAs). (1981 Order at 792).	Today, more graduate students hold appointments as GSRAAs than as GSIs. (Stipulation No. 6).
In 1981, total research expenditures for the University—including University funds and sponsored research—were approximately \$130 million (\$355 million in 2011 dollars adjusted for changes in the Consumer Price Index) (Stipulation No. 7).	In the 2010-2011 academic year, total research expenditures for the University exceeded \$1.236 billion. (Stipulation No. 8) (See also Exhibit 9).
In 1981, the University’s own research expenditures (not including sponsored research) amounted to \$16,353,031—which, adjusted for changes in the CPI, amounts to \$40,466,750 in 2011 dollars. (Provost Hanlon Testimony, Volume 2 at 36:6-37:4).	By 2011, the University’s own research expenditures (again, not including sponsored research) had grown to \$306,128,971. (Provost Hanlon Testimony, Volume 2 at 37:5-37:10). This represents an increase of more than 650% after adjusting for changes in the CPI.
In 1981, ALJ found, “The RA assistantships are based entirely on funds coming from outside the University.” (Id. at 796-97).	It is not true today that GSRA positions “are based entirely on funds coming from outside the University.”  Provost Hanlon testified that “about 20 percent of GSRAAs are funded by the University.” (Volume 2 at 65:17-65:18). When asked the question “Is it true today that all GSRA positions are based entirely on funds coming from outside the University?” Provost Hanlon responded “No.” (Volume 2 at 70:25-71:4).

<sup>3</sup> Based upon a total of approximately 2,000 Graduate Student Assistants, roughly 17% of whom were GSRAAs, 77% of whom were GSTAs and 3% were GSSAs”) (1981 Merc Lab Op at 780, 781, 792).

<p>In 1981, ALJ Sperka found as follows: “The vehicle which brings these funds to the University campus is the individual faculty member, not the University as such.” (at 797) He then acknowledged that “[t]he grant proposal is funneled through certain university screening procedures and, before submission to the various grantors, must receive the imprimatur of the University.” (1981 Order at 798).</p>	<p>In 2012, the evidence is more clear that, despite the continued importance of individual faculty members, the University provides significant administrative support and each application must be reviewed and approved by the Office of Research &amp; Sponsored Projects (“ORSP”). That Office provides part of what Provost Hanlon called “the infrastructure that supports grant funding.” (Volume 2 at 52:35-53:2). As he explained, “we have to invest in the mechanisms which actually process grants, track cost sharing, deal with the funding agencies, make sure that the administration on submission of grants goes smoothly.” (Id. at 53:3-7). The University’s annual budget for ORSP is approximately \$4 million. (Id. at 53:22-25). The many levels of review and the importance of review and approval to protect the interests of the University are described in SPG 303.1. (Exhibit 3)</p>
<p>In the University’s 1981 Financial Statement of Operating Expenses by Function the category identified as “Instruction” constituted \$160.6 million while “Research” constituted \$97.1 million—a difference of approximately \$63.5 million - so operating expenses for instruction were 65.4% greater than those for research. (Provost Hanlon Testimony; Volume 2 at 44:3-44:7) (See also Exhibit 28).</p>	<p>By 2011, spending both for instruction and for research had increased significantly, but operating expenses for Instruction exceeded those for Research by only 16.3%. (Provost Hanlon Testimony, Volume 2 at 45:10-45:14) (See also Exhibit 28).</p>
<p>The 1981 Order does not discuss technology transfer or revenues from the licensing or sale of intellectual property. There is no reference in the 1981 Order to the benefit to the University of interaction with industry.</p>	<p>According to the University’s Office of Technology Transfer, whose mission is to transfer University technologies to “the market so as to generate benefits for the University, the community and the general public,” since 2001, the University has earned more than \$167 million in royalties and equity sales from its discoveries.) (Exhibit 24). Dr. Forrest testified that these revenues are roughly \$15 million per year (adjusting for what he called “burstiness”). (Volume 6 at 11:17-12:2). Dr. Forrest explained that the share of these funds in his control “goes back to supporting that type and incentivizing that type of activity, mostly to encourage people to work more with the industrial sector in the future, to get more research funds, to come up with more inventions...” (Volume 6 at 16:2-16:6). These funds</p>

	<p>support the Business Engagement Center, the Office of Technology Transfer, a “Gap Fund” to promote early pre-venture capital development of potentially-commercial ideas, and the Michigan Venture Accelerator. (Id. at 16:9-17:7). All of these programs are targeted to increase the interaction between the university and industry, in part to be more successful in obtaining grants from the federal government, because the federal government supports research “primarily in what is called the use inspired basic research.” (Id. at 72:9-72:17). Thus, Dr. Forrest confirmed that the University had “found a path where [the University’s] partnerships with industry, [the University’s] outreach to industry can lead to more grant funding or more research opportunities and grant funding from the Federal government...” (Id. at 73:20-73:24).</p>
<p>In 1981, the Commission did not refer to any major capital investments or physical expansion of the University to address a growing research enterprise.</p>	<p>In 2009, the University invested \$108 million in the land and buildings that make up the North Campus Research Complex (“NCRC”). (Volume 2 at 46:18-47:5). The acquisition from Pfizer included a “complex of 28 buildings comprising 2.1 million square feet of office, research and manufacturing space.” (NCRC Website; Exhibit 13). The Office of Technology Transfer and the University’s Business Engagement Center have both moved to that location. NCRC is intended to help the University of Michigan “[e]xpand its research enterprise to generate the ideas and expertise that are the foundation of innovation.” (Exhibit 13). As described in the University’s 2011 Financial Report, “The effort to transform the former Pfizer property known as the North Campus Research Complex (NCRC) into a vibrant multidisciplinary research hub accelerated greatly in FY 2011.” (Exhibit 11 at 8). According to the 2011 Financial Report, NCRC “will provide much needed space to help attract new research funding and faculty to the University.” (Id. at 38).</p>
<p>The 1981 Order did not discuss the importance of obtaining new research grants or the impact of the work of GSRAs on that process.</p>	<p>In 2012, the evidence is clear that the University is striving to expand its research program and an important component of that expansion is obtaining new grants. As Professor Annemarie Palincsar explained, as a faculty member you are always looking for another grant. (Volume 5 at 65:12-65:18). She also confirmed that succeeding in accomplishing the goals of each grant assists in obtaining new grants. (Id. at 66:13-17).</p>

### **C. Since 1981, GSRAs Have Been Recognized as Employees Under Several Laws**

A change in circumstances can be shown by changes in the facts or by changes in the law. Since the 1981 Order, certain laws and statutes applicable only to employees have been found to apply to graduate student research assistants.

