STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

THE UNIVERSITY OF MICHIGAN,

Public Employer,

and Case No. R11 D-034

GRADUATE EMPLOYEES ORGANIZATION/AFT,

Petitioner-Labor Organization,

and

MELINDA DAY,

Intervenor,

and

STUDENTS AGAINST GSRA UNIONIZATION,

Intervenor.
_____/

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BRIEF IN RESPONSE TO ATTORNEY GENERAL'S MOTION TO INTERVENE

TABLE OF AUTHORITIES

CASES

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STATEMENT OF FACTS

This matter concerns an issue that has been settled in Michigan for three decades — that graduate student research assistants (RAs)[1] at state universities are not public employees and therefore cannot participate in mandatory collective bargaining under the Public Employment Relations Act (PERA). This fact was originally recognized by the Commission itself in 1981, in *Regents of the University of Michigan and Graduate Employees Organization*, 1981 MERC Labor Op 777.

In April of this year, the union that lost the 1981 case — the Graduate Employees Organization/AFT (GEO) — returned to the Commission seeking again to have RAs organized as public employees against the same "employer," the University of Michigan. The claimed unit size was 2,200.

At the May 19, 2011, meeting of the University of Michigan Regents, the following resolution was passed by a 6-2 vote:

> Resolved, that consistent with the University of Michigan's proud history of strong, positive, and mutually productive labor relations, the Board of Regents supports the rights of University Graduate Student Research Assistants, whom we

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[1] The legal treatment of graduate students at public universities in Michigan has been unswerving for the last thirty years: two kinds of graduate students have met the PERA definition of public employee, while a third kind has not. The distinction between graduate students who are and are not public employees was set forth in the same 1981 Commission decision that held that RAs at Michigan's public universities are not public employees.

The 1981 dispute concerned the GEO's claim that all people "holding appointments as graduate student assistants at the University of Michigan are employees within the meaning of PERA when engaged in activities within the scope of the graduate student appointment." *Graduate Employees Org,* 1981 MERC Labor Op at 791. The record revealed that graduate students were split into three categories: (1) graduate student teaching assistants (TAs), whose duties consisted primarily of teaching some undergraduate courses, *id.* at 780; (2) graduate student staff assistants (SAs), whose duties included counseling undergraduates and advising them about course selection, *id.* at 781; and (3) (RAs), who generally "perform[ed] research under the supervision of the faculty member who [was] the primary researcher of a research grant." *Id.*

In the university's current nomenclature, TAs are referred to as graduate student instructors (GSIs); SAs are graduate student staff assistants (GSSAs); and as noted above, RAs are graduate student research assistants (GSRAs). For ease of reference, Intervenor will use the abbreviations that the Commission used in 1981.

> recognize as employees, to determine for themselves whether they choose to organize.

http://www.regents.umich.edu/meetings/06-11/2011-06-I-1.pdf.[2] With this resolution, the controlling board of the University of Michigan declared it university policy that contrary to this Commission's holding, RAs are public employees who can engage in mandatory collective bargaining under PERA.

On July 28, 2011, Intervenor Melinda Day filed a motion to intervene and noted that the 1981 decision should be considered binding. Intervenor Day noted that because the Commission had held that RAs are not public employees, the Commission lacked subject matter jurisdiction over the representation petition. On August 3, 2011, the union filed a motion to deny the intervention.

In an order issued in September of this year, The Commission refused to disturb its 1981 ruling. September 14, 2011 Decision and Order. The Commission stated:

> Usually, we do not inquire into the nature of an employment relationship or the legality of a bargaining agreement when we have a Consent Election Agreement signed by the parties. However, this is not the usual case because the issue of the Commission's jurisdiction is squarely before us in light of our previous decision involving these same parties. To decide this issue, we have no information that would allow us to reach a conclusion contrary to the one reached in 1981, that RAs are not employees under PERA.
>
> Our jurisdiction derives from statutory authority and does not extend to individuals who are not employees of a public employer. The Commission's jurisdiction cannot be expanded by an agreement. . . . We cannot find that RAs are employees based solely upon an agreement of the parties. Absent a showing of a substantial and material change of circumstance, we are bound by our previous decision.
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> . . .
>
> Having previously determined that RAs are not employees entitled to the benefits and protections of PERA, we decline to declare that they have become

[2] The six Democratic Party regents voted in favor. The two Republican Party regents were opposed.

> employees based on the Employer's change of heart and present willingness to recognize them as such. The RAs cannot be granted public employee status under PERA predicated on the record before us.

Id. at 3-4. While the Commission accepted the arguments presented by Intervenor Day, it held that she could not intervene in the proceeding:

> While Commission Rule 423.145(3) provides that an employee, group of employees, individual, or labor organization may intervene in an election proceeding, it also provides that there must be evidence showing that ten percent of the members of the unit in which the election is sought support the petition to intervene. Day has not offered any evidence that members of the proposed unit support the petition to intervene; she, therefore, lacks standing to participate in these proceedings.

September 14, 2011 Decision and Order at 4.

On October 3, 2011, the union filed a motion requesting that the Commission reconsider its September 14, 2011, rejection of the GEO's representation petition.[3] In this motion, the GEO tried to introduce some "new" facts that it claims should prevent application of the doctrine of res judicata.

On October 17, 2011, the University of Michigan filed a "Response to Petitioner's Motion for Reconsideration."[4] This document indicated that current facts are nearly identical to those that the Commission considered important in 1981. While the University's filing showed the factual similarities between 1981 and the current time, no argument or conclusion on whether RAs are public employees was presented.

On November 1, 2011, Intervenor Students Against GSRA Unionization ("SAGU") filed a motion to intervene. Its President, Adam Duzik, filed an affidavit saying that its 371 members were opposed "to the Graduate Employees Organization/AFT's attempt to organize University of Michigan graduate student research assistants into a compulsory union." November 1, 2011,

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[3] This document was not served on Intervenor Day.

[4] This document also was not served on Intervenor Day.

Affidavit of Adam Duzik at ¶ 3. The brief in support of the motion to intervene showed that the "facts" presented by the union in its reconsideration motion were not different than those considered by the Commission in 1981. Also, the brief's "Statement of Questions Involved" page characterized the University's response as being opposed to a finding that the RAs were public employees.

On November 4, 2011, the University filed a document titled "Supplemental Response of Public Employer University of Michigan." The University cited the Regent's resolution and clarified that it "wishes the election to go forward."

