

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARINGS SYSTEM

IN THE MATTER OF:

REGENTS OF THE UNIVERSITY OF
MICHIGAN,

Respondent,

and

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

Petitioner-Labor Organization,

and

STUDENTS AGAINST GSRA
UNIONIZATION,
Proposed Intervenor,

and

MICHIGAN ATTORNEY GENERAL,
Appellant Proposed Intervenor

Michigan Employment Relations
Commission No. R11 D-034

Judge Julia C. Stern

MICHIGAN ATTORNEY GENERAL'S AMICUS BRIEF

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INTRODUCTION

For over 30 years, Michigan law has preserved the student-teacher relationship between Graduate Student Research Assistants (GSRAs) and the University of Michigan through the well-settled principle that GSRAs are not public employees. Now, that axiomatic standard is under attack from the Graduate Employees Organization (Organization) that lost this same battle in 1981. And, despite overwhelming opposition from its own faculty and students, the University's Board of Regents has acquiesced to altering that fundamental relationship, voting 6-2 to recognize GSRAs as employees. Wisely, the Commission declined to allow the Parties to change the law by stipulation – and instead ordered the Organization to show a material change in circumstances that warrants overturning 30 years of precedent. The evidence does not permit the conclusion that this burden has been met; therefore, this tribunal should find that GSRAs are not employees.

BURDEN OF PROOF

In its Order sending this matter to the ALJ for fact-finding, the Commission unequivocally stated that the Organization 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.” (December 16, 2011 Order, p 7.) Indeed, the Commission remarked that the Organization's burden “is a heavy burden to meet.” (*Id.* at 6.) The Commission also required competent proof “as to each

category of employee to show that the facts are different from [its] previous decision.” (*Id.*) Importantly, the Commission’s *did not order a de novo review* of whether GSRAAs are employees under PERA. In reviewing the evidence, the ALJ must focus on whether there has been a substantial change in the circumstances of the GSRA appointment since 1981 – and not merely on whether there is sufficient indicia of employment today. In other words, the ALJ may not second-guess the merits of the 1981 decision – rather the task is to compare the facts in 1981 to the facts presented in evidence today and determine whether the facts warrant a different conclusion than the one in 1981 that GSRAAs are not employees under PERA.

SUMMARY OF FACTS

In 1981, the ALJ considering the issue of whether GSRAAs were public employees reviewed an extensive 3,000-page record compiled over 19 days of testimony, along with hundreds of exhibits. The record today is not nearly as extensive, and is insufficient to conclude that there has been a material change in the circumstances between the GSRAAs and the University that would render them employees. The Commission previously found a number of factors persuasive, and all of those are true today. See *Regents of the University of Michigan*, 1981 MERC Lab Op 777, 785. For example, the evidence shows that the nature of GSRA work is still determined by the research grant secured because of the interests of particular faculty members and/or by the student’s own academic interest. See *Id.* The GSRAAs do not work set hours like employee teaching assistants (TAs). See *Id.* The

goal of producing research is still incidental to the GSRA appointment – the students are by no means skilled researchers and their appointment and financial support is still in furtherance of the University’s prime educational mission. See *Id.*

The ALJ further found additional factors persuasive in issuing his recommendation that GSRAAs were not employees in 1981 – and no evidence supports a finding that any of these have changed or are no longer present today either. See *Id.* at 796. For example, the evidence shows the GSRA appointment still usually grows out of a relationship between a graduate student and a faculty member, the faculty member making the appointment is often also the student’s academic advisor, and the GSRA often seeks out a faculty member whose area of concentration most closely coincides with the student’s interests. See *Id.* at 796. Furthermore, GSRA appointments, even if not directly relevant to the particular dissertation, are still academically relevant to the graduate education, as academic relevance is not constrained to the four corners of the dissertation –the doctoral programs are primarily designed to teach students how to do research. See *Id.* at 799. The GSRAAs today are not skilled researchers and are more expensive than post-docs. See *Id.* at 800-01. And research carried out as part of a course of study is still often identical with the research assigned as a part of the “work” of the GSRA – with the study and the work being identical. See *Id.* at 809.

The Parties have introduced a number of exhibits, stipulated facts, and testimony, but have not met their burden of proof because of the facts found relevant and determinative in 1981 are still true today, and the Parties have not

shown otherwise. They rely on numerous University policies that treat GSRAs as employees, as the GSRAs' importance to the University's production of research and knowledge. New facts regarding the GSRA – University relationship that did not exist in 1981, such as the entitlement to protections under the Family Medical Leave Act, and the implications of the Bayh-Dole Act, do not show a sufficient material change in the core relationship between GSRAs and the University, or the GSRAs' role as students.

ARGUMENT

I. In 1981, the Commission held that GSRAs are not public employees subject to PERA because they did not have a sufficient indicia of an employment relationship with the University.