Federal courts have extended Title VII protections to graduate students in similar contexts. Under Title VII, an employee is defined as “an individual employed by an employer.” 42 U.S.C. §2000e(f). Courts have determined that in the graduate student context, where students receive remuneration for their duties, they are employees. *See e.g. Cuddeback v. Florida Bd. of Educ.*, 381 F.3d 1230, 1235 (11th Cir. 2004) (noting that courts have typically refused to treat students as employees for Title VII purposes only where their academic requirements were truly central to the relationship with the institution); *Bucklen v. Rensselaer Polytechnic Inst.*, 166 F. Supp. 2d 721, 726 (N.D.N.Y. 2001) (dismissing the Title VII claim where discrimination was not related to employment, but rather to plaintiff’s role as a student). Particularly instructive is *Ruiz v. Trustees of Purdue Univ.*, 4:06-CV-130-JVB-PRC, 2008 WL 833125 (N.D. Ind. Feb. 20, 2008) *report and recommendation adopted*, CIV.A. 4:06-CV-130JV, 2008 WL 833130 (N.D. Ind. Mar. 26, 2008):

Purdue constructs a legal and factual argument around the central premise that [plaintiff] Ruiz is first and foremost a student. In support, Purdue offers an affidavit of the Associate Dean of the Graduate School [who stated that “[g]raduate assistantships throughout the Graduate School are incidental to and dependent upon successful academic performance as a graduate student .” [The Associate Dean] further stated that assistantships are a form of financial aid to support graduate study....

More relevant to this analysis are the several economic terms set forth in the [offer] letter, which are typical of employment and evidence a level of control. The letter provides an annual salary rate ... a term of employment, the spring 2006 semester, and states that employment will continue as long as Ruiz remains a student in good standing. This statement conditions Ruiz’s employment on her studies and her role as a student. However, it does show that Purdue controls the terms of the parties’

relationship, and that Purdue can end the relationship, and Ruiz's work, if Ruiz does not meet Purdue's performance expectations. The Court also notes that while a portion of Ruiz's compensation appears to have come in the form of tuition remission, it is compensation nonetheless. The fact that Ruiz was not compensated solely in the form of a monetary salary does not lessen Purdue's control over Ruiz.

Analyzing the terms contained in the Employment Manual, which govern issues such as pay, termination, and retention, the Court finds that the Manual evidences additional control.

Ultimately, the Court finds that under the circumstances presented in this case, Ruiz was a Purdue employee for Title VII purposes. The Court recognizes that Ruiz's work is a result of her role as a graduate student. The Court also concedes that in order of importance, Ruiz is likely a student first and a worker second. Nevertheless, a worker is not confined to a single role. And that is the case here. In this case, Purdue compensated Ruiz for her work with an annual salary, provided a temporal term of employment, and controlled its relationship with Ruiz through an Employment Manual. That several indicia typical of employment are absent here, such as sick leave and other benefits, does not reduce the control that Purdue had over Ruiz. It is that control and its attendant economic factors that lead the Court to conclude that Ruiz has standing as an "employee" to bring a Title VII claim against Purdue.

2008 WL at 9-11. Here, as in *Ruiz*, the University presents GSRA with the terms of employment: a salary, including tuition remission; a term of employment, and; the ability to separate the GSRA. As in *Ruiz*, GSRA's at the University of Michigan are not confined to a single role—they are students and employees.

Similarly worker's compensation laws have been found to apply to graduate student research assistants. In *Semus v. Univ. of Rochester*, 272 A.D.2d 836, 710 N.Y.S.2d 128 (2000), the court stated:

The determination of whether an employer-employee relationship exists is a factual issue for the Board to resolve and its findings in that regard must be upheld if supported by substantial evidence. Although no single factor is dispositive, relevant factors to be considered include the right to control the claimant's work, the method of payment, the right to discharge, the furnishing of equipment and the relative nature of the work. Here, the record indicates that claimant received a full tuition waiver, a biweekly stipend from which Federal and State income taxes were withheld and free health insurance coverage in exchange for her work as a research assistant. Claimant testified that she performed her research duties using equipment provided



by the University for at least eight hours per day, including many weekends, under the auspices of a department faculty member who controlled the type of experiments that claimant performed and could recommend that claimant be transferred from her position for unsatisfactory performance. Under the circumstances presented here, substantial evidence supports the Board's decision that an employment relationship existed between claimant and the University, notwithstanding that the record contains evidence that could support a contrary conclusion. Accordingly, the Board's decision is affirmed.

*Semus* at 836-7(citations omitted). Most of the indicia of employment discussed in *Semus* apply to University of Michigan GSRA's. The University controls the method of compensating GSRA's and the relative nature of GSRA's' work. The University furnishes GSRA's with their equipment. Like the graduate student in *Semus*, GSRA's receive tuition waivers, "stipends," from which federal and state income taxes are withheld, and health insurance coverage.

Finally, the Michigan's Whistleblower's Protection Act, MCL 15.361 has been applied to University of Michigan GSRA's. See *McGee v. University of Michigan Regents*, 2011 WL 1376281 (April 12, 2011). The Act defines "employee" as "a person who performs a service for wages or other remuneration under a contract of hire, written or oral, express or implied."<sup>4</sup>

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<sup>4</sup> Since 1981, some states that have analyzed the issue in depth have concluded that GSRA's, like other graduate employees, qualify for inclusion in collective bargaining as public employees. See *United Faculty of Florida, Local 1847 v Board of Regents*, 417 So 2d 1055, 1058 (Fla App 1982, as clarified by 423 So. 2d 429 (Fla App 1982), quoting *UFF v. Board of Regents*, 3 FPER 304, 305 (1977) ("It cannot be doubted that graduate assistants are 'students in institutions of higher learning,' they are all university students pursuing advanced degrees. But that is not all they are. They all perform work for the various universities operated by the board, their work is of benefit to the universities for which it is performed, the work is performed subject to the supervision and control of professors who are employees of the several universities, and the work is performed in exchange for the payment of money by the board to the graduate assistants who perform the work. A more classic example of an employer-employee relationship can hardly be imagined."); and see *Graduate Employees Organization, IFT/AFT, AFL-CIO, v Illinois Educational Labor Relations Board* ("IELRB"), 315 Ill App 3d 278; 733 NE2d 759 (2000) (The IELRB determined, and the Illinois court of appeals agreed, that GSRA's were public employees.)