At its November 8, 2011, meeting, a potential majority of the Commission indicated that it was ready to remand the question of whether the facts had changed sufficiently from 1981 to an Administrative Law Judge, which would allow the Commission to decide whether to revisit its determination that RAs were not public employees. That potential majority indicated that a factor they considered were web pages from the University containing employment type language related to RAs. The potential majority also state that it was likely to hold that SAGU could not intervene in the proceedings, which would thereby leave the only two parties allowed to participate – the union and the University – in agreement that RAs are public employees. Commission staff was requested to work on written orders to reflect these preliminary discussions.

On November 30, 2011, the Attorney General filed a motion to intervene. This motion cited the importance of the University's role as a job creator due to its status as a "nationally recognized research institution." Michigan Attorney General's Motion to Intervene at ¶ 2. It noted that if a hearing were going to be ordered, intervention would be necessary "to ensure all

the facts are presented through the benefit of the full adversarial process." *Id.* at ¶ 5. The Attorney General continued:

> Unlike in 1981, the University is constrained from opposing this position because of the Regents' majority vote. Both sides being in agreement on the pivotal issue, there would be no adversarial process to develop the record whatsoever at any hearing.

Id. at ¶ 12. On December 5, 2011, the union filed an opposition to the AG's motion to intervene.[5]

Intervenor SAGU now files the instant response to the AG's motion.

ARGUMENT

SAGU contends that RAs are not "public employees." This would divest the Commission of subject matter jurisdiction over the representation request. *Prisoners' Labor Union at Marquette v Dep't of Corrections*, 61 Mich App 328 (1975); and *Lansing v Carl Schlegel, Inc*, 257 Mich App 627 (2003).

The Commission has held that Intervenor Day did not have standing to assert the lack of jurisdiction and seems likely to enter a similar holding regarding Intervenor SAGU. But both clearly meet the state constitutional requirements for standing. Assuming the union was to be certified as a mandatory collective bargaining representative for the RAs, GEO has indicated that it will charge around $442 a year in dues. Exhibit A.

In *Lansing Schools Education Association v Lansing Board of Education*, 487 Mich 349 (2010), the Michigan Supreme Court indicated that standing is proper wherever a litigant meets the requirements for declaratory judgments under MCR 2.605. Further, even "where a cause of

[5] This document was not served on Intervenors Day or SAGU.

action is not provided at law," a court has the discretion to "determine whether a litigant has standing." *Id.* at 372. The court provided guidance on when standing should be found:

> A litigant may have standing in this context if the litigant has a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large or if the statutory scheme implies that the Legislature intended to confer standing on the litigant.

Id. Here, the dues deduction that would almost certainly occur if the union was named a mandatory collective bargaining representative is sufficient to provide standing. Further, even if the Michigan Supreme Court were to return to the more strict standing rules found in *Lee v Macomb County Board of Commissioners*, 464 Mich 726 (2001) and its progeny,[6] the improper taking of $442 would be sufficient to provide standing.

The United States Supreme Court has recognized the importance of providing a judicial avenue for an interested party that claims an administrative agency is improperly expanding its jurisdiction. In *Leedom v Kyne*, 358 US 184 (1958), the National Labor Relations Board admitted to improperly including professional employees in a bargaining unit without allowing those employees to vote on the matter. The employees filed suit in a federal district court. The NLRB sought to have the action dismissed. The Supreme Court held that the employees could file an original action to challenge the agency action "taken in excess of delegated powers." *Id.* at 190. Thus, the employees did not have to wait for a final agency order and were not limited to review of a final agency order at a federal court of appeals.

The Commission has previously held that RAs are not public employees, so obviously SAGU's contention that the 1981 holding is still valid is not frivolous. Thus, the question arises how can that claim be presented? Normally, the putative public employer would have an

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[6] *Lansing Schools Education Association* overturned the *Lee* line of cases over a vigorous dissent and two members of the *Lansing Schools Education Association* majority are no longer on the Michigan Supreme Court.

incentive to argue that no public employment is involved and an individual who does not believe himself or herself to be a public employee could rely on the employer to present the issue. But here it can be argued that political considerations of the individual members of the governing board of the putative employer overcame institutional interests. Public employment unions are a large supporter of the Democratic Party and elected Democrats may be willing to accede to organized labor's attempts to stretch the boundaries of public employment. For instance, federal litigation surrounding the unionization of home-based day care workers led to the discovery of emails that the Granholm Administration worked in concert with a public employee union to hide a unionization attempt from the Legislature.[7]

There was also state court litigation regarding the home-based day care unionization. The case challenged whether home-based day care providers were public employees. The case was filed after an election had occurred and so-called dues had begun to be collected. The relief sought was to have the state agency cease collecting dues. The Court of Appeals was ordered to explain its initial dismissal of the action, and it stated that the state agency involved did not have a duty "to ignore the results of the union election." *Loar v Dep't of Human Services*, COA Docket No. 294087 (September 22, 2010). That order was mooted on appeal because the Governor had taken action to end the collection of the dues. *Loar v Dep't of Human Services*, MSC Docket No. 142237 (July 13, 2011).

The day care unionization matter led the Legislature to hold hearings to determine how the Commission came to certify that approximately 40,000 home-based day care providers were

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[7] http://www.mackinac.org/media/images/2011/DaycareUnionEmails.pdf (last visited December 6, 2011).

public employees. On May 4, 2010, Ruthanne Okun, Director of MERC, testified before the State Senate on this matter.[8]

The Court of Appeals has defined subject-matter jurisdiction as "the types of cases and claims that a court has authority to address." *In re AMB*, 248 Mich App 144, 166 (2001). It noted that jurisdiction must be present and that a court has a duty to raise the issue even if the parties do not:

> Jurisdiction of the subject matter of a judicial proceeding is an absolute requirement. It cannot be conferred by consent, by conduct or by waiver or by estoppel. Subject matter jurisdiction is so critical to a court's authority that a court has an independent obligation to take notice when it lacks such jurisdiction, even when the parties do not raise the issue.

Id. at 166-67 (footnote and internal citations omitted).

Despite this requirement, Okun indicated that MERC does not inquire into jurisdiction unless someone raises the issue:

> **Sen. Hardiman:** Ok. In the case of the MHBCCC, were they determined to be the employer in this case?
>
> **Okun:** In this particular case, the documents that were submitted to us indicated that they in fact were the employer, and neither side challenged that – nor did any person in the bargaining unit challenge the employment relationship.
>
> . . .
>
> **Sen. Hardiman**: When you say there was no question, meaning, as far as DLEG or MERC was concerned, the council was the employer?
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> **Okun**: No one challenged the employment relationship – the employer-employee relationship. Nor did any person in the bargaining unit challenge the employment relationship. So, it was not something that we needed to look into.
>
> . . .