In 1981, the Commission determined that GSRAs at the University of Michigan were not public employees under the Michigan Public Employment Relations Act (PERA), MCL 423.201, *et seq.*, in the context of an unfair labor practice charge. At that time, the University and the Organization took adverse positions, which resulted in a thoroughly developed record, enabling the Commission to make a fully informed decision. The University maintained that graduate students were not employees and thus not subject to PERA, while the Organization argued that they were employees and could vote to unionize. The Commission, in concluding that GSRAs were not employees, found the following factors persuasive:

- The nature of GSRA 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. *Regents of the University of Michigan*, 1981 MERC Lab Op 777, 785.

- GSRA's are individually recruited and/or apply for the position because of their interest in the nature of the work under the particular grant. *Id.*
- Unlike the TA's who are subject to regular control over the details of their work performance, GSRA's are not subject to detailed day-to-day control. *Id.*
- GSRA's are frequently evaluated on their research by their academic advisors and their progress in their appointments is equivalent to their academic progress. *Id.*
- Nor does the research product GSRA's provide further the University's goal of producing research in the direct manner that the TAs and SAs fulfill by their services. Although the value of the GSRA research to the University is real it is clearly also more indirect than that of teaching of the undergraduate courses. *Id.*
- GSRA's are substantially more like the student in the classroom or trainees. They are working for themselves. *Id.*

Other relevant factors adopted by the Commission from the recommended decision of ALJ Sperka:

- The GSRA appointment usually grows out of a relationship between a graduate student and a faculty member. *Regents of the University of Michigan*, 1981 MERC Lab Op 777, 796.
- The faculty member making the appointment is often, also, the student's academic advisor. *Id.*
- A graduate student will often seek out that faculty member whose area of concentration most closely coincides with the student's interests. *Id.*
- GSRA involvement on various research projects is academically relevant at least to some degree. It is not necessary to have a thesis already selected for work to be academically relevant. *Id.* at 799.
- GSRA appointments are academically relevant to academic studies – even where the GSRA joins a research project with an application

different from that developed in the dissertation. Academic relevance is not constrained to the four corners of the dissertation – often the Ph.D. programs are designed to teach students how to do research. *Id.*

- GSRA are inefficient and unskilled researchers upon beginning their graduate studies. *Id.* at 800.
- Evaluation of the work of a GSRA is indistinguishable from evaluation of his progress as a student, since the quality of his research work will relate to his progress towards or on his thesis. *Id.*
- Recognition that it is impossible to set limits of hours per week on GSRA appointments. *Id.*
- GSRA appointments for the most part reflect and closely track the student's academic discipline and interests. *Id.* at 801.
- A GSRA may spend more time learning than he will in producing valuable knowledge. *Id.*
- The GSRA is engaged in research as a student, either directly or indirectly on his own dissertation, and receives support as a student for that purpose. *Id.* at 803.
- Research carried on as a part of a course of study is often identical with the research assigned as part of the "work" of the GSRA – with the study and the work being identical. *Id.* at 809.
- Even where a GSRA works on research that is not directly related to a thesis, or performs research while not having selected a thesis, the appointment is still academically relevant to the course of study. *Id.* at 810.

The Commission placed the burden of proof in this matter on the Petitioner-Organization to show that these facts and circumstances the Commission relied on in 1981 have materially changed as to warrant a different conclusion regarding GSRA's not being University employees. Evidence presented to the ALJ in 2012 shows that the facts outlined above are still substantially true today. The Parties' introduction of new facts does not change the original inquiry and is not

determinative of the ultimate question. GSRAAs were not employees of the University in 1981 and are not employees of the University in 2012.

II. The joint exhibits and stipulated facts are not sufficient evidence to conclude that there has been a material change in circumstances since 1981 that warrants a finding that GSRAAs are now employees.

Broadly, the joint exhibits fall into three categories. The first group consists of University publications, websites, policies, and other declarations that GSRAAs are employees. (Joint Exs 3-8, 21, 22, 24.) These documents, which are essentially statements, or “admissions,” by the University, purport to show that use of terms incident to employment in the context of a GSRA appointment supports the finding that GSRAAs are employees. A very similar argument was made and rejected in 1981. “The application of the terminology of employment such as “hire,” “fire,” and so forth, may strike a jarring note but the substance is shown.” *Regents of the University of Michigan*, 1981 MERC Lab Op 777, 805. In other words, whatever language the University may use in describing the GSRA appointment in its literature, the substance of the relationship governs the determination of whether the GSRA is an employee under PERA. The Commission acknowledged as much when it rejected the Parties’ attempt to stipulate to GSRAAs being employees. (September 14, 2011 Commission Decision Dismissing Petition and Denying Motion to Intervene, p 4.) Furthermore, nothing in the evidence indicates that the terms “employment” or “employee” are being used in the context of PERA. And despite what the University’s position is, the 1981 decision is currently law – GSRAAs are not public employees.