#### **IV. IRRESPECTIVE OF THE CHANGE IN CIRCUMSTANCES, THE TREATMENT AND NATURE OF THE WORK OF GSRAS BEAR THE INDICIA OF EMPLOYMENT**

MERC has determined that the relevant test of employment in an educational setting is whether “work is being performed in a master-servant relationship or whether the person performing the work does so as his own master.” *Regents of the University of Michigan and University of Michigan Interns-Residents Association*, 1971 MERC Lab Op 270, 279. “To speak of the performance of services means that an act is performed for the benefit of another and not that the employee is engaged in pursuits of his own. Thus, a student in the ordinary classroom situation is not performing a service for the school when he engages in his own studies.” *Id.* Crucial to this test is a determination of whether the work is performed for the benefit of the student or of the employer. *See Detroit Board of Education and MESC and McNamara Skill Center Union*, 1972 MERC Lab Op 87.<sup>5</sup> As stated in *Regents of the University of Michigan*, 1981 MERC Lab Op 777, the “rationale of *McNamara* focuses on the specific services rendered and decides if an employment relationship exists by determining whether students are providing benefit for another rather than pursuing their individual educational goals.” 1981 Merc Lab Opp at 784-85.

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<sup>5</sup> In *McNamara* the Commission determined that the petitioners were not employees for several reasons. Of paramount importance was the fact that the petitioners were really receiving training from the Employment Security Commission. As the Commission stated:

When the Employment Security Commission provides counseling, unemployment compensation payments or job referral services to unemployed persons, it is fulfilling its statutory obligation. The persons receiving these services are not, even under Petitioner’s theory, employees of the Employment Security Commission. When the unemployed person is referred by the Employment Security Commission to a skill center facility for the purpose of receiving training which may increase his opportunities for employment, he does not then become an employee of the Employment Security Commission.

*Detroit Board of Education and MESC and McNamara Skill Center Union*, 1972 MERC Lab Op 87, 92.

In 1973, the Supreme Court was asked to review the MERC decision regarding University of Michigan medical interns, residents and post-doctoral fellows, *supra*, in which those petitioners had sought recognition as employees under PERA. *Regents of Univ of Michigan v Michigan Employment Relations Comm* (“Interns and Residents”), 389 Mich 96; 204 NW2d 218 (1973). The Supreme Court determined there was ample evidence to support the findings of the Commission that the members of the Association are employees. The Court referenced the following facts, among others:

- The petitioners had a portion of their compensation—which was like a stipend in that it had no relation to number of hours worked or the duties performed—withheld for the purposes of federal income tax, state income tax, and social security coverage. Doctors were not eligible for the exclusion of income for fellowships and education stipend.
- The University furnished the W-2 forms required by the Internal Revenue Service for all employees.
- Compensation was paid by University checks drawn from a University account.
- The petitioners received fringe benefits available only to regular University of Michigan employees, including health insurance coverage.
- The petitioners were required as a condition of employment to sign a loyalty oath required by Michigan law to be signed by all public employees.
- The petitioners were entrusted with many responsibilities that non-employed medical students were not, including writing prescriptions, admitting patients and performing procedures.
- Even though the petitioners were being educated when caring for patients, patient care could still be deemed work. Education and work are not mutually exclusive.

389 Mich 96.

Guided by *McNamara* and *Regents of Univ of Michigan v Michigan Employment Relations Comm*, 389 Mich 96; 204 NW2d 218 (1973), in 1981 the Commission concluded that TAs (GSIs) were employees, because they provided a benefit to the University rather than engaging in pursuits of their own—they were not “working for themselves.” This was based on the conclusion that the

work TA's performed fulfilled one of the central missions of the University—education. The Commission distinguished TAs from GSRAs as follows:

Nor does the research product they provide further the University's goal of producing research in the direct manner that the TA's and SA's fulfill by their services. Although the value of the RA's research to the University is real it is clearly also more indirect than that of teaching 30% of the undergraduate courses. (1981 Order at 785-786).

That finding, which may have been well-grounded in the facts as they were understood in 1981, is simply not supported by the record currently before the Commission.<sup>6</sup>

The facts in 2012 are significantly different than those relied on by the Commission in 1981. The rationale used in 1981—coupled with application of the same case law—applied to GSRAs in 2012, demonstrates that GSRAs now bear the indicia of employment such that they should be considered employees as well as students. The indicia of employment in 2012 can be divided into the following categories: (1) the Regents of the University of Michigan have formally recognized GSRAs as employees; (2) the University recognizes GSRAs as employees, publicly and internally; (3) GSRA work directly advances one of the University's core missions—research—while it also helps the University fulfill the specified aims of its sponsored grants; (4) GSRAs are supervised in the manner of other professional researchers; (5) the University can direct GSRAs research activities and can terminate GSRAs; (6) the University provides GSRAs with benefits reserved for its employees, and; (7) GSRAs are subject to formal rules and protocols applicable to other employees and not applicable to non-employed students.

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<sup>6</sup> The factors considered in 1981 closely track the four factors that have been found to be at the heart of the totality of circumstances test under the economic realities test: “[1] [the] control of a worker's duties, [2] the payment of wages, [3] the right to hire and fire and the right to discipline, and [4] the performance of the duties as an integral part of the employer's business towards the accomplishment of a common goal.” *Clark v United Techs Auto*, 459 Mich 681, 688-89; 594 NW2d 447 (1999) (citations omitted).

### **A. The University Has Formally Recognized GSRAs as Employees**

No entity is better suited to determine if the people it compensates are employees than the employer itself. Because of the legal rights inherent in the employee designation and the potential costs incurred by an employer upon such a determination, an employer's opinion that certain compensated workers are not employees may, on occasion, be met with skepticism. But, here, precisely the opposite is true. When an employer is prepared to accept the responsibilities inherent in the designation of a group of its workers as covered employees under PERA, that acknowledgment deserves great weight. Comparable to a declaration against interest, this designation carries with it the strongest implication of truth.

The Regents of the University of Michigan, through their resolution of May 19, 2011, have accepted the public employee status of GSRAs, and this acknowledgment is an important indication of employment. Their resolution was unequivocal:

Resolved, that consistent with the University of Michigan's proud history of strong, positive, and mutually productive labor relations, the Board of Regents supports the rights of University Graduate Research Assistants, whom we recognize as employees, to determine for themselves whether they choose to organize. (Stipulation 2).

