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,

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AMICUS CURIAE BRIEF OF MELINDA DAY AND STUDENTS AGAINST GSRA UNIONIZATION

I. Background

In 1981, the Commission held that Research Assistants, now known as GSRAs, at the University of Michigan were not public employees under the Public Employment Relations Act. *Regents of the University of Michigan and Graduate Employees Organization*, 1981 Lab Op 777. In the instant matter, the same union involved in the 1981 decision filed an April 2011 representation petition seeking to represent that same group of students. The Commission's subject matter jurisdiction is limited to public employees, so the 1981 decision led the Commission to question whether it must dismiss the current representation petition. Others interested in that issue, including Melinda Day and Students Against GSRA Unionization ("SAGU"), sought to intervene, but the Commission limited the parties that could participate in the proceedings to the petitioning union, Graduate Employees Organization/AFT ("GEO") and the "Public Employer," the University of Michigan. The University, unlike in 1981, now contends that RAs are public employees. The Commission ordered an evidentiary hearing to explore the public employment question:

> [T]his matter is referred to a senior administrative law judge for an expedited evidentiary hearing. At such hearing, the Petitioner shall have the burden of proving, by substantial, competent evidence, such **material change in circumstances** since the decision in *Regents of the University of Michigan*, 1981

> MERC Lab Op 777, as to warrant a finding that some or all of the Graduate Student Research Assistants are employees of the University of Michigan and are entitled to the protection and benefits of the Public Employment Relations Act. The Commission will require competent proof as to each category of employee to show that the facts are different from our previous decision.
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> . . . The administrative law judge may call all witnesses and receive any evidence, in addition to testimony and other evidence offered by the Petitioner and the University, as may be probative and relevant, and may, by subpoena, compel the production of evidence.

Order of December 16, 2011 at 7 (emphasis added). Thus, the Commission indicated that the union bears the burden of showing a material change from 1981, a burden which it described as "heavy." *Id.* at 6. Importantly, the Commission did not indicate that it desired that analysis of the RAs' status begin anew. Rather, it indicated that only if Petitioner could show a material change could the previous result be changed.

The rejected intervenors, Day, SAGU, and the Attorney General have been allowed to submit potentially relevant witnesses and documents. Also, they have been permitted to file amicus briefs discussing the evidence presented at the hearing.

II. Union and University's major change-in-fact claims

A linchpin of the union's argument is that with regard to research grants, "the work will be done whether a particular graduate student is

employed as a GSRA or not." Petitioner's [Pre-]Trial Brief at 11. A second argument presented by the union is that the change in the volume of research currently performed at the University of Michigan distinguishes the present time from 1981:

> Research at the University of Michigan has grown exponentially in the thirty years since the 1981 Commission decision. Current expenditures for research exceed a billion dollars. Most of the funds come from grants provided by agencies of the United States Government and private industry. These grants are not gifts. Rather, they are payments for services to be rendered.

Petitioner's [Pre-]Trial Brief at 2. More fundamentally, the union contends: "Research is the 'product' of the University. And the GSRAs provide labor and expertise to 'produce' this product." *Id.* at 1. Thus, the union views research as a profit-driven business task and graduate students as fungible employees who assist in providing an end product to the grantor – most often the federal government. According to the union, the graduate student's education is a mere "ancillary benefit" and while a research grant may provide information that is useful to a student's dissertation, the "principal goal of the research is not the dissertation; it is the stated goal of the grant." Petitioner's [Pre-]Trial Brief at 12.

The University also focuses on the volume of research conducted and attempts to equate the University with a business. It points to the Patent and

Trademark Law Amendments of 1980, more commonly known as the Bayh-Dole Act, to argue that the University now has a profit motive that did not exist in 1981. This point is implicitly made when the University states: "[The Bayh-Dole] Act greatly increased the incentives to conducting research." Respondent University of Michigan's Pre-Hearing Brief at 6. Later in that document, sales revenue is explicitly discussed: "According to the University's Office of Technology Transfer . . . the University has **earned** more than $167 million in **royalties and equity sales** from its discoveries." *Id.* at 7 (emphasis added).

