STATE OF MICHIGAN
IN THE COURT OF APPEALS

REGENTS OF THE UNIVERSITY OF MICHIGAN **Supreme Court Case No.____**
Appellee, **COA Case No.: 307964**
LC Case No.: 00 0000034

and

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

and

STUDENTS AGAINST GSRA UNIONIZATION,
Proposed Intervenor,

ATTORNEY GENERAL OF THE STATE OF MICHIGAN, PROPOSED INTERVENOR,
Appellant.

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BRIEF OPPOSING APPLICATION FOR LEAVE TO APPEAL

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The Facts

A.

1.

The Graduate Employees Organization, AFT Michigan, AFT, AFL-CIO, ("GEO") is a labor organization representing some 1700 Graduate Student Instructors working for the University of Michigan. In the Spring of 2011, GEO filed a petition with the Michigan Employment Relations Commission requesting the Commission to conduct an election among a separate unit of some 2200 Research Assistants also employed by the University. As required by R423.145 the petition was supported by the requisite "showing of interest." After extensive discussions, GEO and the University reached an agreement for a consent election. The agreement was presented to the Michigan Employment Relations Commission in September, 2011.

Consent election agreements are not just common; they are the norm. Most elections conducted by the Michigan Employment Relations Commission are the result of an agreement between the petitioning union and the Respondent employer to conduct a MERC supervised election. The agreement relates to the mechanics of the election (i.e. date, time and place) and who is eligible to vote. The consent agreement here was not substantially different.

2.

(a)

In 1981 the Commission issued a decision involving these parties. 1981 MERC Lab Op 777. In that ruling, MERC found that Graduate Student Instructors (then titled "Teaching Assistants") and Graduate Student Staff Assistants were public employees for the purposes of PERA but that Graduate Student Research Assistants ("RA") were not. That decision was not

appealed and remained extant. GEO and the University have engaged in collective bargaining now for three decades for a unit which includes Graduate Student Instructors and Graduate Student Staff Assistants.

(b)

A lot changed in the 30 years that has elapsed between the 1981 ruling and the filing of this petition. The role of research at the University of Michigan has shifted; it is now the central focus of the University with more than a billion dollars expended annually. The number of Research Assistants has increased exponentially; there were some 340 in 1981; there are more than 2,200 now.

The University has also changed its relationship with Research Assistants; it now considers them employees and relates to them as employees. Research Assistants are required to comply with statutes applicable only to employees. For example, Research Assistants are required to execute the statutory oath required of all public employees to support the Constitution of the United States (http://spg.umich.edu/pdf/201.17.pdf). Graduate Student Research Assistants are provided rights under statutes available only to employees; for example Research Assistants are eligible for leave under the Family Medical Leave Act if they meet the hours worked requirements of the statute (http://www.hr.umich.edu/acadhr/grads/gsra/benefits.html#vacation).

Based upon these facts, GEO and the University prepared and submitted to MERC a consent election agreement and anticipated that the Commission would approve it.

3.

On September 12, 2011, MERC refused to order an election based on the consent. It did not make any findings of fact or reach any conclusion of law. Rather, it stated that it did not have a sufficient factual basis to determine that the Commission should disregard its 1981 decision. Further, the Commission noted that the parties could not vest the Commission with jurisdiction by agreement.

On October 3, 2011, GEO submitted a request for reconsideration of the Commission's order. In that motion, GEO provided the Commission with an extensive affidavit which provided facts showing that Research Assistants were, indeed, employees. On December 16, 2011, MERC granted the Union's motion. It found that the Union had provided an adequate basis on which to conduct a further inquiry into the employment status of Research Assistants. It ordered a hearing on the merits.

B. The Requests to Intervene

On July 28, 2011, Melinda Day, an individual employee in the proposed bargaining unit, sought to intervene in the representation proceeding. Her request was made as an individual; she proffered no evidence that her request was supported by anyone other than herself. On September 12, 2011, her request was denied by the Commission. MERC rejected the application as the intervener failed to provide any showing of interest as required by R423.145 (3) and, therefore, lacked standing to intervene.