In the face of that fundamental admission, those who would deny employment status to GSRAs must first overcome the logical presumption that an employer would not recognize as public employees individuals who are not entitled to the rights inherent in that designation.

### **B. Internal and External University Communications Repeatedly Refer to GSRAs as Employees**

Even if the University had not formally recognized GSRAs as employees, and if the University were to try to argue that GSRAs are not employees, its innumerable admissions that they are employees would surely preclude any such argument. Ironically, if the University sought to **deny** employee status, its public admissions that GSRAs are employees in the faculty handbook, the

Standard Practice Guide, the Academic HR website, the Benefits Office website and the Financial Operations website would be binding against the University in many litigation contexts.

One internal document, which, in an adversarial proceeding could be offered as the admission of a party opponent, is the PowerPoint presentation, prepared by Thomas Hart and entitled “Hiring the Graduate Student Research Assistant.” (Exhibit 25). According to the LS&A website, Mr. Hart “[s]erves as point person and approver for the College for GSI, GSRA and GSSA appointments.” (Exhibit 31). Mr. Hart is not a University spokesperson, nor does he serve in the central office of Academic HR, but the description he provides sums up the definition of “employee”:

Whenever there is an expectation of a certain effort level or outcome in exchange for pay, an employment relationship exists—especially for, but not limited to, work supported by a grant. (Exhibit 25, slide 3) (emphasis in original).

In discussing GSRAs, the PowerPoint repeatedly uses the words “employee,” “employment,” and “employed.” When describing the termination process, this could not be more clear:

A GSRA who is leaving the University and who is not expected to soon be rehired (e.g. as a research fellow) should be terminated as an employee via the Layoff and Termination form. This ensures the proper COBRA process. (Exhibit 25, slide 13).

If the University were attempting to deny the employment status of these GSRAs, the pervasive use of the language of employment would pose an insurmountable obstacle to that denial. The Board of Regents’ Resolution and subsequent public statement say it all—the University treats GSRAs as students and as employees. It is “factually incorrect and wrong” to argue otherwise.

### **C. The Work is Being Performed for the Benefit of the University**

It is beyond dispute that, like medical interns and residents, graduate students are learning while they engage in sponsored research. However, the existence of an important educational benefit from the work does not mean that the work cannot also be a form of employment. The

University commits to pursue the research goals set forth in grant documents; GSRAs help the University fulfill its obligations under those grants.

The evidence presented regarding the research product shows three things to be true. (1) When GSRAs perform grant-sponsored research, they are contributing to the University's mission of advancing knowledge. (2) When GSRAs perform grant-sponsored research, they are always helping the University meet the specified aims of a funding agency, as set forth in the grant. (3) When GSRAs perform research, they may or may not be developing data relevant to their own PhD dissertations.

### **1. Research is a Core Mission of the University**

In 1981, MERC concluded that “[a]lthough the value of the RA’s research to the University is real it is clearly also more indirect than that of teaching 30% of the undergraduate courses.” (at 785-786). 1981 Merc Lab Op at 785-86. This finding, if it ever was accurate, is certainly not true today.

Just as the Commission recognized in 1981 that education of undergraduates is a core mission of the University of Michigan, research and the dissemination of knowledge is another core mission. As President Harlan Hatcher explained in his report on research in 1962, “the University fulfills three basic, interlocking functions,” which include (1) education, (2) research and dissemination of knowledge and (3) service to society “which is consistent with its education and research functions.” (Exhibit 9 at 2). Provost Hanlon confirmed the centrality of research, when he testified that “[o]ne of the ... core missions of the University is to better the world through our scholarship.” (Volume 2 at 35:21-35:23). And as Vice President for Research Stephen Forrest noted in his 2012 Annual Report on Research and Scholarship, the words of President Harlan Hatcher fifty

years ago “continue to define the central role of research in our academic community.” (Exhibit 9 at 2)

In evaluating the importance of research as a core mission of the University, the relative increase in investment in research over the last three decades is a marked change, which the Commission can and should recognize. The massive growth of research at the University of Michigan since 1981 and the importance of GSRA in advancing that research—is manifest in the record.

It is no accident that the research enterprise at the University of Michigan, like that of other major research institutions, has grown dramatically since 1981. The federal government, the primary source of funds for university research, spends far more today for research than it did thirty years ago. But, there have been qualitative, as well as quantitative changes in the focus on research. One important factor in the sea change in the importance of research to academia was the enactment of The Patent and Trademark Laws Amendments of 1980 (the “Bayh-Dole” Act”). That law, referred to by Vice President Stephen Forrest as “the really big moment in American history,” became effective July 1, 1981. (Volume 6 at 13:19-13:20) (See also Exhibits 16 and 18). As described by Dr. Forrest in his 2012 Annual Report on Research and Scholarship, the Bayh-Dole Act “provides incentives for universities to license the results of federally funded research to help ensure that the public will benefit from its deep investment in research.” (Exhibit 9, at 7) The Bayh-Dole Act reversed the presumption that title to intellectual property created with the benefit of a federal grant vested in the federal government, permitting universities to pursue ownership of intellectual property created under a federal grant. (Exhibit 15). This, together with a growing focus by the federal government on the advantage of university/industry partnerships, led to the growth of



University of Michigan programs to promote technology transfer activities and other types of University participation with industry.

As Vice President Forrest has explained, for many years, the University of Michigan, like other United States universities, had been hermetic, “turned inward . . . without paying much attention to the world around it.” (Volume 6 at 80:24-83:13) But, that changed, and, significantly, much of that change appears to have occurred between the 1981 Ruling and today. As Vice President Forrest explained, “In 1980...NSF instituted a program called the engineering research centers, and they were put in place to get universities to work more hand in glove with industry.” (Forrest testimony; Volume 6 at 82:11-82:14). While Dr. Forrest did not identify exact dates for this cultural change, he testified that the various factors of greater federal investment in research along with “the withering of the industrial laboratories” led to universities becoming “much more a part of society than we used to be.” (Volume 6 at 82:23-82:25). The growth of the research enterprise at the University of Michigan is consistent with this narrative.

In 2011, the University invested over \$306 million of its own funds to maintain its competitive research program—a program that now ranks first in the nation among public universities in total federal research funding. (Exhibit 9 at 4 and at 2). That \$306 million investment compares to expenditures in 1981 of just over \$16 million. Even adjusting for the Consumer Price Index, the University’s own research expenditures increased more than 650% in that time period.

