STATE OF MICHIGAN
IN THE COURT OF APPEALS

IN THE MATTER OF:

Court of Appeals No. 307964

UNIVERSITY OF MICHIGAN,
Appellee Public Employer,

Michigan Employment Relations Commission No. R11 D-034

And

GRADUATE EMPLOYEES ORGANIZATION/AFT,
Appellee Petitioner Labor Organization,

And

STUDENTS AGAINST GSRA UNIONIZATION,
Proposed Intervenor,

And

MICHIGAN ATTORNEY GENERAL,
Appellant Proposed Intervenor.
_____/

APPELLEE PUBLIC EMPLOYER UNIVERSITY OF MICHIGAN'S ANSWER TO THE STUDENTS AGAINST GSRA UNIONIZATION and MELINDA DAY's APPLICATION FOR LEAVE TO APPEAL

Submitted By:

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

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

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COUNTER-STATEMENT OF JURISDICTION

The Students Against GSRA Unionization ("SAGU") and Melinda Day ("Day") (collectively, "Appellants") ask this Court for leave to appeal an interlocutory order issued by the Michigan Employment Relations Commission ("MERC" or "Commission") denying SAGU's Motion to Intervene and referring this representation matter to an investigatory (as opposed to an adversarial) jurisdictional hearing before an Administrative Law Judge.

Appellants summarily conclude, without any citation to authority: "This Court has jurisdiction pursuant to MCR 7.203(B)(3), (4) and MCR 7.205(A)." However, MCR 7.205(A) merely provides the jurisdictional time limits within which an application must be filed. Reference to that rule reveals that Day did not timely file an application with respect to the September 14, 2011, denial of her motion to intervene, and therefore is not properly an Appellant in this matter. In any event, Appellant's Brief does not differentiate between SAMU and Day. The University of Michigan's ("University" or "Appellee") Brief, therefore, does not specifically address Day's rights.

Moreover, this Court does not have jurisdiction over this matter because, by its terms, MCR 7.203(B)(4) does not provide for interlocutory review of an order, unless that order is appealable by law or rule. MCR 7.203 (B)(4) ("The court may grant leave to appeal from: any other judgment or order appealable to the Court of Appeals by law or rule.") The Public Employment Relations Act, 1965 PA 379, as amended, MCL 423.201 et seq ("PERA") only authorizes appeals of final orders. MCL 423.216(e). Therefore, the Commission's Order is not "appealable by law or rule" as required for an interlocutory appeal under MCR 7.203(B)(4). Further, since the administrative proceedings are representation proceedings, not a contested case subject to the Administrative Procedures Act, the appeal cannot be based on MCL 24.301.

Finally, there is no jurisdiction under MCR 7.203(B)(3) ("The Court may grant leave to appeal from: a final order of an administrative agency or tribunal which by law is appealable to or reviewable by the Court of Appeals or the Supreme Court), since there is no final order and an appeal from the statute upon which Appellants rely, MCL 24.263, is by the filing of an action in the Circuit Court, as specified by MCL 24.264.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

Appellants ask this Court for leave to appeal an interlocutory order issued by the Michigan Employment Relations Commission denying the Motion to Intervene filed by Students Against GSRA Unionization.

Have the Appellants, or either of them, demonstrated a right to intervene?

Appellee University of Michigan says: No

Appellant SAGU says: Yes, as to itself, and does not address the issue as to Day

Appellant Day: Does not address the question as to herself

The Commission says: No

INTRODUCTION

Appellants' position in this application for an interlocutory appeal is nothing more than an attempt to engraft upon representation proceedings the rules governing adversarial proceedings involving unfair labor practices and contested cases. The precedents of the Michigan Court of Appeals and Michigan Supreme Court do not support any of Appellants' myriad arguments.

COUNTER-STATEMENT OF FACTS

On April 27, 2011 the Graduate Employees Organization/AFT ("GEO" or "Petitioner") filed a Petition for Representation pursuant to Sections 12 and 13 of the Public Employment Relations Act ("PERA"), MCL 423.212 et seq. (Exhibit 1). The Petition sought to accrete Graduate Student Research Assistants ("GSRAs" or "RAs") to GEO's bargaining unit of Graduate Teaching Assistants ("TAs") and Graduate Staff Assistants ("SAs"). (Id.). On May 19, 2011, the University of Michigan Board of Regents, adopted a resolution that supports the recognition of GSRAs as employees. The resolution does not take a position on the Petition itself, or whether the GSRAs should accrete to the existing unit; the Regents simply recognized the fact that it believes the GSRAs are employees.

The University and GEO then presented a Consent Election Agreement to the Michigan Employment Relations Commission ("MERC" or "Commission"), the preliminary step in allowing the GSRA employees to determine for themselves whether they would like union representation. (Exhibit 2). The Consent Election Agreement clarified that the proposed bargaining unit would not accrete to the existing unit, but would be separate. (Id.).

On July 28, 2011, Melinda Day – represented by the Mackinac Center – filed a Motion to Intervene and for Summary Disposition. (Exhibit 3).