The second group of exhibits consists of financial information regarding research expenditures. These documents undoubtedly show an increase in research budget, funding, and expenditures since 1981. (Joint Exs 9-15, 25, 26, 28.) But, once this evidence is placed into context, it is also irrelevant to determining the nature of the relationship between the GSRA's and faculty at the University. Testimony establishes that the increase in research funding is in large part due to increased federal commitments to stimulate research in areas like health (through the National Institute of Health) and energy (through the Department of Energy). (See Section III.D, *infra*.) Although due to changes in the law it is easier for the University to receive revenue from intellectual property created using University resources, that alone does not transform the GSRA's to employees. No evidence suggests that the University is now in the business of producing research – in fact, no evidence suggests the University is making a profit from licensing of intellectual property, as it spends much more than it receives in revenue. (See Section III.G, *infra*.) The fundamental GSRA – University relationship remains the same – the GSRA's are doing research primarily for their own education, in furtherance of their academic reputation, and dissertation. The University certainly benefits from their efforts, but like in 1981, that benefit is indirect and incidental to the core mission of the University. No evidence shows otherwise.

The final category of exhibits consists of evidence that the GSRA's receive largely the same benefits as TAs and other graduate instructors, who are considered employees. (Joint Exs 1, 2, 23.) At the University of Michigan, the

GSRAs receive, among other things, health care benefits, a stipend, paid leave, and in the University's opinion are entitled to the protections of employment laws, such as the Family Medical Leave Act. Once again, these facts are hardly dispositive. In 1981, the Commission was well aware the GSRAs received many of the same fringe benefits as employee TAs, yet did not find that fact determinative. *Regents of the University of Michigan*, 1981 MERC Lab Op 777, 800. Also, federal treatment was considered in 1981 and dismissed, both for the purposes of taxation and because the NLRB had determined graduate students to not be employees. *Id.* at 780, 784. The competitive nature of recruiting GSRAs to elite universities such as the University of Michigan requires competitive and comprehensive benefit packages to be offered. Certainly the existence of these benefits is a factor that may weigh on the indicia of employment. But, because these factors existed to an extent and were known in 1981, and nothing shows that a few more benefits would require finding employment, their presence does not fundamentally alter the core relationship of the GSRA to the University.

The stipulated facts are likewise unavailing because they summarize the *University's policies and decisions* to give GSRAs competitive compensation and benefit packages, to give them the benefit of certain legal protections, and to withhold taxes from their stipends. But the University does not make the law. The 1981 Commission decision is law and states GSRAs are not employees under PERA. The University cannot simply acquiesce to GSRAs being public employees and

create jurisdiction in the Commission. (September 14, 2011 Commission Decision Dismissing Petition and Denying Motion to Intervene, p 4.)

III. The witness testimony did not demonstrate a material change in the relationship between GSRAs and the University since 1981. The factors relied on in 1981 are still present and substantially the same.

The outcome of this inquiry depends on comparing the relevant facts as they existed in 1981 to the facts surrounding GSRA appointments today to determine whether there has been a material change in circumstances that warrants overturning the 1981 finding that GSRAs are not employees. The witnesses' testimony in this matter falls into two categories – the testimony of the GSRAs, and the testimony of University faculty and Provost Hanlon.

The testimony of the GSRAs is largely irrelevant, as it is anecdotal and no evidence has been produced to show that the students who testified are somehow typical or representative of the approximately 2,200 GSRAs at the University of Michigan. At most, the testimony demonstrates that there are many different types of GSRA appointments, the students have had various experiences working on a number of research projects, for various faculty, and are at different stages of their graduate programs. The Commission recognized the diversity between the individual GSRA appointments in 1981 – and acknowledged that while some GSRAs are more like employees than others, these were “questions of gradation,” and there was “no clear basis upon which to distinguish within the group of graduate student research assistants.” *Regents of the University of Michigan*, 1981 MERC Lab Op 777, 799, 810. No competent proof has been presented to distinguish

between the students within the overall GSRA group today. And even if the GSRA testimony was representative and relevant to the GSRAs as a whole, it would establish that many of the determinative factors from 1981 exist today.

The testimony of the faculty and Provost Hanlon is more relevant because it gives a broader perspective on the state of research at the University and the relationship between the GSRAs and the University. There has been an expansion and growth of research at the University, but testimony indicates the University is still primarily an educational institution with a mission broader than merely producing research for financial gain. Research may be a product of the University, but is an integral part of the University's educational mission, and not a wholly separate aspect. Despite evolution in intellectual property law, the University cannot be considered in the business of producing research. In sum, the facts that led the Commission to conclude that there is not a sufficient indicia of employment for GSRAs at the University in 1981 are still substantially true today, and the new facts alone do not warrant overturning over 30 years of well-settled precedent.