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[8] A transcript of this testimony is attached. The Commission, the union, and the University have all previously been provided with a DVD of this testimony. A copy of that DVD will be mailed to the Attorney General with this brief.

> **Sen. Hardiman**: So there was a consent from the council that these employees – say that again. The council consented to…
>
> **Okun**: There was a consent election agreed to. In other words, indicating the employment relationship and that – who was in the bargaining unit and who would be eligible to vote. And it was that consent election that happens – **when there's a consent election there never is an independent determination by the Michigan Employment Relations Commission**. They're the only body that would have the authority to make that determination, and there were no hearings in this case. Had in fact someone wished to challenge the employment relationship, they would be welcome to do that, and then they would seek a hearing with the Michigan Employment Relations Commission.

(Emphasis added). As can be seen above, her testimony also indicated that MERC would allow interested parties to participate in jurisdictional challenges.

R. 423.145(3) allows a group of the purported employees to intervene in a representation petition proceeding if that group represents more than 10% of the bargaining "unit claimed to be appropriate." It states in relevant part:

> 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 determination with respect to . . . an intervenor's 10% showing of interest is an administrative action and shall be made exclusively by the commission or its agent. . . . Intervention may be permitted . . . with the approval of the commission upon a showing of good cause.

R. 423.157 permits persons having an interest in the subject of an action to be added as a party: "Persons having such an interest in the subject of the action that their presence in the action is essential to permit the commission to render complete relief shall be made parties and aligned as charging parties or respondents in accordance with their respective interests." R. 423.165(2) allows for a motion to dismiss for lack of jurisdiction over a party or lack of subject matter jurisdiction over a charge.

Intervenor Students Against GSRA Unionization is comprised of University of Michigan RAs and has 371 members,[9] a figure that exceeds 10% of the GEO's proposed representation unit of 2,200 University of Michigan RAs. Thus, Intervenor Students Against GSRA Unionization meet the R. 423.145(3) test identified by the Commission to permit a party to intervene in a representation petition matter.[10]

Despite Director Okun's testimony and the above-cited rules, the Commission appears to be on the verge of not allowing RAs to make a subject matter jurisdiction challenge. The 1981 decision shows that when an employer challenges jurisdiction, it is allowed to do so before an election occurs. But here, where there is a clear jurisdictional issue that the employer is not advocating (perhaps due to the individuals' personal political considerations), the Commission seems unwilling to allow the individuals who would be adversely affected by an improper public-employee classification to challenge it.

If the Commission refuses to allow this type of issue to be brought before it, then it will be brought before the courts. This Commission seems intent on holding a hearing with only the union (who wants RAs to be declared public employees) and the University (which is under

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[9] November 1, 2011, Affidavit of Adam Duzik.

[10] The membership for this group was generated after the Commission set the 10% threshold in its September 14, 2011, Order. Two emails were involved. The first email was to a University email list (coe-grad-students-announce@umich.edu) for the college of engineering and mentioned the Commission's 10% threshold for RAs opposed to GEO's unionization attempt and provided a link to a petition. There was also an online letter explaining the situation at the saynotogeo.org (last visited December 6, 2011) website with a link to the petition. The petition provided enough RAs to meet the 10% threshold. The second email was sent to all petitioners and indicated that the undersigned was willing to provide legal representation free of charge and that signing up was solely for the issue of preventing "compulsory GSRA unionization." All petition signees were provided with an opportunity to withdraw from the group if they were no longer GSRAs or if they had developed qualms about legal representation. After those names were removed, there were 371 people left on the list.

This list can be provided to the Commission should it, pursuant to R. 423.145(3), wish to verify "the showing of interest" by SAGU.

orders from the Regents to accept that RAs are public employees).[11] Excluding interested parties will almost certainly lead to any issue decided in that hearing being relitigated.

For example, members of the Commission indicated that they took notice that University websites used language that indicated there was an employment relationship between RAs and the University. At a hearing, it seems likely that neither the University nor the union would seek to challenge the contention that the employment-type language from these websites could be used as a type of admission against the University – i.e. the putative employer. But SAGU would argue that these websites could not be used as an admission against the putative employer since the University is on the union's side. The party that could seek to use University websites as an admission is the party that disagrees that RAs are public employees. Thus SAGU could use the myriad of web pages indicating that the RAs are students to disprove the University's claims that they are public employees. For instance, the University labels RAs "Students" on the University identification cards as opposed to the label "Admin" that is provided to post-doctoral employees. Exhibit B. The Academic Human Resources page defining RAs[12] states:

> A Graduate Student Research Assistantship (G.S.R.A) is an appointment which may be provided to a student in good standing in a University of Michigan graduate degree program who performs personal research (including thesis or dissertation preparation) or who assists others performing research that is relevant to his or her academic goals. . . . The Graduate Student Research Assistantship program is a vehicle to provide financial support for the academically-related research activities of active University of Michigan graduate students.

For SAGU, the references on the web pages are a party admission (by the University) that RAs are students and not public employees.

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[11] One cannot help but wonder how cross examination would proceed in that scenario.

[12] http://www.hr.umich.edu/acadhr/grads/gsra/what.html (last visited December 6, 2011).

If the Commission is not going to let SAGU or individuals who claim not to be public employees participate in this hearing at this time, it is hard to see why such entities would be allowed to file an "unfair labor practice" charge after an election. The Commission would be setting itself up for two hearings – one by two parties that agree on the employment status of RAs before an election and one after an election. Such a duplication of effort makes no practical sense. Further, while there was a hint in the day care case that the Court of Appeals would not disturb a MERC certified election, that case was mooted by the Michigan Supreme Court. Also, in that case, there was no record of those that were opposed to the public-employee designation being rebuffed from participating at the Commission. It is difficult to believe that a reviewing court would look kindly upon a process where parties who have a cognizable constitutional injury are denied access to a process to redress that injury. By choosing to exclude those with constitutional standing, the Commission is also opening up the possibility that hearings on future issues related to its jurisdiction will not occur at the Commission, but at the various Circuit Courts throughout the state. Were that to occur, the work that went into the Commission's hearing would be for naught. No court would hold that res judicata applied if the only two parties allowed to participate agreed on the legal conclusion. Thus, the entire process would start from scratch and the Commission would lose its role as a primary fact finder in these allegedly public-sector labor disputes.