On September 14, 2011, the Commission entered an Order denying Day's Motion to Intervene and also denying the GEO's Petition. (Decision and Order, September 14, 2011)(Exhibit 4). The Commission reasoned that it was bound by its 1981 Opinion in *Regents of the University of Michigan*, 1981 MERC Lab Op 777 ("1981 Opinion"). The 1981 Opinion considered whether TAs, SAs and GSRAs were "employees" under PERA. The Commission determined that the distinction between "student" and "employed" turned on whether the "work is being performed in a 'master-servant' relationship or whether the person performing the work does so as his own 'master.'" In the 1981 Opinion, the Commission held:

> TAs provide a benefit to the University rather than engaging in pursuits of their own. They provide services similar to those of nonstudent employees; they do not control what courses they teach or what hours they work; they are supervised and may be removed for inadequate performance; and, they are compensated based on the amount of work they provide. . . . Likewise, SAs perform regular duties of a type which benefit the University.
>
> . . . [T]he relationship between the RAs and the University does not have sufficient indicia of an employment relationship. The nature of RA work is determined by the research grant secured because of the interests of particular faculty members and/or by the student's own academic interest. They are individually recruited and/or apply for the RA position because of their interest in the nature of the work under the particular grant. Unlike the TAs who are subject to regular control over the details of their work performance, RAs are not subject to detailed day-to-day control . . . . RAs are substantially more like the student in the classroom . . . . They are working for themselves.

The Commission determined that – absent a change in facts - it was bound by the 1981 Opinion. The Commission found that the neither the Petitioner nor the University had presented any evidence regarding a change in facts and that the parties' agreement did not confer employees status on GSRAs. Thus the Commissioner held "[t]he RAs cannot be granted public employee status under PERA predicated on the record before us." (Ex. 4).

The Commission held that Day could not avail herself of Commission Rule 423.145(3), which governs intervention. The Commission properly concluded that Day presented no showing of

interest that could entitle her to intervene. She did not file a motion for rehearing or otherwise challenge the ruling. Her interlocutory appeal, therefore, is untimely pursuant to MCR 7.205(A) and need not be addressed.

On October 3, 2011, the GEO filed a Motion for Reconsideration arguing that the Commission should engage in a fact-finding process to determine whether there had been a change in circumstances of GSRA employment warranting a reconsideration of the 1981 Opinion. (Exhibit 5). Even though the Commission had previously determined that Day did not have standing to intervene, the Mackinac Center, this time appearing for "Students Against GSRA Unionization," filed a second Motion for Intervention. (SAGU Motion to Intervene and to Deny Petitioner's Motion for Reconsideration, November 1, 2011)(Exhibit 6).

The GEO opposed this improper request and argued that the SAGU effort to intervene was not supported by an actual, tangible, showing of interest; although SAGU claimed to represent 371 persons, such a claim has to be supported by the proper evidence. (GEO Letter to Commission, November 3, 2011)(Exhibit 7). The GEO argued that the SAGU request was far too late, and that the rules prevent an intervener from holding an election hostage by submitting untimely requests to intervene. (Id.). The GEO argued that, setting all the procedural deficiencies aside, SAGU is attempting to exercise intervention rights it does not have. (Id.). A 10% petitioner does not have the right to interfere with an election process. (Id.). The "Mackinac Center cannot climb into an election process for the sole purpose of preventing an election. … Only a petitioner, or someone with the rights of a petitioner (i.e. an entity with 30% showing) may seek to withhold consent or have a petition dismissed. A 10% intervener does not have such authority." (Id.).

On December 16, 2011, the Commission denied SAGU's Motion to Intervene and granted the GEO's Motion for Reconsideration. (Decision and Order on Motions to Intervene and Motion for Reconsideration of Order Dismissing Petition)("Dec 16 Order") (Exhibit 8):

> While Commission Rule 423.145(3) provides that an employee, group of employees, individual, or labor organization may intervene in an election proceeding, it also states that there must be evidence showing that ten percent of the members of the unit in which the election is sought support the petition to intervene. The affidavit filed in support of the motion to intervene submitted on behalf of Students Against GSRA Unionization simply states that the group has 371 members. There is no assertion as to how many of this number support the motion to intervene and no authorization cards accompanied that motion. Furthermore, intervention in an election proceeding is only granted when, upon a proper showing of interest, a rival to the labor organization seeking representative status wishes to be included on an election ballot. See Commission Rule 145(3). The group known as Students Against GSRA Unionization does not seek placement on a ballot. Rather, it seeks to intervene in this proceeding for the purpose of expressing its opposition to our conducting an election, a purpose that it lacks standing to pursue in a representation proceeding. For those reasons, we must deny its Motion to Intervene and for Summary Disposition.