The union believes that the research "machine" can and would continue to operate independently of the existence of graduate students. There are serious flaws with this argument: (1) it ignores the clearly expressed intent of the federal government that grants are tied to education and training, not just to obtaining quality research; (2) it ignores that the University loses hundreds of millions of dollars annually by providing research; (3) it contradicts the union's witnesses' testimony that their research is critical to their education; and (4) it was considered and rejected by ALJ Sperka in 1981. These flaws will be addressed below, after the growth of research funding is set forth.

A. Growth of research funding

Both the union and the University are correct that research has grown both in absolute and inflation-adjusted dollars. Provost Philip Hanlon testified that in 1981, $129 million was expended on research. February 2, 2012 Transcript at 31. In fiscal year 2011, it was $1.2 billion. *Id.* at 33. Using the consumer price index, the University spends four times more on research in 2011 than it did in 1981. See, *Id.* at 32-33. [1]

Provost Hanlon explained that the University's pursuit of grant money is not profit driven, but as a means to obtain "excellent research results." *Id.* at 54. He further noted: "[The University's] interest is in the research, not in the money that comes to support it." *Id.* at 55. Later in his testimony, Provost Hanlon expanded on this thought:

> [W]e want to generate as much scholarship and research that will impact the world for the good as we possibly can.
>
> Research funding is a tool to support that objective, and so we are sort of pursuing research funding, which will help us in that goal of producing research."

Id. at 88.

The increase in research expenditures has not been due to the University valuing research more vis-à-vis undergraduate education, but primarily because of increased availability of federal research funds:

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[1] While there has been a large increase in research expenditures in the last thirty years, as a proportion of the University's total budget, research expenditures have dipped from 15% in 1981 to 13% in 2011. February 2, 2012 Transcript at 44.

> I think the availability of federal funding is absolutely the number one . . . factor that's led to this increase in research funding.
>
> It certainly is 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 that our educational mission has become more important to the University since 1981.

Id. at 85.

B. Federal model of symbiotic research and education

The first flaw in the union's conceptualization is that it ignores the federal government's interest in the education of graduate students. For nearly six decades research and graduate education have been intertwined and remain so today. With the National Science Foundation Act of 1950, Congress created the National Science Foundation (NSF). From its inception, the NSF has been authorized to "award scholarships and graduate fellowships for study and research in the sciences or in engineering at appropriate nonprofit American or nonprofit foreign institutions selected by the recipient of such aid." 42 USC § 1869; see also 64 Stat 149 (1950) (original act implementing statute). In 1988, as part of the Academic Research Facilities Modernization Act, Congress highlighted the importance of the symbiotic research and training relationship:

> [T]he fundamental research and related education program supported by the Federal Government and conducted

> by the Nation's universities and colleges are essential to our national security, and to our health, economic welfare, and general well-being.

42 USC § 1862a(1). Another subsection of that statute, 42 USC § 1862a(5), discussed why NSF has a role in providing capital improvements. That provision also discussed the role that NSF, the universities, and others have in fostering research and training:

> [A]s part of its responsibility for maintaining the vitality of the Nation's academic research, and in partnership with the States, industry, and universities and colleges, [NSF] must assist in enhancing the historic linkages between Federal investment in academic research and training and investment in the research capital base by reinvesting in the capital facilities which modern research and education programs require.

Id. This research-education symbiosis is not limited to the NSF. In the National Research Service Award Act of 1974, which largely concerns the National Institutes for Health (NIH),[2] Congress found and declared that:

> (1) the success and continued viability of the Federal biomedical and behavioral research effort depends on the availability of excellent scientists and a network of institutions of excellence capable of producing superior research personnel.
> (2) direct support of the training of scientists for careers in biomedical and behavioral research is an appropriate and necessary role for the Federal Government; and

[2] The growth in federal research funds over the last three decades is largely due to the increase in NIH research funds. Ex 9 at Figure 2 shows that NIH funding has increased from around $6-7 billion in 1981 to over $30 billion today. Ex 9 at Appendix 2 (Bates No 000052) shows that NIH currently accounts for a little over $571 million of the University's 2011 research expenditures or 46.2% of the fiscal 2011 total.