On November 1, 2011, an organization styling itself as Students Against GSRA Unionization ("Organization") filed a motion to intervene. It also was not supported by any showing of interest. On December 16, 2011, the request was denied. The Commission stated:

> "While Commission Rule 423.145(3) provides that an employee, group of employees, individual, or labor organization may intervene in an election proceeding, it also 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 has371 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."

This appeal followed.

Argument

I. The Court of Appeals Did Not Err

A.

1.

The Court of Appeals correctly determined that it did not have jurisdiction to consider an interlocutory appeal from MERC in a representation proceeding. MCR 7.203(B)(3) was modified from its predecessor, GCR 1963 806.2 which stated that "The Court of Appeals may grant leave to appeal from...(2) Final *or interlocutory* judgments or orders of administrative agencies or tribunals which by law are appealable to the Court of Appeals or the Supreme Court." The current rule makes clear that this Court may not consider interlocutory appeals from administrative agencies.

> (B) Appeal by Leave. The court may grant leave to appeal from...(3) 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."

The express language of the court rule precludes appellate review of an interim order.

2.

The proceeding before the MERC ALJ is a contested case and does not determine the legal rights of a party nor is it required by law. First, the matter is a representation case, not a unfair labor practice charge. A representation proceeding is purely investigative and not adversarial. Second, the rights of parties are well known. Only certain facts are uncertain.

The proceeding scheduled before a MERC Administrative Law Judge is not a "contested case." The primary purpose of a representation case is to determine the make up of a proposed bargaining unit. In most election proceedings, no hearing is conducted; the parties agree on the bargaining unit

A representation matter is an investigation. Parties are not considered adversaries. Rather, the hearing is a factfinding process. As a result, a hearing is not always required in representation proceedings. *A H S Community Services, Inc and Michigan Department of Mental Health*, 7 MPER ¶ 25121 (1994) (Indeed, this case sought to proceed without a hearing and the parties each suggest that a hearing is not required.).

"As a first step in clarifying and applying these concepts we begin with the premise, fundamental to proceedings under both PERA and. the Labor Mediation Act, *that representation proceedings are investigatory and not contested or adversary proceedings*." *University of Michigan*, 1970 MERC Lab Op 754

The Court of Appeals correctly determined that MCL 24.301 did not apply here because that provision applies only in contested cases.

3.

The Administrative Procedures Act does not supercede the Court Rules. MCR 7.203(3) could not be more specific. Interlocutory appeals to the Court of Appeals from

administrative agencies are not permitted; the Court of Appeals does not have jurisdiction to grant leave to appeal. Even if MCL 24.301 applied here, it would only apply to matters appealable to the Circuit Courts. MCR 7.203 was intended to limit the jurisdiction of the Court of Appeals and does so. Therefore, MCL 24.301 is not applicable with regard to appeals to the Court of Appeals.

4.

Inexpiably, the Appellant fails to explain why it believes that the Court of Appeals decision was wrong. The application for leave contains a great deal of exposition on public sector labor law (most of which is utterly irrelevant here). But the brief does not incorporate so much as a paragraph as to why the Court of Appeals was incorrect. As such, it should be presumed that the Appellant concedes that the Court of Appeals lacked jurisdiction. Given that, this application is devoid of merit. The Court of Appeals correctly determined that it lacked jurisdiction to consider the application for leave to appeal.

II. MERC Did Not Err

A. Appellant Lacked Standing to Intervene

1.

Appellants lacked standing because neither supported their request to intervene with a tangible showing of interest.

The proceeding before the Michigan Employment Relations Commission is a representation case in which MERC engages in factfinding to determine whether an election should be conducted in the proposed bargaining unit. Such proceedings are not adversarial in nature and is not a "contested case." Hearings are not always required. *A H S Community Services, Inc and Michigan Department of Mental Health*, 7 MPER ¶ 25121 (1994) ((Indeed,

this case sought to proceed without a hearing and the parties each suggest that a hearing is not required.)

The rules of the Michigan Employment Relations Commission permit intervention in representation cases. However, intervention is allowed only when a party seeks to represent a group which wishes to be placed on the election ballot. R423.145(3) states, in pertinent part that

> "An employee, group of employees, individual, or labor organization which makes a showing of interest not less than 10% of the employees within the unit claimed to be appropriate may intervene in the proceedings and attend and participate in all conferences and any hearing that may be held."