A. GSRAs still apply for GSRA positions because of their interest in the nature of the work under a particular grant.

Although the students' testimony in this matter is not highly probative, it does show that many the facts found persuasive in 1981 are still present today. In 1981, the Commission found it relevant that the GSRAs are either individually recruited or apply for the position because of their interest in the nature of the work under a particular grant. *Regents of the University of Michigan*, 1981 MERC Lab

Op 777, 785. GSRA involvement on various research projects arose as a result of their relationship with the professor who had secured the research grant. *Id.*

Additionally, the nature of the GSRA work was determined by the research grant secured because of the interests of the particular faculty members or the student's own academic interest. *Id.*

The GSRA's today become involved in the research in the exact same manner. For example, Andrea Jokisaari, a GSRA at the College of Engineering, became involved in a research project after speaking with a faculty member who described a new project funded by a grant that sounded interesting to her. (Tr Vol I, 39:16-40:7.) She told her advisor, who became the principal investigator (PI) on the research project that she would love to work on the particular project. (Tr 39:22.) Jeremy Moore, another GSRA at the School of Engineering, also testified that he spoke with faculty regarding research and asked if there were openings to work on a grant project. (Tr Vol II, 12:8-14.) The subject matter of Mr. Moore's research – non-linear optics – was interesting to him, so he decided to research it, and the research ultimately became the foundation for his dissertation. (Tr 14:21-25; 16:17-22.) Importantly, there was no evidence that any GSRA's were randomly assigned to work on research that had no academic relevance or link to their studies or their dissertation. Each had at the very least a relationship to the GSRA's specialty and course of study.

B. GSRA's are still primarily working for themselves on research that is academically relevant and furthers their education and attainment of the terminal degree.

Another important factor in 1981 was that the GSRA's were primarily working for themselves, in furtherance of their academic goals and towards attaining a terminal degree. *Regents of the University of Michigan*, 1981 MERC Lab Op 777, 785. Testimony in 2012 established that in a majority of the cases today, at least some of the research generated as a GSRA was being used in dissertations – and even where it was not directly used, it inspired further research or was otherwise academically relevant to the GSRA. For example, Ms. Jokisaari testified that the knowledge attained and research generated as part of her GSRA appointment project was being used for her dissertation. (Tr Vol I, 42:23-25; 43:7-8.) Of course, the data produced was being shared with CASL (the consortium funding the research grant), but the research being done for the CASL project is indistinguishable from the research being done for the GSRA's dissertation. (Tr 45:9-11.)

Elaine Lande, a GSRA at the School of Education, likewise testified that some of her research as a GSRA was being used in her dissertation. (Tr 60:18-61:9.) And even Alix Gould-Werth, a former GSRA at the University's School of Social Work, who testified that her research as a GSRA was not directly used for her dissertation, admitted that the research "inspired" her dissertation topic. (Tr 95:14-21.) In fact, she had not even selected her dissertation topic at the time she started her GSRA appointment. (Tr 94:12.) But the 1981 decision recognized this exact

reality – the ALJ found that “[o]ften, the graduate student receiving an RA appointment has not selected his thesis.” *Regents of the University of Michigan*, 1981 MERC Lab Op 777, 799. Moreover, the GSRA may permissibly “tailor his research interests to the grant or may perform the work in the hope of adapting the data to his own purposes.” *Id.* at 798-99.

Importantly, the ALJ deemed work done in the GSRA’s general area of academic interest academically relevant. The ALJ recognized that there are multiple ways of doing research, such as experimenting, developing new knowledge to apply to a particular problem, training others in a given field, and organizing knowledge and new theories for the purposes of making them more accessible to others. *Id.* at 799. The ALJ also observed that work on a research project may be to develop a technique or a skill, or merely because of interest in an area, “although [the GSRA’s] thesis may be unrelated.” *Id.* Therefore, even if there was testimony that Ms. Gould-Werth’s experience was representative of the other 2,200 GSRA’s, her research and its correlation with her academic interests is consistent with the facts and circumstances in 1981.

Christie Toth, a GSRA at the School of Education, testified that the research for her dissertation was completely independent of the research she performs as a GSRA at the Sweetland Writing Center. (Tr 78:23-79:11.) But it suffices to say that her experience is an anomaly – no other testimony or evidence establishes that her experience has somehow become the norm for all the other GSRA’s. Dr. Annemarie Palincsar, the Associate Dean of Academic Affairs at the University of

Michigan School of Education, confirmed that Ms. Toth's experience was not typical, even within the School of Education. (Tr Vol V, 28:22-23.)

Even in the relatively small group of GSRA's who testified, Ms. Toth was the only one whose research as a GSRA had no bearing on the research for her dissertation. And in 1981, the ALJ recognized that there may be outliers among the broad group of GSRA's. "Despite this conflict of testimony [regarding whether GSRA appointments were academically relevant], it is clear that in *virtually all cases*, the RA appointment reflects and closely tracks the student's academic discipline and interests." *Regents of the University of Michigan*, 1981 MERC Lab Op 777, 801 (emphasis added). In other words, even in 1981, the ALJ recognized the existence of outliers within the GSRA position, but that did not preclude a finding that the GSRA's are not public employees under PERA.