And, consistent with the interest of the federal government in seeing more interaction between universities and industry, the University of Michigan has grown its technology transfer and its industry outreach programs far beyond anything that could have been imagined in 1981. The University acquired the Pfizer land and buildings for an investment of more than \$100 million. That area, now dubbed the North Campus Research Complex (NRDC), is touted as “an opportunity for

the University to broaden its contributions as one of the nation's premier research universities and strengthen its ability to stimulate new business through partnerships with businesses in the private sector.” (NRDC website; Exhibit 13 at 1) The University's Office of Technology Transfer and its Business Engagement Center have both been relocated to the NRDC. The University is also reaching out to the broader community to share the benefits of its research through its Venture Accelerator. All of these efforts fit nicely into a strategy described by Vice President Forrest:

I also believe that the Federal government supports research primarily in what is called the use inspired basic research. The reason for that is that innovation has been a driving engine for our economy in the post war years. So, if we want to be successful with the Federal Government, we have to be successful with industry, even though the actual dollars we get directly from industry is small.

(Dr. Forrest Testimony, Volume 6 at 72:9-72:17). As Dr. Forrest and other witnesses attested, the University of Michigan has been extremely competitive and has gotten a larger share of the increased federal research funds than other universities, leading to its current status as the leader among public universities.

The changes at the University of Michigan are not simply quantitative, they are qualitative.

As Professor Annemarie Palincsar explained regarding the School of Education:

when I first arrived, in late 1989, there were... many fewer faculty who regarded their primary work to be educational research...But the culture of the school has changed and so people are hired – my colleagues and I are hired because we have promise – the promise that we're going to be able to be successful researchers, make a contribution to research.”

(Dr. Palincsar Testimony, Volume 5 at 67:16-68:3) When asked a direct question on this subject, she did not hesitate:

**Q:** Today is it fair to say that research has become a larger part of the work done at the school of education than in 1989?

**A:** I would say yes. And we have more infrastructure that's dedicated to supporting the conduct of research as well.

(Id. at 68:7-68:12). The explosive growth of research at the University of Michigan did not occur by accident. The University invested tremendous resources in this endeavor, and that investment is paying off.

There are many ways to measure the increased focus on research at the University, but there is no question that research has grown enormously. In 1981 the Commission reviewed a program reported to include approximately 340 GSRA's, with total research expenditures of approximately \$130 million. Now the Commission is reviewing a group of 2,128 GSRA's and a research budget in Fiscal 2011 of more than \$1.236 billion.

If there ever was a question about whether research is a critical product of the University, that question was certainly answered when the University's own investment in research increased 650%. In 1981, Judge Sperka found that the University was not investing its own funds in supporting GSRA's; today, 20% of GSRA's are funded by the University.

While the 1981 Ruling referred to the role of the faculty in obtaining research grants, it did not advert in detail to the role of the University. The current record is clear that the University, through its Office Of Research and Sponsored Projects, invests approximately \$4 million in the infrastructure to support grant applications. And, when a grant is awarded, the award goes to the Regents of the University of Michigan, not to the faculty member or members who proposed the research. The University accepts the grant and commits to provide the resources necessary to meet its specific aims. On sponsored research projects with GSRA involvement, those GSRA's are doing the work of the University, when they pursue the objectives or stated aims of the grant.

In 2012, as in 1981, GSRA's learn from the research they conduct. But, the evidence shows that since 1981 the University's research enterprise has expanded dramatically. In 1981 there were four times more Teaching Assistants than GSRA's; today there are more GSRA's than GSIs. And, in

2012, it is still true that GSIs further a University mission when they teach, but it is equally clear that GSRAs further a core University mission when they perform research.

## **2. GSRA Research Directly Advances the Research Mission**

When GSIs teach undergraduate courses, they are being educated themselves. Many, if not most, GSIs plan to pursue careers in academia, and classroom experience can be extremely valuable for their education. But, as the Commission determined in 1981, when GSIs teach undergraduate courses they are contributing to the University's education mission. Even though GSIs benefit from learning how to teach, they are doing the work of the University and are rightly treated as employees.

GSRAs—like GSIs—learn important skills when they do their sponsored research. The University uses these research opportunities, in part, to teach graduate students how to succeed as researchers—to become skilled scientists. (Hanlon Tran. 90:5-20). Their academic evaluations depend, in part, on whether they are “developing these kinds of skills that they need as a researcher.” (Id. at 91:12-13). However, as with GSIs, the GSRA's relationship with the University is not one-sided; it is symbiotic. GSRAs pursue the research necessary to meet the objectives of the grantor; while doing so, they advance their own academic needs.

The work of GSRAs, to the extent they are working on sponsored research, advances that research to address the “Specific Aims” of the grant. (see e.g. Exhibit 34 at 25) As Vice President Forrest explained, if a GSRA working on sponsored research discovers a “new and interesting direction,” that new work can only be funded under an existing grant with the approval of the grantor. If the granting agency is not interested in supporting this new endeavor, a different funding source must be found and the lab will “generally bring in somebody else to continue on the more orthodox line...” (Volume 6 at 44:16-45:5)

But, a GSRA who is moving research in the directions sought by a grant is doing the work necessary for the University to meet its grant commitments. The work of a GSRA also includes efforts to assure that knowledge gained through their research is shared with the world outside the University. As Dr. DiRita explained:

“I say, ‘We’re kind of running a little business here and everybody benefits when the product that comes out of it are the papers that we can show the world what we’ve done.’”  
(Volume 4 at 133:3-133:6)

Knowledge discovered and shared on one grant also serves the larger interest of the employer—the University—in pursuing new research opportunities. As Professor Annemarie Palincsar explained, as a faculty member you are always looking for another grant. (Volume 5 at 65:12-65:18). She confirmed that succeeding in accomplishing the objectives of a grant assists in obtaining new grants. (Id. at 66:13-17). So, to the extent that the work done by GSRA helps meet the aims of each grant, the entire research enterprise at the University benefits.

Significantly, Vice President Forrest explained that the University of Michigan has succeeded because of what he called a “virtuous cycle”:

You create a virtuous cycle when you try to create excellence in research. If you’re an excellent research institution, you get the best faculty. When you get the best faculty, you start to attract the best students. And best just engenders best, so it just – it feeds back into the system. So, we have been growing at a faster rate in the research domain than many of our peers of the last several decades, I would say.

(Id. at 18:25-19:9) GSRA are one of the critical components in that virtuous cycle. Their success in grant-funded research “feeds back into the system,” allowing the University to expand and improve its world class research program. There are many important contributors to the success of the University’s research enterprise. Each GSRA working on sponsored research is one of those contributors.