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

In addition, the Commission determined that the doctrine of *res judicata* does not apply to a representation matter such as this. (Dec 16 Order, p. 5)(Ex. 8). The Commission determined that the GEO had adequately supplemented the record, after denial of the original petition, to show that it is possible that there has been a change in circumstances since the 1981 Opinion. (Id. at 6). The Commission referred the matter to a senior Administrative Law Judge to "conduct an evidentiary hearing at which [the GEO] will have the opportunity to attempt to show that there has been a substantial and material change in circumstances since [the 1981 Opinion] was issued." (Id.). The Commission held:

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

(Id. at 6).

Administrative Law Judge Julia C. Stern was assigned to the matter and entered a Pre-Hearing Order addressing the proofs to be submitted by the Petitioner and by the University, and reserving time to "allow [ALJ Stern] to subpoena additional witnesses or documents" if she deems further proofs to be necessary. (Pre-Hearing Order at 1-2)(Exhibit 9).

ARGUMENT

I. STANDARD OF REVIEW

The "legal rulings" standard of review relied upon by Appellants is not the appropriate standard of review in this case. As made clear by the Supreme Court in the only case cited by Appellants, *Amalgamated Transit Union, Local 1564, AFL-CIO v Southeastern Michigan Transportation Authority*, 437 Mich 441, 450; 473 NW2d 249 (1990), that standard is derived from Const. 1963, Art. VI § 28 and MCL 24.306(1). Those provisions, however, are applicable when reviewing "[a]n administrative decision, following a hearing held pursuant to the provisions of the Michigan Administrative Procedures Act," as noted in *THM, Ltd v Commissioner of Ins*, 176 Mich App 772, 776 ; 440 NW2d 85 (1989).[1]

[1] Const. 1963, art. 6, § 28 provides:

> All final decisions, findings, rulings and orders of any administrative officer or agency existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights or licenses, shall be subject to direct review by the courts *as provided by law*. This review shall include, as a minimum, the determination whether such final decisions, findings, rulings and orders are authorized by law; and, *in cases in which a*

As discussed, *infra*, as a matter of law the proceedings in this case are not required to be (and the Commission has not specified them to be) a contested case pursuant to the Administrative Procedures Act.

A decision regarding intervention "is an administrative action and shall be made exclusively by the commission or its agent." Commission Rule 423.145(3). Similarly, the determination whether to hold a hearing regarding a representation question is within the Commission's discretion. *Sault Ste Marie Area Pub Sch v Michigan Educ Ass'n*, 213 Mich App 176; 539 NW2d 565 (1995). The standard of review on such decisions is based upon abuse of discretion. *Michigan Association of Public Employees v Michigan Employment Relations Com*, 153 Mich App 536, 546; 396 NW2d 473 (1986) (The court of appeals will not set aside a discretionary decision by the Commission absent a showing that the commission's decision "is so perverse or palpably wrong as to expressly amount to a breach of its statutory duty").[2]

II. APPELLANTS FAIL TO DEMONSTRATE ANY ERROR IN THE COMMISSION'S DENIAL OF SAGU'S REQUEST TO INTERVENE

A. Appellants' Premise is Fundamentally Flawed: Representation Matters are Neither Adversarial Nor Subject to the Adversarial-Based Contested Case Provisions Governing Unfair Labor Practices

Essentially, each of Appellants' undenominated sub-arguments is, to some extent, based upon a misconception of what is involved in the determination of union representation where public employment is involved. The process is governed by explicit statutory provisions, administrative

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> *hearing is required*, whether the same are supported by competent, material and substantial evidence on the whole record.

(Emphasis added.)

[2] See also *In re Wayne County*, No. 190660; 1997 WL 33352796 (April 11, 1997) ("we will not disturb a remedy imposed by the MERC unless the order constitutes a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the PERA")

procedures and precedent which distinguish representation issues from issues of unfair labor practices which may arise where a right to representation has already been determined and remains unquestioned. Representation issues are matters of investigation by the Commission, to determine whether the Commission has statutory jurisdiction over the parties and the subject matter. If it does not have jurisdiction, the Commission takes no further action unless and until a party with standing raises a legitimate concern regarding whether changed circumstances justify acceptance of jurisdiction -- which the Commission then investigates as before. (And, even if it *does* find jurisdiction, the jurisdiction is not continued if a party raises a legitimate concern over continued jurisdiction and investigation shows a change of circumstances). On the other hand, where jurisdiction exists and remains unquestioned, the Commission may conduct adversarial proceedings, in contested cases in which an unfair labor practice has been alleged and a statutory remedy has been sought.

Thus, the statutory basis for representation proceedings is found in MCL 423.212, which provides in relevant part:

> Sec. 12. When a petition is filed, in accordance with rules promulgated by the commission:
> . . . .
> **The commission shall investigate the petition** and, if it has reasonable cause to believe that a question of representation exists, shall provide an appropriate hearing after due notice. If the commission finds upon the record of the hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof. Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with the rules of the commission.