Allowing the Attorney General's intervention may ameliorate some of the difficulties here, but it is not a perfect solution. Under MCL 14.28, the Attorney General represents the interests of the State, not the interests of Day or SAGU. While it is expected that these interests should be in harmony, it is not guaranteed. Further, while it may help in this case, there is no guarantee that the Attorney General will exercise similar discretion in future cases where the

jurisdiction of the Commission should be at issue but is not due to political considerations at the public employer.

In opposition to the AG's motion, the union states: "The concept of third parties climbing into representation cases is anathema to the notion of a prompt election based on the free choice of employees in an appropriate unit." Brief Opposing Motion to Intervene at 9. But the question at issue in this jurisdictional matter is whether the GSRAs are public employees at all. This is not a run-of-the-mill election. Here, the boundaries of public employment are being pushed and those who believe RAs are not public employees should be allowed to participate to make that case.

RELIEF REQUESTED

Intervenor Students Against GSRA Unionization requests that the Commission grant this motion to intervene and deny the union's motion for reconsideration of the September 14, 2011 Decision and Order, which dismissed the representation petition for lack of jurisdiction.

Alternatively, if the Commission decides to order a hearing on the change in circumstances from 1981, Intervenor Students Against GSRA Unionization, requests that both it and the Attorney General be allowed to participate in the process as parties.

Respectfully Submitted,

Patrick J. Wright (P54052)
Attorney for Intervenor Students Against
GSRA Unionization
Mackinac Center Legal Foundation

Dated: December 6, 2011

[redacted]

Subject: FW: For GSRAs -- Dues: what they are and what they're worth

From: "Graduate Employees' Organization" <umgeo@umich.edu>
To: [redacted]
Date: Mon, 17 Oct 2011 10:30:30 -0400 (EDT)
Subject: For GSRAs -- Dues: what they are and what they're worth

Dear [redacted]

One important part of joining a union is paying membership dues. In fact, membership dues represent the main concept of a union: if we all combine our resources and work together, we'll benefit more than we would as individuals acting alone.

This week, we want to explain why GEO dues are a good value and a wise investment for us as GSRAs.

GEO members pay dues on a percentage-of-pay basis. Using the current dues schedule, a GSRA with an 0.5 appointment for a full year would pay $442 in dues a year once a contract is in force. (As we've related elsewhere, no dues are charged until a contract is reached.)

As GSRAs, what would we each get for that $442?

Here are some facts to keep in mind as you think about this question:

$602 > $442

$2,394 > $442

Both of these facts, as you'll see, mean that GEO dues are a good investment.

Ex. A

In the recent past, $442 in GEO dues has saved each GEO member—and every GSRA--at least $602 somewhere else. Mainly, it's done this by helping GEO build the power to keep our money in our pockets at the bargaining table.

In 2010, the UM administration began acting on the recommendations of its own Committee on Sustainable Health Benefits (COSHB) in an attempt to shift health-care costs to employees. (For more on COSHB, see http://bit.ly/ojT7Fm.)

For graduate employees, COSHB recommendations would have hurt. The reform would have cost a single grad employee an additional $602 in annual health care premium costs. It would have cost a grad employee with a spouse $1,863 annually. Insuring oneself, one's partner and any number of kids would have set a graduate employee back a total of $2,573 in additional premium costs alone – and that's not including co-pays.

The COSHB recommendations were implemented without negotiation for the vast majority of employees on campus, including everyone from highly-compensated administrators and faculty to the lowest-paid clerical workers at UM. The only employees who escaped the COSHB recommendations were represented by unions, including GEO (which has a history of successfully beating back co-premiums as far back as 2003, when hundreds of members turned out to oppose them)—and GSRAs, who benefited from GEO's advocacy. As a result, GradCare copremiums remain at zero.

Moving on to the $2,394 figure above, let's look at salary. What might salary minima look like without GEO?

To attract bright graduate students, surely UM would have to raise salaries at least somewhat over the years. The university administration recognizes this--in the past, it has expressed great enthusiasm for linking GSI/GSSA salaries to faculty salary increases. (In theory, that might seem fair--but in practice, UM administrators calculate "faculty salary increases" by excluding increases faculty received for promotions, "competitive adjustments," etc.)

So, how has GEO done at the bargaining table in comparison to "faculty salary increases" as defined by UM?

The "faculty salary increase" has averaged 2.1 percent a year since 2004-05. GEO's annual raises have averaged 3.5 percent during that time.

That might not seem like much of a difference, but it adds up: a year-round 0.5 GSRA would have made $2,394 less per year had these increases not been applied.

So: where's the value in paying union dues? Dues underwrite the power to help win improvements to our wages and benefits at the bargaining table.

But why does the bargaining table matter to GSRAs? Aren't we just free-riders, benefitting from the gains of GSIs? Historically, that has been the case. But just as 1,600 GSIs working together are more effective than GSIs without a union, so will 2,200 GSRAs joining GEO make for an even more powerful organization. Economic times are getting rougher—and the University has cut benefits and salary for all other employees who don't have unions, including faculty. The protection of a contract will ensure that the benefits we currently enjoy as GSRAs cannot legally be retracted without negotiation.

In addition to facilitating wins at the bargaining table, GEO dues help support state and national-level advocacy by our affiliates on a variety of issues of direct relevance to us as researchers and as students. This work includes lobbying by AFT Michigan for increased state-level funding for UM, and by AFT for federal-level funding of the grants that support our research. For more on this, see http://www.umgeo.org/research-assistant-campaign/where-does-my-dues-money-go/.

If you have questions about dues, or about what a GSRA union would mean to you and other GSRAs financially (or in any other way), don't hesitate to contact the GSRA steering committee: gsracampaign@geo3550.org.