C. The GSRA's enjoy a significant level of independence and freedom in conducting the research with minimal control from the University.

The level of control over the details of their work performance was another factor deemed important in 1981. *Regents of the University of Michigan*, 1981 MERC Lab Op 777, 785. The ALJ compared the TA position, where the student was required to teach a set amount of hours, using specific materials, during set days of the week, to the GSRA position, where the hours and manner of work were more flexible. *Id.* at 800. Today, the GSRA's certainly enjoy guidance and direction from faculty members, and while some faculty members may be more prone to micro-manage than others, GSRA's are still not subject to what amounts to detailed

day-to-day control. For example, Ms. Jokisaari is required to put in a minimum number of hours into the GSRA research as a consequence of having a full time appointment, but her advisor is flexible about when she can pursue her work and Ms. Jokisaari may work from home as necessary. (Tr Vol I, 49:4-18.) Simple, informal communication with the advisor is sufficient to arrange absences or work around illnesses and scheduling conflicts. (Tr 50:3-8.) Ms. Jokisaari is required to certify her research efforts on a particular grant every semester, but this is not the same as submitting a timesheet every pay period to receive wages. (Tr 51:4-18.) She is not required to keep track of every hour – but merely has to certify that because the GSRA received funding from a specific funding source, she did research on projects funded by that source. (Tr 52:3-9.) Not all GSRA's even submit an effort certification – for example, Ms. Lande does not. (Tr 59:9-15.)

Ms. Lande is another GSRA whose work schedule is flexible and varies a lot. (Tr 64:5.) She has only one group meeting per week with her PI and others involved in the research project. (Tr 64:19.) And she has one individual meeting with the PI to discuss her work on the grant. (Tr 64:21.) When sick, she and the PI collaborate informally so that she can catch up and the necessary research is done. (Tr 65:10-66:16.) The rest of the GSRA testimony was consistent with this notion – although some GSRA's were subject to more specific requirements regarding office hours and meetings than others, none testified that they were required to be at work at certain hours of the day or were confined to using particular materials or methods for their research. Notably, all but one GSRA uniformly testified that they were

unaware of the University's sick leave policy for graduate students, and while Ms. Lande was generally aware of it, it was through an experience of a friend. (Tr 50:17-19; 65:10-66:16; 99:14-17; Tr Vol II, 22:20-22.)

D. The research product that the GSRA's provide does not further the University's goal of producing research in the direct manner that the TAs and SAs fulfill by their services.

One of the primary arguments that the University and the Organization advance is that "[a]lthough GSRA's often receive personal academic benefit from the research they are compensated to perform, the University also obtains substantial and direct benefit from that research." (Respondent University of Michigan's Pre-Hearing Brief, p 5.) The reasoning is that because research at the University has grown substantially, and changes in intellectual property law permit the University to "pursue ownership of intellectual property created under a federal grant," the GSRA's are mere employees driving this multi-million dollar research machine. (*Id.* at 6.) This argument challenges the Commission's 1981 conclusion that "although the value of the GSRA research to the University is real, it is clearly more indirect than that of teaching of the undergraduate courses." *Regents of the University of Michigan*, 1981 MERC Lab Op 777, 785. It is flawed for several reasons: (1) evidence shows that the growth in research funding is due to expansion in federal policies and grants; (2) no evidence establishes that the University's primary mission has shifted from education and research for the greater good to research for profit as a business; and (3) research that the GSRA's perform still primarily

benefits the GSRA in furthering their educational goals, with any benefit to the University being incidental.

Dr. Philip Hanlon, Professor of Mathematics, Provost, and Vice President for Academic Affairs is intimately familiar with the University's role as a research institution and has personal knowledge of multiple factors, including budgetary considerations, that are relevant to the inquiry of whether GSRA's are employees. (Tr Vol II, 28:6-21.) Unlike the individual GSRA's who testified, his testimony is broadly applicable to the University and its relationship with the GSRA's as a whole. Dr. Hanlon acknowledged that the research budget in 1981 was four times greater in real dollars than today and total university funds spent on research were significantly greater as well. (Tr 31:8-41:5.) He explained that the expansion in research spending is due to priority changes in federal government research funding since the 1990s when the National Institute of Health (NIH) budget doubled and grants from the NIH increased significantly. (Tr 38:5-13.) Additionally, over time the National Science Foundation (NSF), the Department of Energy (DOE), and other federal agencies have substantially increased spending on research grants. (*Id.*) Dr. Stephen Forrest, Vice President for Research, confirmed this conclusion, and added that although it is difficult to determine exactly what part of the federal research budget actually goes to universities, federal spending overall has increase in tandem with research grants. (Tr Vol VI, 18:2-13.) Another reason that the University has received more grants is that it has become more competitive, more renowned, and has attracted better faculty with the attendant

research grants. (Tr 18:14-19:9.) Thus, contrary to the arguments of the University and the Organization, research has expanded because of changes in federal government policies and the University's excellent reputation – not because research has somehow become a business of the University. Dr. Hanlon expressly stated that the University does not merely pursue research because of the attendant funding – the University “go[es] after excellent research results.” (Tr Vol I, 54:14-15.)