The Court of Appeals has explored the nature of the Commission's investigatory obligation. *See e.g. Hepler v State, Dep't of Labor*, 64 Mich App 78; 235 NW2d 161 (1975); *Michigan Assoc of Public Employees v MERC*, 153 Mich App 536; 396 NW2d 473 (1986); *and see Sault Ste Marie Pub Sch v*

Michigan Educ Ass'n, supra. In *Hepler*, a changed circumstances case involving a request for decertification, the Court noted:

> As provided in § 12 of the public employment relations act [PERA] 1965 PA 379, the director of MERC investigated the petition and supporting documents, and administratively dismissed the appellants' petition on October 9, 1974. Appellants successfully sought review by MERC of the dismissal and counsel for Central Michigan University (CMU) and CMUFA made appearances. In an opinion dated December 16, 1974, MERC unanimously affirmed the director's dismissal, and appellants commenced this appeal.
>
> . . . .
>
> CMU's contention that the Administrative Procedures Act, *MCLA 24.201*; MSA 3.560(101), *et seq.*, requires MERC to hold a hearing before dismissing a decertification petition is meritless. The action taken does not involve a contested case within the meaning of the APA. *Kelly Downs, Inc v Racing Commission, 60 Mich App 539; 231 NW2d 443 (1975).*

64 Mich App at 81-82 & fn 4. Similarly, in *Michigan Assoc of Public Employees v MERC*, the Court of Appeals noted:

> MAPE contends that in light of *Smith v Lansing School Dist, 149 Mich App 131, 135; 385 NW2d 624 (1985)*, the commission cannot lawfully administratively dismiss the petition in this case absent an evidentiary hearing or oral argument. In *Smith*, an unfair labor practice case, this Court ruled that "MERC is not empowered to summarily dispose of complaints without granting an evidentiary hearing or permitting oral argument." However, in so ruling, this Court referred to PERA § 16(a) and pointed out that it requires that MERC, when addressing charges of unfair labor practices, must conduct all proceedings as a "contested case," pursuant to provisions of the APA.
>
> We find no analogous "contested case" requirement for representation petitions. We read the PERA § 12 provisions as allowing the commission greater discretion to determine whether a question of representation exists and whether to hold a hearing on that question. Moreover, Administrative Rules 43 and 44 are consistent with § 12 in vesting fairly broad discretion in the commission or its agent to determine whether good cause exists to hold a hearing on a representation question. Accordingly, we read *Smith* narrowly as limited in its applicability to unfair labor practices cases.
>
> MAPE has failed to convince this Court that MERC's discretionary decision was "so perverse or palpably wrong as to effectively amount to a breach of its statutory duty." Viewing MERC's decision within the whole

> of the statutory framework and the legislative spirit of PERA, and balancing plaintiff's claims that MERC's decision infringes on the employees' exercise of free choice in the selection of a bargaining representative against the timeliness of plaintiff's exercise of that choice and the need to protect the status quo in the midst of the bargaining process, we decline to grant the relief requested. MERC properly concluded that MAPE's petition was not sufficient to create "a question of representation" within the terms of § 12 of PERA.

153 Mich App at 548-550.

Finally, in *Sault Ste Marie* the Court of Appeals reaffirmed the nature of the proceeding as investigatory and the Commission's discretion whether to have such proceeding. The opinion also belies one of Appellants' primary arguments - that the manner of proceedings ordered by the Commission was newly-devised for this case. The Court in *Sault Ste. Marie* held:

> As noted by the MEA, in *Univ of Michigan* v *Univ of Michigan Teaching Fellows Union*, 1970 MERC Lab Op 754, 759-760, the MERC stated that, although representation proceedings are investigatory and not contested or adversary proceedings, the petitioner has the burden of producing evidence to establish the appropriateness of the bargaining unit sought.
>
> . . . .
>
> The MEA also contends that the MERC violated the duties imposed on it by statute and administrative rule when it failed to hold an evidentiary hearing. Again, we disagree. The proceedings in this case consistently have been treated as controlled by § 12 of the PERA. As noted by the MERC, § 12 gives the MERC the discretion to determine whether to hold a hearing regarding a representation question, as do the administrative rules. *Michigan Ass'n of Public Employees, supra*, p 549. There is no requirement that an evidentiary hearing must be conducted in every case. *Id.*

213 Mich. App. at 182.

In the final analysis, as the Commission has made clear, the proceedings are not in the manner of a contested case – they are representation proceedings. The review "is an investigatory and not an adversarial proceeding." (December 16 Order at 4)(Ex. 8)(citing *University of Michigan*, 1970 MERC Lab Op 754, 759 (1970) and MCL 423.212.). Since this is not a contested case, which,

for purposes of the APA, "is a proceeding in which a determination of the legal rights, duties, or privilege of a named party is required by law to be made after *an opportunity for an evidentiary hearing*," the proceedings are "not subject to the APA requirement that a decision be made only after the parties have been afforded an opportunity for an evidentiary hearing." *See e.g. In re Wayne Co*, No. 190660, 1997 WL 33352796 (Mich Ct App April 11, 1997) (finding that a petition for unit clarification is not a contested case for purposes of the APA).