### 3. Data Generated During GSRA Research Is Intended to Meet the Aims of the Grant

Graduate students are being educated when they engage in research. But, this does not mean that the data they collect is solely for their own purposes. As Dr. DiRita—a witness proposed by the Attorney General—testified:

- Q. [A] faculty member has its own goals, obviously, right?  
A. Sure, absolutely. [...]One of which is to train graduate students.  
Q. But others too, right?  
A. That's correct.  
Q. ...[T]he faculty member ... hopes to produce some useful research under their own name, right?  
A. No question. But it's -- the grand bargain is that-- the reason that you're at Michigan is because you want graduate students to be part of your effort.  
Q. Right. I understand, it's a symbiosis, if that's the right word.  
A. Good word to say, yeah.  
Q. I don't know if that's the right word or not, but ... more than one purpose is served by the research arrangement, right?  
Q. Would you agree?  
A. Yes.

(Dr. DiRita Testimony, Volume 4 at 50:21–51:22). While data collected by GSRA is intended to be used to satisfy the grant, that same data can also be of incidental benefit to the GSRA collecting it.

The GSRA testified that much of the research they performed was not directly relevant to their dissertations and, even when it was relevant to their dissertations, it was not being generated primarily for the dissertation, but to satisfy the aims of a grant. Andrea Jokisaari testified the data she was generating in her first two projects as a GSRA was not being generated for or used for her dissertation. (Volume 1 at 36:6-36:11). The data generated during her third project was also being created to fulfill the project, but she was able to use this data for her dissertation. (Id. at 44:22–45:14). It was Ms. Jokisaari's understanding that the data would be generated whether she was writing her dissertation or not. (Id. at 45:19–46:9). Similarly, Elaine Lande testified that although

she generated a considerable amount of data performing discrete projects under a single project grant, she is only incorporating the “past five months” worth of data into her dissertation. (Id. at 59:16–62:14). The data was not generated for her dissertation—she decided on her topic after the fact. (Id.). Christie Toth’s experience—albeit unusual—is particularly telling. The GSRA research she performs is set by her advisors and has almost no relationship to her dissertation—writing instruction at Native American Community Colleges. (Id. at 79:2-79:18). Alix Gould-Werth stated that her dissertation was “inspired” by her work, but the data generated under the grant will not be used in her dissertation. (Id. at 95:14–96:8). Stephen Raiman testified that he has not yet selected his dissertation topic. (Volume 5 at 80:8–80:14). In other words, he may or he may not use the data he is generating for his own purposes.

That the research data is generated for the grant is clear from the beginning of a GSRA appointment. The sample “Offer Letter,” which is often provided to prospective GSRAs, explains that the GSRA appointment will support research performed by a specific professor:

Your appointment will support research with Professor<<X>> in her <<lab or on her project titled <<name>>].

(Exhibit 1(d)). The GSRAs testified that they did not apply for the grants and that the grants were not secured for them. (Jokisaari Testimony, Volume 1 at 39:5-39:7); (Lande Testimony, Volume 1 at 57:24–57:28; 57:14-57:18). As Dr. Forrest testified:

**Q.** So, you may or may not have had an idea, but the granting agency didn’t say, “You’re getting this money and you can spend it as long as you also spend it to hire John Doe as a GSRA”?

**A.** That is correct. And there is a really good reason for that. The timing of grants is uncertain. The timing of your graduate student that you have on -- in your group at the time is, if anything, very certain. There’s a person there who needs to make progress toward their degree.

(Dr. Forrest Testimony, Volume 6 at 42:2–42:11).

In fact, if one GSRA did not perform research under a grant, the granting agency would still require the research to be performed. The University would be required to assign another GSRA or professional researcher to the project. As Dr. DiRita testified:

**Q.** [If GSRA's] weren't there, in order to get the work done, the University would have to hire somebody else who wasn't a student to do some of that work. [...]

Do you agree that that's the case?

**A.** I think that the ... work would still be done. We would try to hire somebody else, but it's not -- we don't -- we don't hire students with the idea that they will accomplish this aim on this grant.

(Dr. DiRita Testimony, Volume 4 at 49:15–50:2). Dr. Forrest similarly attested to this:

**Q.** Finally, I just want to get back to one subject that you talked about, which is the circumstance in which a graduate student research assistant is working on a grant and comes up with a--I think you called it a new and interesting direction that diverges from the grant -- that diverges from the grant so much that the grantor agency or entity does not consider that work consistent with the grant [...] when the University finds another way to fund that GSRA's activity ... the work that that GSRA was doing needs to be replaced on the grant the GSRA was working on, correct? [...]

**A.** Again, I'm trying to consider the various ways that these things are managed. There are many different ways. Sometimes there's enough flexibility within the group that other people just merge into that and then you find another student to do some other project within that -- within that funding umbrella. But, in general, I think one could say that, yes, those tasks, if they were important enough to -- getting to the research goal of the grant, that they could not be otherwise replaced, then you would probably seek a new GSRA to take over.

(Dr. Forrest Testimony, Volume 6 at 94:3-96:13). The work on a grant is not created for or by specific GSRAs. When a GSRA cannot perform a required task under the grant, another researcher must. This is not in the nature of a work that is created for the benefit of GSRAs.

GSRA research generates deliverables for the University and the funding agency. As stated by Ms. Jokisaari:

[The funding agency] has these requirements for us that are called deliverables, and these deliverables are basically set -- they're deadlines and we have specific topics for these deliverables. In our case it's typically: What did -- what did you find out in the literature? What are you planning on doing about it? Or if you've done enough research, what have you found out so far?



(Jokisaari Testimony, Volume 1 at 43:9–43:16). Multiple witnesses confirmed that the work of GSRA is, by definition, directed towards achieving the “specified aims” of the grants on which they work. Dr. Forrest explained the potential situation in which a GSRA discovers a “new and interesting direction,” but the new research is not consistent with the original grant. If the granting agency is not interested in supporting this new endeavor, a different funding source must be found and the lab will “generally bring in somebody else to continue on the more orthodox line...” (Volume 6 at 44:16-45:5). In other words, the GSRA is doing the work of the University—helping to fulfill the objectives of the grant. If those objectives are not being met, the GSRA cannot be funded under that grant.

Further proof that the research is not solely for the student is the fact that the students do not control the nature of the work—that is set by the grant itself and the principal investigator. As stated in the sample offer letter, “[s]pecific duties and schedules should be discussed with Prof. <<X>>. Given that research support and the related activity can vary over time, your specific duties and schedules may also change.” The GSRA also testified that they do not set the agenda on the grants. (Toth Testimony, Volume 1 at 77:13– 77:17).