Research has not supplanted education as the primary mission of the University. The University's pre-hearing brief states that “since 2001, the University has earned more than \$167 million in royalties and equity sales and its discoveries,” in an attempt to show that the University's significant earnings create a monetary incentive to produce research. (University's Pre-Hearing Brief, p 7.) The University however does not mention how much money was *spent* on research to generate those earnings. No evidence produced shows the significance of this earnings figure. Nor is there evidence that the University makes any profit, or that the University is even interested in making a profit from licensing intellectual property generated as a by-product of the GSRA research. According to Dr. Forrest, only 30 to 50 GSRA's per year (out of 2,200) are listed as inventors on patent applications. (Tr Vol VI, 21:22.) If the GSRA's were somehow an integral part of the University's machine to generate intellectual property revenue, one would expect a higher percentage of inventors. Instead, this figure is more consistent with a

conclusion that the GSRAAs are engaged in education and any patentable invention is a byproduct of their academic efforts.

In fact, the documents the University has provided show the University *spent* \$300 million internally for research funds in the last fiscal year. (Tr Vol VI, 6:17-18.) If the University spent \$300 million on research just in the last year, and its intellectual property earnings have only been \$167 million for the *past ten years*, it seems apparent that the University is losing money on research despite tech transfer and other mechanisms for licensing intellectual property created at the University. Dr. Forrest stated that over the past few years, the University has only received approximately \$15 million in intellectual property revenue, an amount dwarfed by research expenditures. (Tr Vol VI, 11:24-12:2.)

The Dr. Hanlon explained that the core mission of the University is broader than merely getting research money – it is to better the world through scholarship, and to let the world take advantage of and disseminate the work created through research. (Tr 88:8-16.) Further, Dr. Hanlon again emphasized that “our interest is in the research performed, not in the money that comes in to support it.” (Tr 55:17-19.)

Clearly, Dr. Hanlon’s testimony demonstrates that the core philosophy of the University has not changed since 1981 with respect to its fundamental mission as an educational institution. Although the University’s research is on a much larger scale than 30 years ago, in 1981, the ALJ already acknowledged, “the size of [research] funding equals a significant fraction of the [University’s] budget.”

Regents of the University of Michigan, 1981 MERC Lab Op 777, 808. The significance of research funding to the University or the fact that the University is a major research center has not changed since 1981. (*Id.*) Critically, Dr. Hanlon acknowledged that the availability of federal funding is the primary reason for the increase in research funding but stated that “[i]t is certainly not the case that research is more important to the University than it was in 1981; that’s absolutely not the case. In fact, if anything, *I would say our educational mission has become more important to the University since 1981.*” (Tr 85:19-24 (emphasis added).)

The economic realities of research support this – Dr. Forrest testified that it is much more expensive to use a GSRA on a research project than a post-doctoral researcher (post-doc). (Tr Vol VI, 98:2-3.) Although some research projects use GSRA’s and post-docs in different roles, with the post-docs expected to take a greater leadership role, the GSRA is generally both less efficient and more expensive. (Tr 97:9-98:20.) With respect to GSRA research and funding, Dr. Forrest testified, “You tend to fund them [GSRA’s] for three years while they’re just learning, very often breaking things, unfocused. This is life. And so you spend three years of a very high stipend and tuition to get them to the point where in their last two years they actually are making progress in the research. Now, the Federal government and even companies understand this.” (Tr 98:5-12.) The fact that GSRA’s are inefficient and unskilled researchers upon beginning their graduate studies, and that they may spend a greater time learning than producing valuable knowledge, was true in 1981 and was expressly recognized by the ALJ. *Regents of*

the University of Michigan, 1981 MERC Lab Op 777, 800-01. This is true today – and the fact that the University continues to use GSRA's on research projects despite the availability of more economical means, indicates that research at the University is driven by more than monetary considerations. In fact, Dr. Forrest acknowledged the University receives a tremendous benefit from training and education that the GSRA's receive while involved on research projects. (Tr 100:5-11.) But that benefit is not one that is not monetary – it is one that furthers the University's mission of worldwide impact and excellence. (Tr 100:11-101:8.)

E. Research grants are inextricably tied to graduate student education. The work of a GSRA as a researcher is largely indistinguishable from academic progress as a student and still primarily benefits the GSRA in their role as a student.