PERA compels the Commission to determine whether GSRAs are, in fact, employees, within the meaning of the Act. The Commission has stated that the only issue under review is whether there has been a "material change in circumstances" since the 1981 ruling in Regents of the University of Michigan, 1981 MERC Lab Op 777, which would warrant a determination that some or all GSRAs are employees under PERA. (December 16 Order)(Ex. 8). Have the facts of the relationship between the University and the GSRAs changed? Has the law changed? Has the benefit to the University from the work changed? In the investigatory proceeding that has been ordered, all relevant facts are available to the Union, the University and the Administrative Law Judge. The fact that the proceedings are not adversarial does not change this; the Commission's determination is to be driven by the facts and the law, not by policy perspectives.

Appellants accuse the Commission of having shifted 180 degrees from an initial denial of the GEO's petition to an Order after a motion for rehearing allowing the petition. However, the Commission merely recognized that changed circumstances over a period of 30 years of exponentially accelerating technological advances and the role of GSRAs in that process *might* be sufficient for it to revisit its 1981 decision. The ALJ is to conduct investigatory hearings solely for that purpose -- to determine whether jurisdiction exists for further action; this is uniquely within MERC's statutory and regulatory mandate.

B. Appellants Have Not Demonstrated a Right to Intervene

The second major argument encompassed in Appellants' Statement of Questions Involved is that the Commission "improperly excluded all interested persons who sought party status to argue against MERC jurisdiction." Appellants once again rely upon a confused admixture of rules governing representation proceedings and those applicable to unfair labor practices; they fail to analyze the limitations placed upon intervention where the contested case provisions are inapplicable; and, in the end, they would have this Court disregard the appropriate standard of review and sit as a "super-labor board."

1. Appellants Failed to Satisfy the Commission's Applicable Rule Governing Intervention

The rule governing the filing of petitions for an election, for decertification and for intervention in such proceedings, is found at Commission Rule 423.145, which provides:

> (1) *A petition* for an election to determine a collective bargaining representative, except when filed by an employer, or a decertification petition *shall be supported by a showing of interest existing at the time of the filing of the petition of 30% of the employees in the unit* claimed to be appropriate. A showing of interest is not required for a self-determination election petition.
>
> (2) Evidence of interest shall be submitted at the time of filing a petition. *Unless an original showing of interest is received within 48 hours of the filing, the petition will be dismissed.*
>
> (3) An employee, group of employees, individual, or labor organization which makes *a showing of interest not less than 10% of the employees within the unit claimed to be appropriate may intervene* in the proceedings and attend and participate in all conferences and any hearing that may be held.
>
> The signature of an intervenor is not required on a consent election agreement unless the intervenor demonstrates to the commission that 30% or more of the employees in the unit claimed to be appropriate wish to be represented by the intervenor, in which event, the intervenor's signature on the consent election agreement is required. *The determination with respect to the statutory 30% or an intervenor's 10% showing of interest is an*

> *administrative action and shall be made exclusively by the commission or its agent. Once a consent election agreement has been signed by all required parties known to the commission, an interested party shall file a written request to intervene and provide a showing of interest within 2 business days of the date of the consent*. The date of the consent is the date on which the last required signed copy of the consent agreement is received by the commission. Intervention may be permitted after 2 business days with the agreement of all parties and the approval of the commission or its agent or with the approval of the com-mission upon a showing of good cause. *An intervenor who has not less than a 10% showing of interest but less than 30%, may file a motion with the commission and serve a copy on each of the other parties within 48 hours after a consent election agreement is signed alleging reasons for disallowance of the consent election agreement and requesting a hearing. The commission or its agent shall determine whether the petition establishes good cause for holding a hearing*. If the commission or its agent decides that a hearing should be held on the petition, then the consent election agreement shall be suspended pending disposition of the case by the commission.
>
> (4) Intervention will not be allowed after the close of the hearing without the agreement of all parties and the approval of the commission or its agent, or the approval of the commission upon a showing of good cause.

A plain reading of these provisions reveals that the only purpose of intervention, where certification of a bargaining unit is involved, is to assert the interest of a group of at least 10% of the people in the bargaining unit that is claimed to be appropriate. Rule 423.145(3). *Evidence* of the interest must be filed within 48 hours of the petition. Rule 423.145(2). The determination of whether appropriate evidence of the interest has been submitted "*is an administrative action and shall be made exclusively by the commission or its agent*." Rule 423.145(3) (Emphasis added).

There is no basis to question the Commission's ruling that a 10% showing was not made by SAGU, which only stated the size of the group (but did not state either its percentage of the whole or that a group of 10% supported the action to intervene).[3] Nor is there any doubt that the Commission was not provided with authorization cards, either with the motion to intervene or within 48 hours

[3] In this appeal, the only motion to intervene timely before the Court is the one filed by SAGU. As noted above, the appeal as to Day was untimely. Her continued presence in the caption of the matter is a mystery.

thereafter. Moreover, the necessary interest, as a rival to the labor union seeking representative status, was unquestionably absent. SAGU was not a rival seeking to represent GSRAs -- it was "Against GSRA Unionization" and contended that NO bargaining unit was appropriate. (Dec 16 Order, pp 3-4)(Ex. 8).[4]

Moreover, as to objecting parties, once the relevant parties then known to the Commission have signed the Consent to Election form: "*An intervenor who has not less than a 10% showing of interest but less than 30%, may file a motion with the commission and serve a copy on each of the other parties within 48 hours after a consent election agreement is signed alleging reasons for disallowance of the consent election agreement and requesting a hearing.*" Appellants fail to mention the undisputed fact that the Consent Election Agreement in this matter was presented to the Commission in August, 2011, while SAGU did not file a motion to intervene until November 1, 2011. Even if one used the filing of the motion for reconsideration (October 3) as the relevant date, rather than the Consent date, the November 1 filing was untimely.