Best regards,

Andrea Jokisaari

Chair, GEO GSRA Steering Committee

Materials Science and Engineering

Samantha Montgomery

President, GEO

Psychology and Women's Studies

Graduate Employees' Organization (GEO) | Local 3550 American Federation of Teachers, AFL-CIO
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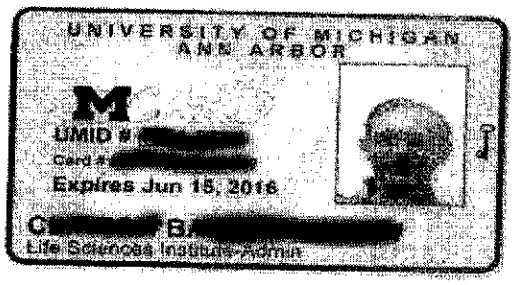
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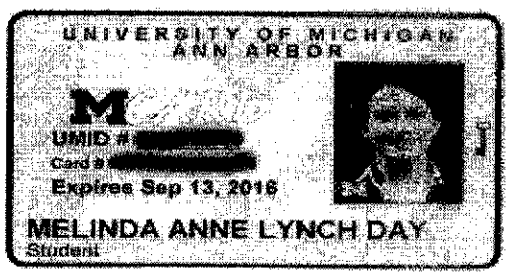
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ANN ARBOR
UMID #
Card #
Expires Sep 13, 2016
MELINDA ANNE LYNCH DAY
Student

Ex. B

Senate Subcommittee – 5/4/10 – Ruthanne Okun

Sen. Bill Hardiman: Ms. Okun, I understand you're the person who has the knowledge about some of these issues. Could you please let the members – just provide us with a brief overview of the process of forming a union in general and then we'll talk a little bit more specifically about your involvement and what you go through. If you could provide us with that I'd appreciate it.

Okun: Generally what happens is employees will sign cards, indicating that they wish a particular labor organization is to represent them for purposes of collective bargaining. And when they have 30% of the cards, they present a petition to us. It's called a petition for representation proceedings, and as a result of the petition for representation proceedings we'll check cards. We will ask the employer to provide a list of names and addresses of employees whose names are in that bargaining unit – in the proposed bargaining unit – and we check those names against the cards. And if they're in fact the 30% showing of interest then we will proceed to hold an election. The union may also go to the employer and seek voluntary recognition, but if the employer refuses voluntary recognition, or if they feel that it's more appropriate to have a private election, then we will in fact hold an election to determine whether the employees in the bargaining unit wish the union to represent them. There may be also questions regard to the people who are in or out of the unit, whether the unit is appropriate, other issues with regard to the time and date of election. In such case, they will proceed to a hearing before an administrative law judge of the state office of hearings and administrative rules. And, if not, the parties can enter into a consent election agreement, and they will proceed to hold a private election.

Sen. Hardiman: So, your role is to receive the cards from the employees and verify that they are indeed employees and that there are indeed 30% of the –

Okun: Our role is simply to conduct the election. Again, we don't receive the cards directly from the employees. We receive the cards from the petitioner, and then we will check the cards in accordance with the list of names and addresses that is provided by the employer.

Sen. Hardiman: Ok. In the case of the MHBCCC, were they determined to be the employer in this case?

Okun: In this particular case, the documents that were submitted to us indicated that they in fact were the employer, and neither side challenged that – nor did any person in the bargaining unit challenge the employment relationship.

Sen. Hardiman: So you received documents from the council, the MHBCCC, that they were indeed the employer of the childcare workers for whom you received petitions for. Is that correct?

Okun: I was not privy to – I was not – the election officer would have received the documents. I don't recall if they were from the employer or from the union, or from both. But, there was no question in this case presented to us as to who in fact was the employer.

Sen. Hardiman: When you say there was no question, meaning, as far as DLEG or MERC was concerned, the council was the employer?

Okun: No one challenged the employment relationship – the employer-employee relationship. Nor did any person in the bargaining unit challenge the employment relationship. So, it was not something that we needed to look into.

Sen. Hardiman: So, someone in your office – the election officer is it? – received some documentation from the council stating they were the employer of the 40,000 or so daycare workers? Is that…

Okun: That is correct. The parties, together, had presented information to us that there was an employment relationship.

Sen. Hardiman: When I spoke with the chairman of the council, and the director last week – if I recollect that properly – they said they received authorization, I think it was from MERC, saying that they could act – I can't remember the exact term – but I think it was as the employer in an employment relationship, they thought they received – if I'm incorrect, and the director can correct me if I am – they received authorization from MERC saying that they could act in an employer relationship. You're saying you received documentation that they were indeed the employer for these daycare workers that were subsequently unionized?

Okun: I'd have to see what document they were referring to, indicating that they were employer, but it would not be something that we would generally do. Parties present to us information with regard to the employment relationship.

Sen. Hardiman: I'm a bit perplexed as to how these daycare providers were deemed employees, and I guess I still am. It sounds like you're saying you received documentation that they were the employer, and they're saying they received authorization from MERC, saying that they were authorized to act as the employer, I believe. So, that still seems to be a mystery. Who would know precisely? Who would have that information?

Okun: We would – again, it would be the information that they had presented to us with regards to employer-employment relationship. There probably was information, and again neither party objected to the fact that – there was nothing, no independent determination made by MERC. It never went to MERC. If there would be a question as to whether there was an employment relationship, it would need to be determined by the Michigan Employment Relations Commission. And again, it was a consent election where the parties agreed as to who the employer and the employees were, or who was in the bargaining unit, who wasn't in the bargaining unit, and then, therefore, they proceeded to an election.

Sen. Hardiman: So there was a consent from the council that these employees – say that again. The council consented to…

Okun: There was a consent election agreed to. In other words, indicating the employment relationship and that – who was in the bargaining unit and who would be eligible to vote. And it was that consent election that happens – when there's a consent election there never is an independent determination by the Michigan Employment Relations Commission. They're the only body that would have the authority to make that determination, and there were no hearings in this case. Had in fact someone wished to challenge the employment relationship, they would be welcome to do that, and then they would seek a hearing with the Michigan Employment Relations Commission.

Sen. Hardiman: Can you provide to this committee the documentation that stated initially that these daycare workers were indeed employees of the council?

Okun: I can. I'm not certain if in this case there was an interlocal agreement in regards to that, or if there was something presented with regard to the nature of the employment relationship. But, again, either party always has the opportunity to challenged the nature of the employment relationship, and if they do that they can seek a hearing with the Michigan Employment Relations Commission. And, no one did seek a hearing in this case, and therefore the parties entered into a consent election agreement, which allowed the election to move forward.

Sen. Hardiman: Well, there are two things here. One, we're talking from 40 and I've heard as high as 70,000 daycare workers, and some of them didn't know they were being unionized until they received notification that they were in the union. So, I don't think that they would seek any relief from that because they didn't know it. So, there must've been some documentation, from what you're telling me, that says that they were indeed employers – or that the daycare workers were indeed employees of the council. So, if you could provide us with that documentation that would be helpful. I think the second thing

is, are they public employees? Are these daycare workers public employees of the council? I guess that's at issue as well.