Dr. Victor DiRita, a Professor and Associate Dean of Graduate Post-Doctoral Studies at the University's Medical School, testified extensively that GSRA's' research is inextricably tied to their progress as a student and is a crucial component of their education. Dr. DiRita clarified that direction from faculty regarding research progress, setting of goals, and weekly meetings was an integral part of the educational process. (Tr Vol IV, 95:5-20.) A semblance of control is both expected and necessary in the classroom and in the research lab, as it enables the educator to both guide the student in the right direction and to evaluate that student's progress. (*Id.*) Dr. DiRita further emphasized that even where the students would enter the graduate program interested in a specific project, the goal

would be to get the student to think broadly and develop new ideas, and not to just have them perform a set role to achieve a predetermined result. (Tr 96:22-97:18.)

In 1981, one of the ALJ's key findings was the evaluation of the work of a GSRA is indistinguishable of his progress as a student, since the quality of his research work will relate to his progress towards or on his thesis. *Regents of the University of Michigan*, 1981 MERC Lab Op 777, 800. Dr. DiRita's testimony supports the same finding today and rejects the Organization's argument that the GSRA is nothing but a cog in the University's research machine. According to him, "I've got a slot on a grant, you're going to do this project and you'll be done in three years. It's just not how it works." (Tr 97:16-18.)

In 1981, the Commission acknowledged that "the value of the GSRA research to the University is real, it is clearly more indirect than that of teaching of the undergraduate courses." *Regents of the University of Michigan*, 1981 MERC Lab Op 777, 800. Dr. DiRita's testimony establishes that there are today there are many more purposes for GSRA research than simply generating research for a specific project on a specific grant. (Tr 102:10-24.) For example, if a grant is lost, the GSRA would remain a student and continue working on the dissertation, but the technicians and others employed specifically to generate research for the project would be let go. (Tr 103:11-14.) This shows that there is much more to the GSRA's work on a specific grant than just generating research – like in 1981, it is inextricably linked to the student's educational progress.

Much of Dr. DiRita's testimony was in response to questions about whether the University considers research or the academic papers in which the research is published its "product." Although Dr. DiRita acknowledged the importance of producing research, publishing papers, and generating knowledge, he emphasized that the benefits of doing so were many the GSRA involvement in the process was a part of learning. (Tr 132:16-21.) And importantly, publication of papers is an important metric of the student's progress that is not tethered to the specific research grant, but rather tethered to their training as an academic. (Tr 133:14-23.)

F. GSRA's are frequently evaluated on their research by their academic advisors and their progress in their appointments is equivalent to their academic progress.

Both the Commission and the ALJ in 1981 noted that the progress of the GSRA as a student was indistinguishable from his or her work as a researcher, and therefore GSRA evaluations did not make a distinction. *Regents of the University of Michigan*, 1981 MERC Lab Op 777, 785, 800. This fact remains true today – progress as a researcher is an integral component of the GSRA's education and they are neither treated nor evaluated differently in their role as a student as opposed to their role as a researcher. Dr. Katharine Barald's testimony illustrates the continued existence of this symbiotic relationship.

Dr. Barald is a Professor of Cell and Developmental Biology at the medical school and a Professor of Biomedical Engineering at the college of engineering. (Tr 138:23-139:5.) She is intimately familiar with the nature of the GSRA

appointments, as she has chaired one of the admissions committees for the Program for Biomedical Sciences for the past 12 years. (Tr 139:12-23.) Dr. Barald evaluates students in a number of programs, both on their research and academic progress. (Tr 140:16-24.) She has her own research lab and is a PI on several grants, working with students holding fellowships, training grants, and a few GSRA appointments. (Tr 143:3-18.)

Importantly, although students on training grants and fellowships are not included in the proposed bargaining unit, Dr. Barald makes no distinction in treatment or evaluation of her students based on their classification. (Tr 163:14-164:3; 170:15-22.) In other words, GSRA do the same type of work as students on fellowship do, and all types of students are evaluated simultaneously on their academic and research progress. This testimony helps establish that progress on research is an integral part of the academic learning process and just like in 1981, there is no clear delineation between the education and the work component of the GSRA appointment.

IV. The new facts introduced that were not present in 1981 are insufficient to find a material change in circumstances from 1981.

The Organization and the University argue that the evolution in both intellectual property law and employment law since 1981 warrants a conclusion that GSRA are now employees. But, the facts that the University may derive some revenue from intellectual property licensing, and that the University decided to

extend labor law protections to the GSRAs, do not alter the fundamental relationship between the GSRAs or the University.