(3) graduate research assistance programs should be the key elements in the training programs of the National Institutes of Health and the Alcohol, Drug Abuse, and Mental Health Administration.

88 Stat 342 (1974). The above statutes are just some examples of why the National Research Council can accurately state, "after World War II the federal government made the deliberate decision to fund basic research through academic institutions in order to integrate research training with the active conduct of research." National Research Council, *Research Training in the Biomedical, Behavioral, and Clinical Research Sciences* (2011) at vii.

At one point, this tribunal questioned Dr. Victor DiRita if "the GSRAs . . . are doing work that if they weren't there, the University would pay somebody to do, whether that was a post doctoral fellow, some level it might be a technician or even somebody who - - who has less than a master's degree. [GRSAs are] doing some work of value to the [principal investigator] and towards the progress of the grant. Now, do you disagree that that's the case?" February 21, 2012 Transcript at 48. After a colloquy between Dr. DiRita and this tribunal, he stated: "I think that the work . . . would still be done. We would try to hire somebody else, but . . . we don't hire students with the idea that they will accomplish this aim on this grant." *Id.* at 49-50. He further noted that while a professor "hopes to produce some useful research under

their own name" that one of the main goals "is to train graduate students" since "the grand bargain is that - - the reason that you're at Michigan is because you want graduate students to be part of your effort." *Id.* at 50-51.

Dr. DiRita's testimony should not be taken to mean that GSRAs could be replaced across the board without any consequences to the University. His work-would-still-be-done answer seems to apply to a particular grant or project as opposed to broadly throughout the University. The federal government wants student training. If the University tried to replace all doctoral students with post-docs, it would no longer receive the hundreds of millions in federal grant money it currently receives. Dr. DiRita testified that proposed federal grants are reviewed by "a study section" of "faculty members, typically researchers" and scored. *Id.* at 60. The reviewers then look at how much money they have and determine what scores they will fund up to. *Id.* It is difficult to believe that academics would be willing to provide funds to an educational institution that provides no graduate education. In fact, if a grant is not a "great student project[]," it is unlikely to be funded. *Id.* at 79.

Dr. Stephen Forrest explained that GSRAs and post-docs are not fungible. His explanation came after a hypothetical was posed where a GSRA takes his or her research in a new direction that cannot be supported by the

grant and the principal investigator needs more assistance on the research contained in the grant. Dr. Forrest initially indicated that a professor might seek another GSRA. The following exchange then occurred:

> Q: And if you couldn't find a GSRA or make a good match with a GSRA, might you instead hire a post-doc to come in and do that work?
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> A: It's not generally an either/or. I have post-docs not to do things that GSRAs do. I have them do things that GSRAs don't do. For example, a post-doc has, in my view, a much larger responsibility to organize and lead the graduate students and to mentor them, whereas the graduate students have a lesser requirement for that. Keeping . . . the trains of the lab running is more a job of a post-doc and my research scientist than it is of the GSRAs.
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> So, sometimes the post-doc will do that task. Maybe you would even hire one to do it, but - - at least it's my experience. Now, I have to talk from personal experience. There's lots of graduate students, as we know, but there's 2,200 or thereabouts GSRAs . . . and every one is slightly different. But, it's hard to imagine that you could replace many GSRAs with post-docs. It's a different mission.
>
> The GSRA is part of workforce training and there's a huge educational component. With post-docs, there's less of both of those. This person is already in the workforce and there's not so much research training. We have to keep in mind that the economics for GSRAs, in terms of doing research, is very poor compared to post-docs in general.