Okun: Again, no one challenged the nature of the employment relationship. It wouldn't be our position. When parties consent to an election, it would not generally be something that we would do to look into it unless one of the – again, someone in the bargaining unit, or someone brought it to our attention that there was not in fact an employment relationship.

Sen. Hardiman: Well, under that scenario, someone who is doing some work and receiving some state funds, someone could come in and say that all of these people are employees of an entity, and if that's not challenged they could be seen as employees as well. And I guess I'm just – I'm thinking about the thousands of people who didn't even know this process was going on. So, you consider them to be – are they public employees for the purpose of the candidacy of the election? Are they public employees or just employees?

Okun: We would consider them public employees.

Sen. Hardiman: You would consider them public employees?

Okun: Yes, and I also have to differ with the fact that there were a number of employees who didn't know the election was going on. We sent out – and I don't recall if this one was 30,000, but there were two large elections that we've held. Probably the largest in our history. And we sent out 30,000, or 30,000 ballots in one case – 29,000 ballots in one case and 30,000 in another case. And, they were again to every individual that was on the list that was provided to us by the employer.

Sen. Hardiman: These ballots that you send out: Is this certified mail or how do you send these ballots out?

Okun: I think they were sent out by the State of Michigan mailroom. There was nothing we did independently with regard to that, but they were actually sent out by the State of Michigan mailroom. And we received some ballots back, but not a significant number enough to have an effect on the results of the election.

Sen. Hardiman: Let me ask another question about that. So, you sent out these ballots to these people who were designated as employees, and you received what percentage back?

Okun: Let's see. With regard to the –

Sen Hardiman: Or the number.

Okun: – ballots themselves, we received about 6,700 – 6,600 ballots back. And, 234 of them were spoiled. But, we, again Senator, we have no control with regard to how many ballots we receive back. The ballot went out, they went out again by the State of Michigan mailroom. There was nothing unusual with regard to this election except the fact that it was a large number. But, it was fairly routine with regard to a mail-ballot election that was held within our agency.

Sen. Hardiman: So there are 30,000 ballots sent out, you received 6,700 back, so there are 23,000 that did not send a ballot back. We don't know if they opened the mail, got the mail, we just don't know, but these folks are now deemed to be in this union.

Okun: You know Senator, I used to represent employers, and one of the things we always told people when there were union elections was the fact that the union will be selected by a majority of the people who vote in the election – not with regard to the majority of the people in the bargaining unit. That's why you try to encourage everyone to vote in the election, and we receive the ballots back and however many we receive back, the majority of those that we receive back, that's who determines whether there is or is not a union.

Sen Hardiman: I was working at GM many, many years ago, and if I was working at company and there was an election, I'd know that. If I was an independent – or considered myself an independent contractor – I wouldn't expect to be confronted with a ballot election. I just wouldn't, because I would have no reason to. Ok, I think I understand what you did, and you're going to give us some documentation that show – what showed your organization that these people were in the union. So, in your mind, in MERC's mind, these 30,000, 40,000 employees are public employees of the council – as recognized by MERC. Are they governmend by the Public Employment Relations Act?

Okun: They are.

Sen. Hardiman: They are. Are there other benefits provided to them? Is that part of that or is this – as far as I know, their deemed to be in this union and they're paying union dues – is someone negotiating for their benefits, their health care, retirement, anything like that? Or is that not your –

Okun: That's not within our purview.

Sen Hardiman: That's not your area to think about.

Okun: The only way we would become involved is if they asked our assistance with regards to mediation.

Sen Hardiman: Ok, so, according to you they are public employees. Alright, there other questions? Senator Jansen.

Sen Jansen: Thank you, Mr. Chair. A couple quick questions. Have you overseen an organizing process like this before? And for me, the question is begging: There's a funding source to the employee that seems different than most where they're being paid by, I'll say, the state – which is somewhat of a third party in some cases and the union is then taking money from that third party before they actually get the money delivered to them for the service. Is that – seems –

Okun: All of our public employees receive money, receive their salary from the state.

Sen. Jansen: Yeah, and you're making the assumption that they are public employees, because that's what's happened. But it seems to me that before this all happened they were not public employees; they were third party, or they were private independent contractors, or whatever you want to call them. So, I mean, you're maybe look at it today, but it seems if I go back and look at this, they were independent contractors and someone was paying them and this union process was – it just seems very odd to me. Have you ever overseen a unionization process like this before in your role.

Okun: I was familiar with the unionization process, which was taking place similarly with my colleagues throughout the country. Similarly, I think a similar process took place in Washington and Illinois and Iowa, so it wasn't anything unusual. Again, the situation that occurred in our agency – we're a very, very respectful agency. I mean we do everything above board and we try not to violate any laws if we can certainly do that. And the only thing unusual in this particular case was the number of ballots – and we certainly could have sent out that large number on our own, but we thought it would be more appropriate to have it done in a more professional manner via the state mailroom. So, it wasn't really anything unusual.

Sen Jansen: But you had never run an election, or you had never been overseeing a process like this before? This seems different than any other that I've seen.

Okun: We run elections every day, and probably because of the number of employees and probably because of the cost impact travel and so on, the majority of them are mail ballot elections.

Sen. Jansen: But I'm kind of coming back yet to the – this is an independent contractor in my mind when we're looking at this at the beginning. They're being paid by somebody that is an outside source, because they're working with the family and the person that has the child – that's who they're providing the service to. It just seems to me – and we all know in a normal process it's employee A that works for the company, and that's where the negotiation happens, that's where the unionization happens. This is a triangle. It seems to me that that is not a normal unionizing process. You see what I am saying?

Okun: The bargaining relationship was always between a – is with a third party. And our law says that we don't generally consider where the funding comes from in determining the nature of the employment relationship. And I'm sorry if I'm not answering your question, but it's difficult for to –

Sen. Jansen: I'm not trying to put you in a bad position. It just seems to me that maybe it isn't a triangle, it's actually a square, because you actually have four entities. You've got the actual union itself involved in this process, so it seems to me that there's now even one more party involved. But it sounds like you – whatever, I've got a couple other questions. If 30,000 ballots, 29,000 ballots, 30,000 ballots were all mailed out three separate times, who paid for those?

Okum: I'm sorry; three separate times you said?