Finally, the rule governing intervention is inapplicable, because the matter committed to the ALJ for investigation is not a question of certification or decertification envisioned as the reasons for intervention; it is the preliminary issue of whether jurisdiction exists. No case is cited and none has been found which would apply Commission Rule 423.145 to an "interest" in arguing jurisdiction in an investigative proceeding. As this Court has specified on numerous occasions:

> "[T]his Court will not search for authority to support a party's position, and the failure to cite authority in support of an issue results in its being deemed abandoned on appeal."

See, e.g., *Fifth Third Mortgage-Mi v Hance*, 2011 Mich App LEXIS 1715 (Mich Ct App Sep 29, 2011), *quoting Flint City Council v Michigan*, 253 Mich App 378, 393 n 2; 655 NW2d 604 (2002).

[4] Of course, if SAGU is opposed to GEO representing the proposed bargaining unit, the proper way to oppose the representation is through the electoral process.

2. Appellants' "Right to Challenge Subject Matter Jurisdiction" and "Right to a Declaratory Judgment" Arguments Relate to Adversarial/Contested Cases and Not to Investigatory/Representation Issues and Their "Constitutional Standing" Argument is At Best Irrelevant

Appellants offer a series of creative arguments to justify intervention and to argue subject matter jurisdiction by means other than the rule governing intervention. The first such attempt is the citation to Commission Rule 423.165(2)(b) which is asserted to "allow[] a challenge that MERC lacks subject matter jurisdiction." (Appellants' Brief at p. 17). Examination of the Rule defeats the argument. The Rule provides:

> R 423.165 Motion for summary disposition.
>
> (1) The commission or administrative law judge designated by the commission may, on its own motion or on a motion by any party, order ***dismissal of a charge or issue a ruling in favor of the charging party***. The motion may be made at any time before or during the hearing.
> (2) A motion for summary disposition made under this rule may be based upon 1 or more of the following reasons:
> (a) The commission lacks jurisdiction over a party.
> (b) The commission lacks jurisdiction ***over the subject matter of the charge***.

(Emphasis added). Here, there is no "charge," nor is there a "charging party."

The placement of Rule 423.165, in Part 6 of the Commission's Rules, further demonstrates the limited application of the rule and its inapplicability in this context. The General Provisions governing Part 6, Rule 423.161, leave no doubt. Subsection 1 of the Rule provides:

> (1) An application to the commission for an order other than that sought for by the unfair labor practice charge shall be by motion.
> Examples of such motions are set forth in R 423.162 to R 423.167.

See also 423.161(3) ("Each adverse party may file a written brief in opposition to any motion . . . ."); *id.*, 423.161(6) ("Rulings by an administrative law judge on any motion, except a motion resulting in a ruling dismissing or sustaining the unfair labor practice charge in its entirety . . . .")

Appellants then attempt to argue intervention in the context of an "interested party" and declaratory judgments pursuant to the Administrative Procedures Act, MCL 24.263. Once again, the rule must be viewed in the context of contested case proceedings. The statute provides:

> ***On request of an interested person,*** an agency may issue a declaratory ruling as to the applicability to an actual state of facts of a statute administered by the agency or of a rule or order of the agency. An agency shall prescribe by rule the form for such a request and procedure for its submission, consideration and disposition. A declaratory ruling is binding on the agency and the person requesting it unless it is altered or set aside by any court. An agency may not retroactively change a declaratory ruling, but nothing in this subsection prevents an agency from prospectively changing a declaratory ruling. A declaratory ruling is subject to judicial review in the same manner as an agency final decision or order in a contested case.

(Emphasis added).