A. Evolution in intellectual property law does not render the GSRAs employees of the University.

Dr. Forrest addressed the important issue of intellectual property at the University. It was not an issue discussed in 1981, but the evolution of intellectual property law has led the University and the Organization to argue that the University now derives a more direct benefit from GSRA research, as it can obtain valuable patents and licenses on inventions created with University resources. (University's Pre-Hearing Brief, p 7.) Under the University's policy, 30% of that amount goes to the researchers, including PIs and GSRAs, who are encouraged to split the revenue equally. (Tr Vol VI, 15:7-8.) Thus, in the past few years the University has received approximately \$10 million as revenue, which is divided between the Office of Vice President for Research and the department where the invention occurred. (Tr 15:11-15.)

Importantly, Dr. Forrest clarified some important University policies regarding intellectual property rights. The policy states that the University assumes ownership of any intellectual property if it is produced by employees, who are those individuals receiving a salary or stipend including faculty, GSRAs, and GSIs. (Tr 21:9-18.) But Dr. Forrest explained that despite any use of employee or student labels, the practical effect of the policy is that any student who receives any university resource support, such as faculty guidance, materials, lab space in the

course of developing the intellectual property, does not own that property – the University does. (Tr 20:11-18.) And the policy is merely another publication – or statement – by the University, it is not determinative of GSRA status as employees.

B. The fact that the University entitles GSRA's to more labor law protections than in 1981 does not determine their status as employees under PERA.

As discussed in Section II, *supra*, several joint exhibits show that GSRA's are entitled to the same protections as employees under labor laws, but this is insufficient to overturn the 1981 decision and consider GSRA's employees under PERA. Most importantly, it is the *University's opinion* that the GSRA's are protected under employment laws such as the Family Medical Leave Act. This issue has not been litigated and the University does not make the law. The current state of the law is that the GSRA's are not employees under PERA.

Also, in 1981, the Commission knew GSRA's received many of the same fringe benefits as employee TAs, and nothing indicates that a few additional benefits would have compelled a conclusion that GSRA's are public employees. *Regents of the University of Michigan*, 1981 MERC Lab Op 777, 800. Competition for the best students requires the University to offer competitive and comprehensive benefit packages to be offered. The Commission already recognized that just because the University says GSRA's are public employees, it does not make them so. (September 14, 2011 Commission Decision Dismissing Petition and Denying Motion to Intervene, p 4.) The new facts regarding labor law protections are thus irrelevant to the question presented.

CONCLUSION AND RELIEF REQUESTED

When the Commission ordered an administrative hearing in this matter, it clearly stated that the Organization had 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.” (December 16, 2011 Order, p 7.) The evidence produced at the hearing shows the factors relevant to finding GSRAs were not employees in 1981 are still present today. And the new facts are irrelevant and insufficient to overturn 30 years of precedent. Thus, even with the University’s acquiescence this time around, the Organization did not present such evidence to meet its “heavy” burden. (*Id.* at 6.)

The Attorney General does not argue that things are exactly the same at the University as they were over 30 years ago. Both common sense and the evidence show that the University has evolved and grown, both as a major research institution and as ^a preeminent center of education. The monetary expenditures on research and grants have grown exponentially. Certainly, the stipends, benefits, and protections that the University extends to GSRAs have grown to attract the best and brightest students. And developments in intellectual property law have facilitated the University’s ability to derive revenue from licensing agreements.

Yet the Commission’s directive was clear: the Organization had to prove material change in circumstances from 1981 to warrant a different conclusion. With all due respect to the witnesses who have testified, much of their testimony is

irrelevant to the 1981 factors. And the relevant aspects of the evidence show that GSRAs are still involved in research for the primary purpose of education, their research is academically relevant, and primarily, educational considerations govern their relationship with faculty. This is true because the overall mission of the University remains the same today as it was in 1981 – to educate, to produce knowledge, to better the world. The GSRAs, as student-researchers, play a critical role in this mission. This reality does not make them employees for hire, nor does it change the University’s mission into a profit-centered business model.

Analyzing the evidence with focus on the relevant factors, and given the scope of the question posed by the Commission, the conclusion is obvious. Just like in 1981, “the relationship between RA’s [sic] and the University does not have sufficient indicia of an employment relationship.” *Regents of the University of Michigan*, 1981 MERC Lab Op 777, 785. The Parties’ arguments to the contrary are unavailing. The Organization has not met its burden, and indeed, a significant amount of evidence shows the factors found relevant in 1981 are still intact today. The GSRAs at the University of Michigan are simply not employees of the University, are not subject to PERA, and the Commission does not have jurisdiction to certify the Organization as their exclusive bargaining representative.

For these reasons, the Attorney General respectfully urges the tribunal to make the only conclusion supported by the evidence – that the Organization did not meet its burden and the evidence is insufficient to demonstrate a material change

in circumstances to warrant overturning the 1981 decision and concluding GSRAs
are employees of the University.

Respectfully submitted,

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A handwritten signature in black ink, appearing to read 'Dan V. Artaev', written over the printed name of Dan V. Artaev.

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