Sen. Jansen: You said 30,000 ballots were sent –

Okun: Oh no, there were two elections – two large elections, very large elections that we handled – and one of them was 29,000 and one of them was 40,000.

Sen. Jansen: 40,000?

Okun: Correct.

Sen. Jansen: Because I hard you say 30, 29 and 30.

Okun: Oh, I'm sorry. If I did, I misspoke.

Sen. Jansen: Ok so it 40 and 29.

Okun: Right, there were two separate large ones.

Sen. Jansen: Alright, so in those elections who paid for those mailings and the materials and all the processing – how does that work?

Okun: Normally the state pays for that – we pay for that

Sen. Jansen: Ok, so they're unionizing and we're paying the bill on that.

Okun: We always pay with regard to mail ballots, with regard to mail ballot elections, whatever costs that's – as a public agency – that all of the costs with regard to associated with the election would be [*sic*].

Sen. Jansen: Ok, so, in your budget, I'm going to guess, easily, that was $69,000 to mail those two batches out. Ok, maybe you got a cut rate, but there's still printing, there's still processing – just let me use the number. Ok, $69,000 – how did you, where in your budget did you find money to pay for this?

Okun: The same way we would find to pay for any election that comes up. And I don't think it was anywhere near the $69,000. In fact, when we talked about the concern that we had with the large election, we thought about perhaps contracting it out to someone like the American Arbitration Association, and we found that via the state mailroom we could do it significantly cheaper.

Sen. Jansen: Ok, well maybe I can run my next election through that same office.

Okun: We'd be happy to have you.

Sen. Jansen: Yeah, ok, so, the budgeting process for that you really can't budget that. That's something you don't really know how many elections you're going to have and that process.

Okun: That is correct. Our budget is very, very fluid. It's very challenging to try to budget for situations – especially like, in a situation right now, we might receive a huge number of fact findings where we pay the entire amount. So, we don't have any control over that.

Sen. Jansen: There's obviously a mailing of 40 and 29,000, the names and address and all that. That also came from state then? It had to.

Okun: The names and addresses came from the employer.

Sen. Jansen: Ok, so –

Okun: They're required to provide us with a list of names and addresses.

Sen. Jansen: Ok, these would be the same name and addresses where automatic subsidy checks are going to, right?

Okun: I'm sorry; I don't know where they came from. We just request that the employer provide us with names and addresses.

Sen. Jansen: Ok, alright. Thanks.

Sen. Hardiman: Thank you Senator Jansen. Senator Scott.

Sen. Scott: Thank you Mr. Chairman. Is there other states in which this kind of election is held for childcare workers?

Okun: There was an election, again, in Washington. I believe there was one in Washington. Now, I should also mention that there was a question as to whether the employer would voluntarily recognize the employees, and I think in this particular case the parties together believed that with the large number of employees they should proceed with an election. And there was in Washington state, I believe – I don't know if was an election or a voluntary recognition – but they are recognized. There was also in Illinois and in Iowa from what I understand.

Sen. Scott: And when was this election held?

Okun: This was held in 2006.

Sen. Scott: 2006.

Okun: Correct.

Sen. Scott: So if it was held in 2006, Mr. Chair, why are we having this problem now? I guess I don't understand what's really going on, and I'm trying to.

Sen. Hardiman: Senator, let me see if I can state it very succinctly. From my standpoint, there are 40,000, and maybe up to 70,000 at times, daycare workers in this state who are deemed to be in a union. This is not a statement against unions, but if you look at the process in which these people were quote unquote unionized, many believe that they're independent contractors – perhaps even private business people. They have a small business; they're not making a lot of money; they're independent. And for some of them – and I've seen letters – some of them have said, hey, all of the sudden I have a notice that I'm in a union, and that I'm not an employee of the state. How can I be in a union? And it's wrong. And, from this chairman's standpoint, in the appropriations

subcommittee, I've asked the question: Where's the value? What is the benefit? And people have talked about collaboration and communication and all of that – that's good. But the real benefit is a provision of training services and other services that the department is providing – not the council, and not the union. And so, I think it's in 2008 there's been some estimate that there's been as high as $3.7 million in union dues paid. But the lynchpin is the council, and so that's the issue. Now, in 2006 this didn't happen, but in 2008, 2009, it did, and so that's why I'm focused on this issue.

Sen. Scott: Are you saying that the majority of the people do not wish to be in this union and they're forced into it? Is that what you're saying?

Sen. Hardiman: I'm saying that some are, and I think that forced unionization is absolutely wrong. And I'm saying that this process – it's wrong. And, so, I have a few more questions, but that's my point. Do you have more questions?

Sen. Scott: Ok, I guess what – I've been in unions for many years and if you didn't want to be in the union, you weren't forced to be in the union.

Sen. Hardiman: I don't want to debate this right here with you, but the point is –

Sen. Scott: I'm not debating; I'm just trying to figure out what's going on –

Sen. Hardiman: The point is that it was a process that was certainly unusual, to say the least, that brought many people into the union – some that had no knowledge that they were going to be put in the union. And I'm saying it's absolutely wrong, and I'm not going to sit idly by and allow it to happen, and there are a few other points too which I will state later, but that's my thought.

Sen. Scott: Ok, well I'm just trying to find out more about it since I am on this committee, Mr. Chair. Thank you.

Sen. Hardiman: And Senator, you can ask any questions you would like of the witness. I have another question. You're saying that you received a document – you're not sure what document it was – that stated that these people were public employees of the council. And that's why you proceeded with this to oversee this process – this election process. Is that correct?

Okun: That is correct.

Sen. Hardiman: Ok. What documents do you typically receive that would tell you that? Because it seems like someone could bring you a document and say: well this person is

getting state dollars over here through some type of contractual process, and they're in the union – or they're public employees when they're independent contractors. And you're saying you don't check that at all? You just proceed with the election? Am I correct?

Okun: We would receive the petition, and the petition would name the employer and it would also name the union. And if there's no question about it – or any premonition that we had that this was not a public employment relationship – then we would proceed with the election. Again, generally the elections that we handle are with ABC school district, or ABC road commission, and so that would not be something that we would normally question.

Sen. Hardiman: So you didn't think that these were independent contractors? Or that thought never crossed your mind? I mean, I'm trying to figure out what happens.