The rule does not permit an individual, without support, to participate in the proceeding. An individual may request to intervene only if the request is supported by at least 10% of the proposed bargaining unit and that person represents those persons. See *Township of Redford,* 6 MPER ¶ 15099 (1984) (In absence of special circumstances, intervention in representation proceeding will be permitted only when appropriate showing of interest is established either prior to or at time of hearing.)

Neither Appellant had standing because neither provided MERC with a showing of interest. Day appeared on her own. The other Appellant claims to represent some individuals but provided no evidence to support its claim. A showing of interest is not demonstrated by bare claims or affidavits. (It is usually presented as individually signed cards. *Lenawee Intermediate School District* 24 MPER ¶ 28 (2011).) Here *nothing at all* was provided to the Commission which would allow MERC to conclude that Day represented anyone other than herself or that the Organization actually represented anyone at all.

Both Ms. Day and the Organization lacked standing to intervene because neither presented any evidence of interest.

2.

The requests to intervene were untimely even if they had been supported by the requisite showing of interest. R423.145(3) requires a request to intervene to be submitted no more than 2 business days following the execution of a consent election agreement. A consent agreement was submitted to MERC on August 3, 2011. The Organization requested intervention on November 1, 2011. This was nearly two months following the expiration of the deadline for interveners. As such, this request was untimely.

3.

The requests to intervene were improper on their face. A request for intervention under R423.145(3) is made for the purpose of providing an additional choice to voters. Intervention is customarily sought by another labor organization which wishes to represent public employees. See e.g., *Wayne County*, 22 MPER ¶ 36 (2009). Here, both Ms. Day and the Organization seek intervention for another purpose; they wish to upend the election process and interfere with the rights of 2,200 public employees to cast a ballot. MERC noted the nefarious purpose for the proposed intervention. It commented that "... 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." Neither Ms. Day nor the Organization wish to be placed on the ballot. As such, their request would be invalid even were it adequately supported.

4.

"Constitutional" standing is not the question before either MERC or this Court. Intervention by individuals in a representation proceeding is permitted where the proposed intervenor wishes to present the opportunity to select another labor organization as their representative. (In every election voters have the choice to vote "no union.") For the purpose of the proceedings before MERC, standing is only conferred upon demonstration of a showing of interest. Neither Ms. Day nor the organization presented such a showing. Therefore neither had standing no matter how interested they may be in the outcome of the matter.

B.

Appellants assert that MERC erred in not providing a declaratory ruling. Citing the Administrative Procedures Act, MCL 24.263, Appellants somehow argue that both had a right to request, and receive, a declaration of rights. *The problem with this contention is that neither Day nor the Organization ever requested a declaratory ruling*. Rather, both sought to become *parties* to the representation proceeding.

MERC discourages declaratory rulings. *Lakeshore Public Schools Board of Education,* 1 MPER ¶ 19147 (1988) (Commission will not issue rulings on speculation). It is uncertain whether either Ms. Day or the Organization could have demanded one. But the question is irrelevant; neither made such a request. Accordingly, all argument regarding the right to a declaratory ruling should be disregarded as moot.

C.

Appellants make a series of arguments regarding the jurisdiction of MERC. The purpose of these contentions is uncertain. MERC has jurisdiction to enforce two statutes: the Labor Relations and Mediation Act, MCL 423.1; the Public Employment Relations Act, MCL

423.201 *et seq*., Both statutes apply to employees of employers: employees of private employers; employees of public employers. No one contends that MERC has jurisdiction over persons who are not employees. That issue was not presented to MERC nor was it preserved for appellate review. It is fully moot.

Conclusion

The Court of Appeals lacked jurisdiction to consider an interlocutory appeal from MERC. And, even if it had jurisdiction, the Employment Relations Commission did not err in denying intervenor status to either Ms. Day nor the Organization. This application should be denied.

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing instrument was served Patrick J. Wright at the Mackinac Center Legal Foundation, 140 West Main St., Midland, Michigan 48640; Christine Gerdes at the University of Michigan, 503 Thompson St # 5010, Fleming Admin Bldg., Ann Arbor, Michigan 48109; David Fink at David Fink & Associates, 100 West Long Lake Road, Suite 111, Bloomfield Hills, Michigan 48304 by

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