The fact that research on a particular project is not always used by the GSRA as part of a dissertation is also shown by the fact that GSRA testified that they often work on more than one grant and numerous research projects during their tenure at the University. For example, Ms. Jokisaari testified that she has been appointed as a GSRA for seven semesters and worked on three separate projects. (Volume 1 at 33:3-33:9). Ms. Gould-Werth testified that she performed numerous projects at the instruction of her advisor, including creating data sets, running analyses, writing, proofreading papers and “other side work.” (Id. at 64:14–65:7). Jeremy Moore had GSRA appointments in at least two research groups. (Volume 2 at 10:15–11:5). After he had begun

working in his current group, his advisor asked if he would be willing to change his research focus so that he could work under a new research grant. (Id. at 13:5–13:24). Mr. Slater performed much of his GSRA work studying interstellar dust, but switched to studying the Milky Way at the end of 2010. (Volume 3 at 7:19–10:13).

Thus, when GSRAAs certify their effort, they are not certifying that have been educated; rather, they certify that they expended “physical and mental energy to perform and/or support objectives of the University’s missions.” (See Underlying Principles and Definitions in Effort Reporting) (Exhibit 8) (emphasis added). As is defined in the University’s policies, effort certification is a “self-attestation of an employee’s university activities for a stated time period. Appropriately certified effort provides audit-able documentation to demonstrate to the university’s sponsoring partners that the sponsor did in fact receive the level of effort committed through the award process.” (Id.).

#### **D. GSRAAs are Controlled and Supervised in the Manner of Professional Researchers**

The record is very clear on the University’s right to supervise and control GSRAAs. The University has the right to hire GSRAAs. The University has control over where and when GSRAAs perform research. The University can—and often does—require GSRAAs to attend meetings and other work sessions. The University can control GSRAAs leaves of absence. The University provides the facilities and tools required for GSRA research. The University sets the levels of GSRA compensation and links that compensation to the GSRA’s work fraction. And, perhaps most telling, the University has the right to fire GSRAAs:

“If it is determined that the appointee is not making satisfactory progress towards a degree, or when appointment performance is unsatisfactory (including cases involving misconduct) the appointment duties may be reduced and the appointment fraction and stipend may be reduced correspondingly, or the appointment may be terminated. Prior to initiating a termination, the matter should be discussed with the

GSRA in an effort to correct the problem. Where efforts at correction are inappropriate or prove to be unproductive, the proposed termination of appointment and support should be reviewed and approved in advance by the department chairperson or an equivalent level of authority (in an Institute or Center) prior to proceeding. In addition, the Academic Human Resources Office should be made aware of the pending action.”

(Exhibit 1(b)). This level of control over GSRA's plainly indicates that GSRA's are University employees.

The University has instituted numerous protocols and procedures that govern GSRA's employment relationship with the University. These procedures are found in the University's Standard Practice Guides. SPG 303.3 governs the procedures applicable to investigation of academic misconduct for “all instructional faculty, primary researchers, and other staff members, including without limitation graduate student research assistants, graduate student teaching assistants, graduate student staff assistants, undergraduate students employed in research or other scholarly activity, postdoctoral fellows and postdoctoral research associates, visiting faculty or staff, faculty or staff on sabbatical leave, adjunct faculty when performing University work, and faculty or staff on leave without pay.” (Exhibit 4). GSRA's relationships with students are subject to SPG 601.22 (Stipulation No. 16(e)), “Faculty-Student Relationships” Policy. (SPG 601.22) (Exhibit 7). Under SPG 303.4, University of Michigan Technology Transfer Policy, the University typically will own intellectual property created by a GSRA, even in some circumstances if that creation occurred after the conclusion of the term of the GSRA appointment, but “will not generally claim ownership of Intellectual Property created by students.” (Stipulation 16(c)) (Exhibit 5). The University requires GSRA's performing research under certain grants to complete a “certificate of effort,” when performing research under federal grants (Exhibits 6, 8 and 29), where, in most circumstances, those who are funded via fellowships—do not have to complete this certification. (Stipulation No. 16(f)).

Finally, the University requires GSRAs to take an oath to uphold the constitution; students are not required to take the oath. (Stipulation No. 16(b)).

GSRAs are not supervised like students, who are evaluated solely on academic progress, or like GSIs, who are subject to day to day supervision, based on fixed-schedules and class-related duties. Rather, the supervision of GSRAs is closer to the supervision provided in a professional environment. The agenda is set by the advisors and the GSRAs are expected to behave like professionals to achieve the aims of the agenda. GSRAs are treated more like the petitioners in *Interns and Residents*, who were entrusted with many responsibilities that medical students were not.

As can be expected, GSRAs are supervised in virtually the same manner as post-doctoral fellows.

As Dr. DiRita testified:

**Q:** [G]enerally, when you supervise the postdocs, do you supervise them with the same types of standards that you use with respect to the Graduate Student Research Assistants in terms of their effort?

**A:** Well, in terms of this -- I mean, with the caveat that they're at a different stage of their training and what they know, the expectations are very similar. They're learning, they're inquiring in areas of investigation that we don't know the answer to. They're expected to put progress, you know, make progress and write papers. So, it's very similar, although they're at different stages. [...] The expectation is data, not that I see you. I can see you produce no data or I cannot see you produce data, and as long as the data's valid and we can repeat it and everything, I'm happy.

...

**Q:** So, this standard that we talk about in terms of how you measure progress or work in the lab, would that standard or that rule apply in your labs whether you're dealing with an experienced research who's not a student and a student? Are you looking at pretty much the same types of standard?

**A:** [...] I view the post-doc or grad student as a trainee, so they might be at different levels of their training, but they're trainees, and so the expectation about, "You know, you have to own this, this is your commitment, not necessarily mine. I mean, you want to do this because you want to have my job in the future or you want to be in pharmaceuticals, whatever," that's their ownership that I expect. That's my expectation. But my view of [GSRAs and post doctoral fellows], trainees in the single group, is completely different than a [non graduate student assistant] when I say, "Show up, you've got to be here. It's not about the data, it's about me seeing you." Totally different."

(Dr. DiRita Testimony, Volume 2 at 107:20–110:10). As Dr. DiRita testified he tells his GSRAs, “If I never see you, but I’m getting data and I can prove the data is right, then we’re in great shape.” (Id. at 91:19–91:21).