Okun: You know, again, with our elections, that would be something that perhaps our elections officer would have discussed with the individual parties, but because no one brought it up – and because the parties consented to the election as presented to us – that we would proceed to hold the election. And presented information to us that there was in fact an employment relationship [*sic*]. You know I should follow up on something that Sen. Scott had said with regard to people being required to be a part of the union: The Supreme Court has specifically said that people cannot be required to join a union. They can be required to pay the dues for the purposes of collective bargaining, and that's something that's specifically in the Supreme Court. The union is required to provide to employees an indication as to what the costs of representation are – and it is that cost that they can assess rightly on all members of the bargaining unit, because they are all supposed to receive benefits of union organization.

Sen. Hardiman: If they're members of a bargaining unit – if they work for a company or an entity – I can understand that. These are independent contractors, and you were given a petition and some documentation which we will see shortly because you'll give it to us. And so under the Public Employee Relations Act, they have to be public employees before you can grant them collective bargaining rights. Is that correct?

Okun: Again, we would've assumed from the documents that we received that there was an employment relationship.

Sen. Hardiman: You assumed from the documents you received – ok, we will take a look at those documents. Senator Scott.

Sen. Scott: Thank you, Mr. Chair. Are providers forced to be in the union?

Okun: No. No one can be forced to be in the union.

Sen. Scott: Was the election proper and legal?

Okun: Everything that we do is above board. The election was no different than any other election we would've held, according to our procedures.

Sen. Scott: So can they opt out?

Okun: Employees have the right – no employee can be forced to join the union. They only can be forced – or required – to pay their dues for the purposes of collective bargaining. A union has the obligation to represent all persons in the bargaining unit, whether they are members or not.

Sen. Scott: I'm sorry, would you repeat that?

Okun: A union has the obligation to represent all persons in the bargaining unit, whether they are members or not. But no one can be forced to join the union.

Sen. Scott: So if these members feel if they are forced to they can opt out of that?

Okun: There is a specific provision in the Public Employment Relations Act, which provides that no employee can be forced to join a union.

Sen. Scott: Thank you.

Sen. Hardiman: You know, that's an interesting discussion here, because the fact is that they would still have their union dues, or an equivalent amount, skimmed off – I would say skimmed off the top – of their payments, whether they were in or not. And if they are independent contractors and their issue is are they public employees or are they independent contractors. Now you said you held two elections. One of 29,000 and one of 40,000. When were these election held? And you had a petition from a union, correct? Is that who provides the petition?

Okun: There are two separate elections that were held.

Sen. Hardiman: Can you explain the first one, first.

Okun: I believe the first one was with regard to the home help workers. That was in 2005, and they were represented by the Service Employees International Union.

Sen. Hardiman: Was that the 29,000 or the 40,000?

Okun: I think that was the 40,000 if I recall. Are you waiting for me to respond?

Sen. Hardiman: I thought you were looking, but –

Okun: With regard to the second, and the second one is –

Sen. Hardiman: No, I'm sorry. The first one you said was from the Service Employees –

Okun: International Union. Correct.

Sen. Hardiman: Who was the employer in that case?

Okun: The employer in that case was Michigan Quality Community Care Council.

Sen. Hardiman: Ok. So you held the election. Did you hold the election?

Okun: We did.

Sen. Hardiman: So the 29,000 daycare workers became into the union in that case; is that correct?

Okun: That was the second election, Senator, sir. The second election involved the daycare workers and childcare providers together, and Michigan Home Based Child Care Council.

Sen. Hardiman: I'm sorry. We were talking about the first election first, right? The first election was in 2005 and that was with the SEIU –

Okun: The Service Employees International Union, SEIU, and the Michigan Quality Community Care Council. And that was in 2005.

Sen. Hardiman: And the second election was – who was the union, who was the employer?

Okun: That was the election the Michigan Home Based Child Care Council and childcare providers together. Michigan with AFSCME and UAW consortium.

Sen. Hardiman: Ok, and that was held when?

Okun: 2006.

Sen. Hardiman: Ok. Ok. Thank you, that's all the questions we have now. We look forward to the documentation that you received that designated these daycare workers as public employees. Thank you very much.

Okun: Thank you for the opportunity to present.

Sen. Hardiman: Thank you.

Court of Appeals, State of Michigan

ORDER

Sherry Loar v Department of Human Services

Docket No. 294087

LC No. 00-000000

Donald S. Owens
Presiding Judge

Patrick M. Meter

Stephen L. Borrello
Judges

Pursuant to the September 15, 2010 remand order of the Supreme Court, the Court states:

Mandamus is a writ issued by a court of superior jurisdiction to compel a public officer to perform a clear legal duty. *Jones v Department of Corrections,* 468 Mich 646, 658; 664 NW2d 717 (2003). To obtain a writ of mandamus, a plaintiff must have a clear legal right to the performance of the specific duty sought to be compelled, and the defendant must have a clear legal duty to perform the act. *Casco Twp v Secretary of State,* 472 Mich 566, 577; 701 NW2d 102 (2005). The act must be ministerial, and the plaintiff must be without other adequate legal or equitable remedy. *Citizens for the Protection of Marriage v Bd of State Canvassers,* 263 Mich App 487, 492; 688 NW2d 538 (2004). The burden is on plaintiff to prove entitlement to a writ of mandamus. *Id.*

This Court denied plaintiffs' complaint for mandamus because plaintiffs failed to meet their burden of identifying a clear legal right to the performance of a specific, ministerial duty by defendants. Defendants did not have the clear legal duty to ignore the results of the union certification election.

Plaintiffs are actually seeking declaratory and injunctive relief, which are available in other actions. Where other persons who are not state officers are necessary to the determination of this action, jurisdiction lies with the circuit court and not this Court. Plaintiffs have other remedies available, and mandamus is inappropriate.

We do not retain jurisdiction.

COURT OF APPEALS OF THE STATE OF MICHIGAN
1965

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

SEP 22 2010
Date

Sandra Schultz Mengel
Chief Clerk

H

Supreme Court of Michigan.
Sherry **LOAR**, Michelle Berry, and Paulette Silverson, Plaintiffs–Appellants,
v.
DEPARTMENT OF HUMAN SERVICES and Director of Department of Human Services, Defendants–Appellees.

Docket Nos. 142237.
COA No. 294087.
July 13, 2011.

Order

On order of the Court, the motion for leave to file brief amicus curiae is GRANTED. The application for leave to appeal the September 22, 2010 order of the Court of Appeals is considered, and it is DENIED, because the questions presented are moot.

Mich.,2011.
Loar v. Department of Human Services
489 Mich. 982, 799 N.W.2d 176

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