The first fatal flaw in Appellants' argument is that there is nothing in the record that would suggest that a request for a declaratory ruling was **ever made**, even if Appellants were assumed, *arguendo*, to be "interested persons." Thus, the condition precedent to application of the statute was never satisfied. Moreover, if a request had been made, Appellants fail to demonstrate that the denial or failure to rule would be appealable to this Court. Indeed, neither result would be appealable to this Court, as explained by the Court in *Bentley v Department of Corrections*, 169 Mich App 264; 425 NW2d 778 (1988):

> Once an agency that falls under the provisions of the APA receives a request for a declaratory ruling it has three available options: grant the request and issue a declaratory ruling, deny the request, or ignore the request (fail to act).
>
> ***When the agency denies a request or fails to act, relief in the form of a declaratory judgment action in circuit court may be available***. Section 64 of the act provides:
>
> > Unless an exclusive procedure or remedy is provided by a statute governing the agency, the validity or applicability of a rule may be determined in an action for declaratory judgment when the court finds that the rule or its threatened application interferes

> with or impairs, or imminently threatens to interfere with or impair, the legal rights or privileges of the plaintiff. ***The action shall be filed in the circuit court of the county where the plaintiff resides or has his principal place of business in this state or in the circuit court for Ingham county. The agency shall be made a party to the action. An action for declaratory judgment may not be commenced under this section unless the plaintiff has first requested the agency for a declaratory ruling and the agency has denied the request or failed to act upon it expeditiously***. This section shall not be construed to prohibit the determination of the validity or applicability of the rule in any other action or proceeding in which its invalidity or inapplicability is asserted. (*MCL 24.264*; MSA 3.560(164).)

169 Mich App at 269-270; 425 NW2d at 780 (emphasis added).

Appellants then attempt to establish that they are "interested persons," in order to demonstrate the applicability of the APA Declaratory Judgment provision (which, as discussed above, cannot be applied, by its terms, due to Appellants' procedural defaults, even if a contested case were involved). Appellants seek to rely upon MCL 24.205(7), which defines "person" for purposes of the APA. That Appellants are persons is clear. However, the definition in subsection (7) must be viewed with subsection (6) in mind, as the prior provision provides some rationale for the expansive definition for "person," specifying that "party" shall mean:

> a person or agency named, admitted, or properly seeking and entitled of right to be admitted, as a party **in a contested case**. In a contested case regarding an application for a license, party includes the applicant for that license.

Once again, the conclusion follows – Appellants seek to force a round pegged investigatory proceeding into a square pegged contested case. Appellants' argument, even if presented to the Commission, would fail.

Nor is there any legitimate basis for appeal emanating from Appellants' confusion of the concept of "Constitutional Standing" with the term "standing" as used in the Commission's Decision

and Order. The Commission obviously used the term to refer to SAGU's ability to show that its arguments were intended to come within the range of interests addressed by Rule 423.145(3).[5]

3. The Commission Did Not Commit Error by Finding Intervention Inappropriate Under the 10% Interest Requirement

Finally, in their desire to reverse the Commission on the intervention issue, Appellants try to show that SAGU in fact exceeded the minimum 10% showing of interest, with a lengthy explanation that requires the gathering of information from other pleadings, two emails sent to disparate groups and an "online letter explaining the situation at the saynotogeo.org." (See Appellants' Brief at p. 20 & fn 12). The Commission was not required to accept SAGU's invitation to conduct an online investigation and extrapolate whether or not 10% existed and speculate as to the relevance of the "interest" asserted and this Court should likewise decline the exercise invited by reference to the exhibits attached to Appellants' Brief.

Even more fundamentally, however, the standard of review requires an abuse of discretion, and there is no arguable basis to assert that the Commission's action "is so perverse or palpably wrong as to expressly amount to a breach of its statutory duty" [6]or that the Court should "disturb a remedy imposed by the MERC [where the order does not constitute] a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the PERA."[7] On this matter, which ultimately relates to an investigatory hearing on jurisdiction, preliminary to an issue of certification, this Court would be well-guided by the decision of the Court of Appeals in *Hepler v*

[5] In any event, the doctrine of Constitutional Standing in this context does not apply. The only "injury" SAGU alleges – the requirement to pay dues – is not the issue being investigated and is no more than speculative at this point. Appellants acknowledge this when they admit that constitutional standing (an issue which is separate and apart from the question of the application of the rule governing intervention) exists only if jurisdiction is taken and the union is named a mandatory collective bargaining representative.

[6] *Michigan Association of Public Employees v Michigan Employment Relations Com*, 153 Mich App at 546.

[7] *In re Wayne County*, No. 190660; 1997 WL 33352796 (April 11, 1997)

State, Dep't of Labor, 64 Mich App 78; 235 NW2d 161 (1975), in which the parallel issue of decertification was involved:

> Appellants and CMU would have the Court substitute its judgment for MERC's, find the showing of interest was proper, and conclude that there is reasonable cause to believe that a decertification question exists. We decline the invitation. It is not our function, nor do we possess the special prowess demanded, to act as a super-labor board. Section 12 provides that a petition for decertification must comply with subsection (a), and any relevant MERC rules, in order to trigger the exercise of MERC's duty under subsection (b) to determine whether there is reasonable cause to believe that a decertification election exists. In substance, MERC held that there had been noncompliance with subsection (a) and accordingly it did not proceed to subsection (b). As noted earlier, MERC rule 43.1 requires that the petition be supported by a showing of interest of 30 percent or more of the bargaining unit. Further, MERC has provided by rule 43.2 that "The determination with respect to the statutory 30% * * * showing of interest is an administrative action and shall be made exclusively by the board or its agent." 1968 AACS R 423.443.2. This rule makes express what is implicit in § 12, and we believe it our duty to respect the solemn expression of legislative will.
>
> Absent a showing that MERC's discretionary decision is so perverse or palpably wrong as to effectively amount to a breach of its statutory duty, the Court will not set MERC's determination aside. In the instant case, MERC determined that the showing of interest documents must contain language indicating in positive terms that 30 percent or more of the particular bargaining unit no longer considers the existing certified bargaining representative as their representative. MERC found the effect of the appellants' showing of interest as required in subsection (a) was tantamount to a request for an election -- the terms were neutral, and nothing more. We cannot say that this determination constitutes so clear a showing of error as to require reversal.