When GSRAs are evaluated, they are evaluated in the manner suitable to their work. As Dr. Forrest testified:

**Q.** Now, in -- in reviewing any one GSRA, among the things that you are looking at is the extent of their effort on the project, that is are they showing up and trying to do what has to be done?

**A.** I often draw the distinction with my students between showing up and thinking. [...] So, to me, you know, you can work, but it’s important to work smart. I do not log them in and out, but I have a very good idea of who’s putting in effort by what they deliver intellectually.

(Dr. Forrest Testimony, Volume 6 at 52:21–53:7). Dr. DiRita agreed that he evaluates GSRAs based on the research they are performing:

I think that’s a fairly common sense in the department. I think most people want to see their students during the day, because if there’s things they need to talk about and we like to talk to our students on a frequently regular basis, then we like to see them. But, we don’t -- I think many of us don’t have reporting requirements in terms of, “You have to be here from this time to this time.” It’s more about the data. We’re data driven.

(Dr. DiRita Testimony, Volume 4 at 91:23–92:8).

Like post-doctoral fellows and other professional scientists, GSRAs are subject to the oversight one would expect in a professional environment. Ms. Jokisaari testified that she is expected to be in the office most days; there are certain things that her advisor tells here she must do, but because the work is theoretical, she can work at home. (Volume 1 at 48:22–49:20). Her advisor prefers advance notice of sick days, and is flexible about scheduling as long as she is told. (Id.). Ms. Lande advised that she has a group meeting with others who are involved in the grant and with her advisor once a week. (Id. at 64:2–64:21). If she is ill or if “something comes up” she lets her advisor know and if necessary someone might stand in for her. (Id. at 65:5–65:18). Christie Toth’s work is

scheduled at a weekly research meeting, which Ms. Toth must attend. (Id. at 81:22–82:5). But, as long “as the work is getting done” her schedule is flexible. (Id. at 82:10-82:20). Ms. Gould-Werth also meets with her advisor once per week to discuss the tasks that she was expected to complete in the preceding week. (Id. at 98:20–99:8). Mr. Moore’s schedule is similarly flexible—he attends weekly meetings, works from 9 to 5 and other hours as necessary and will usually “have to ask” if he would like to take the weekend off. (Volume 2 at 21:2–22:18). Mr. Raiman agreed that he is responsible for performing the required research, and that scheduling is done informally with his advisor. (Volume 5 at 98:14–99:18).

#### **E. GSRA’s are Provided with Compensation and Benefits Like Employees**

In 2012, GSRA’s are compensated for performing research. (Stipulation No. 9). Although departments and principal investigators have the discretion to adjust the compensation upwards (See Stipulation No. 9(b)), GSRA’s in Ann Arbor or Dearborn are paid approximately \$4,400 per month, depending on their work commitment. (Stipulation No. 9) (See also Exhibit 2(a)). Similarly situated GSRA’s who perform research at the Flint campus are paid approximately \$3,100 per month. (Id.). As the University acknowledges in the parties’ stipulations, absent unusual circumstances, a Graduate Student Research Assistant would not be given money without making contributions to the defined set of research activities proposed in the grant or contract. (Stipulation No. 9). GSRA’s are paid primarily from grants or contracts awarded to the University to conduct a defined set of research activities. (Stipulation No. 9(b)). GSRA Stephen Raiman acknowledged that he is compensated for his role as a GSRA. (Volume 4 at 100:16-100:21). As in the payments provided in *Interns and Residents*, compensation is paid by University checks drawn from a University account.

In the *Interns and Residents* opinion, the Supreme Court noted that the petitioners had a portion of their compensation—which was like a stipend in that it had no relation to number of hours

worked or the duties performed—withheld for the purposes of federal income tax, state income tax, and social security coverage.<sup>7</sup> Consistent with GSRA's employee status, federal and state taxes are withheld by the University from GSRA stipends and each GSRA is issued a W-2. (Stipulation No. 16(g)). GSRA's are compensated based on their fractional appointment—their compensation is adjusted based on a minimum amount of effort they commit to devote to a project. According to the University's Office of Research & Sponsored Projects: "Payments to Graduate Student Assistants are considered to be 'reasonable compensation' for the performance of services rendered to the University in connection with research or teaching assignments. (Stipulation No. 16(g)(i)). As such, these payments are subject to federal and state income taxes..." (Id.) In contrast, federal and state taxes are **not** withheld by the University from fellowship payments made to United States citizens and resident aliens. (Stipulation No. 16(g)(ii)). Graduate student Stephen Raiman, called to testify at the suggestion of counsel for SAGU, confirmed that federal income taxes were not withheld from his fellowship checks, while his compensation as a GSRA was subject to withholding. (Volume 4 at 105:19-106:5).

The University has come to consistently recognize GSRA's as student-employees and has thus provided them with employment benefits provided to other student-employees. As outlined in the tables above, GSRA's are eligible—like other student employees—to receive health and insurance benefits, including health and life insurance, dental insurance and travel accident insurance. (Exhibit 1(e)). In addition to any benefits that were available in 1981, GSRA's now receive vision benefits, Dependent Care Flexible Spending Accounts, and Medical Expense Flexible Spending Accounts. If GSRA's "terminate employment or become ineligible for benefits [they] may continue [their] health plan coverage under COBRA." (Exhibit 23).

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<sup>7</sup> GSRA's do not have taxes withheld for social security coverage. (See Oral Stipulation of Parties, Volume 6 at 106:20-107:16).

As in *Interns and Residents*, the fact that petitioners receive fringe benefits available only to other employees is an indication of employment. The benefits provided to the different groups of student employees in 2012 are nearly identical. The only difference is that GSIs and GSSAs have a choice of several health care plans, while GSRAs are eligible for one plan. While the student employees receive nearly identical benefits, other graduate students receive a very different set of benefits. These students receive health care coverage to protect their well-being, but do not receive those benefits which are more traditionally employment perquisites. Graduate students who are not also employees, do not receive Group Term Life Insurance, are not eligible to participate in Supplemental Retirement Accounts, Health Care Flexible Spending Accounts, Dependent Care Flexible Spending Accounts, and cannot obtain Travel Accident Insurance. (Exhibit 23).



## V. CONCLUSION

The University has determined that its GSRAs are both students and employees. The University treats GSRAs as it does other student-employees. The University is confident that the facts have borne this out.

Therefore, University respectfully submits that the Commission should conclude that University of Michigan GSRAs are employees under PERA.

Respectfully submitted,

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