64 Mich App at 86-87 (emphasis added).

C. Appellants' Subsidiary Arguments Do Not Support the Relief Sought

Finally, Appellants' Brief is interspersed with a series of arguments which in the aggregate are nothing more than unavailing attempts to cast aspersions upon the process or to elevate their purported role as advocates in a non-adversarial proceeding.

Appellants argue: "MERC itself has previously held that RAs are not public employees, so obviously Day and SAGU's contention that the 1981 holding is still valid is a serious one."

Appellants fail to demonstrate any connection between the "seriousness" of their argument, and whether they have satisfied the procedural requirements for intervention. Whether their position on jurisdiction is of the utmost gravity or ultimately frivolous is not a relevant inquiry.

Appellants argue: "Thus, the question arises, as to how the assertion that the 1981 decision still applies and therefore deprives MERC of subject matter jurisdiction can be presented?"

This concern was raised by the Commission itself and addressed by its referral of the matter to an investigative proceeding in which the ALJ has fundamentally inquisitorial powers, can call upon the parties and the Attorney General for answers, and can subpoena her own witnesses as necessary. Appellants condemn the result of the investigatory process before it even begins and posit that they alone can legitimate the proceeding.

Appellants argue: "Normally, the putative public employer would have an incentive to argue before MERC that no public employment is involved and [an employee who is of that opinion] could rely on the employer to present the issue."

This ignores the statutory process by which a Consent Agreement can be reached -- and the fact that unlike the situation in the private sector, the Commission can (and in this case did) exercise its discretion to investigate the merits. The employee who believes that no public employment is involved must rely upon a neutral fact-finder who is vested by statute and rule with investigative authority to examine all sides of the issue regardless of whether the position is otherwise espoused.

Appellants argue: Commission Rule 423.157 permits the joinder of persons having an interest in the subject of the action.

Appellants again look to engraft a rule that applies in unfair labor practice proceedings. The argument has no more legitimacy in this iteration than in the ones discussed earlier.

Appellants argue: The 1981 proceeding was not merely investigatory -- it was also adversarial.

In 1981, the genesis of the jurisdictional conflict was an unfair labor practice charge, which leads to adversarial proceedings. There is no authority provided by which this Court can disregard legislative enactments simply because Appellants believe an adversarial proceeding would be "better."

Appellants argue: "But here it can be argued that political considerations of the individual members of the governing board of the putative employer overcame institutional interests."

That political argument could be interposed whenever an elected official or officials are constitutionally or statutorily vested with decision making power. Appellants would have this Court disregard the powers vested in the Board of Regents by the Michigan Constitution (Mich Const. 1963 Art. VIII, § 5) and 150 years of precedent.

Appellants argue: In 1981 "no appeal was taken, and this remained the state of the law for the last thirty years."

The length of time a matter has remained undisturbed is not relevant to whether it should remain extant -- particularly where the governing standard itself is based upon an allowance for change when there is a demonstrable "change in circumstance."[8] In this case, the issue is ripe for investigation by a neutral administrative jurist.

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[8] Even in the absence of statutory flexibility, the doctrine of *stare decisis* is not immutable. As noted by Justice Hathaway in the concurring opinion in *Regents of the Univ of Mich v Titan Ins. Co*, 487 Mich 289, 314-315; 791 NW2d 897 (2010), quoting Chief Justice Roberts:

> *stare decisis* is neither an inexorable command nor a mechanical formula of adherence to the latest decision. If it were, segregation would be legal, minimum wage laws would be unconstitutional, and the Government could wiretap ordinary criminal suspects without first obtaining warrants.

CONCLUSION AND RELIEF REQUESTED

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

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

Respectfully submitted,

FINK + ASSOCIATES LAW

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

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

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487 Mich at 311-312, quoting *Citizens United v Fed Election Com'n*, 130 S Ct 876, 920; 175 L Ed 2d 753 (2010)(citations omitted).

PROOF OF SERVICE

I hereby certify that on January 20, 2012, I electronically filed the foregoing paper with the Clerk of the Court using the electronic court filing system which will send notification of such filing to Patrick Wright, Esq., who has agreed to e-service in this case through newly received case-specific permission, and upon Mark Cousens, Esq., who is included in the List of Approved E-mail Addresses for E-Service.

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

/s/ Cheryl A. Pinter___
Dated: January 20, 2012 Cheryl A. Pinter

INDEX OF EXHIBITS