February 23, 2012 Transcript at 96-97.[3]

Another distinction between GSRAs and post-docs and others in the workforce who are employed in the lab concerns what occurs when funding is

[3] Dr. Forrest's last sentence about the economics of GSRAs and postdocs will be discussed below.

lost. Dr. DiRita explained: "If I lost that grant, the student would still get a dissertation. And in fact, we're very cautious about that. So, if I lose a grant, the student stays a student, but the technician and other people that you asked me about don't stay in their jobs." February 21, 2012 Transcript at 103.

Therefore, the concept that GSRAs and post-docs are fungible fails. It may be that a postdoc can provide assistance here or there when a GSRA is no longer able to assist on a research project, but post-docs cannot replace GSRAs en masse.[4]

Further, both Dr. DiRita and Dr. Forrest explained that University research differed from private research. Dr. DiRita indicated that most graduate students work on "basic research" grants, not grants where NIH or another entity indicates that they are "looking to build three widgets, and here's how we're going to do it, and here's what we need to do it." February 21, 2012 Transcript at 67. The University does not want graduate students on those types of contract grants. *Id.* Further, NIH "is more and more interested in [e]nsuring that if we have students on [a grant], those students

[4] This is indirectly supported by Dr. Forrest's answer to a question from this tribunal. The question was: "[I]f the University wasn't training graduate students through the GSRA appointment, would it be more beneficial for the faculty and the granting agency to hire post-docs to do it?" February 23, 2012 Transcript at 102. Limiting his answer to the individual researcher, not the University, Dr. Forrest indicated that the answer was "Yes." *Id.* He was not asked whether this hypothetical could ever realistically occur given the training and education expectations that the federal government has as a part of its grants.

are not technicians and that they are monitored as students." *Id.* at 78. Dr. Forrest indicated that if the University "wanted to be Bell Labs, it would have a very different economic proposition going forward." February 23, 2012 Transcript at 48.

Thus, the federal government, which makes the majority of the grants to the University, does not view graduate student education as a mere "incidental benefit" of the research process. Rather, the federal government believes it is in the national interest for this country to have a pool of well-trained scientists and researchers. Providing a means for this training is part and parcel of the entire grant process. The union's suggestion that the research would continue without graduate students is pure speculation and almost certainly wrong. For at least six decades, the design has been to make graduate education and research all part of one process.

C. University loses money on research

In fiscal year 2011, the federal government provided $824 million of the approximately $940 million expended on research that came from non University of Michigan funds. Ex. 9 at 4 (Bates No. 000045). Thus, the federal government provided around 88% of the sponsored research. In fiscal year 2011, the University of Michigan spent around $306 million of its own funds on research. *Id.* So, when those funds are included, the total fiscal year

2011 expenditure on research was a little under $1.237 billion of which the federal government provided 66.7%. *Id.*

Dr. Forrest indicated that the University's funding of around 25% of the research expenditures out of its own funds each year is typical. February 23, 2012 Transcript at 5. In large part, this is due to the fact that training/educating GSRAs is bad economics. Dr. Forrest explained that GSRAs are more expensive to use than post-docs:

> A: You tend to fund [GSRAs] 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 are actually making progress in the research. Now, even the Federal government and companies understand this.
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> With a postdoc, you - - actually they're loaded salary, that means benefits, and overhead, and everything else, is actually - - in the engineering field certainly - - is very comparable to the total loaded salary of a GSRA after you pay tuition and everything else. And a post-doc is a fully trained professional. Somebody else has paid all the bills to educate that person.

Id. at 98. This tribunal then asked whether "the [economics][5] should balance each other out for those two groups, when you take into account the fact that the GSRA is getting - - is receiving training, etcetera?" *Id.* Dr. Forrest responded: "Actually, the economics are substantially worse, I believe, for a

[5] The transcript actually states "the academic should balance." The undersigned presumes that was a transcription error.

graduate student." *Id.* at 98-99. He did admit that there are indirect benefits to the University:

> I think in the end one has to agree that the University derives tremendous benefit out of teaching GSRAs, but they're certainly not economical ones and they're not the - - and the professor who actually has the grant is not - - does not necessarily view it as an economical end, but most researchers I know are very dedicated teachers.

Id. at 99-100. After another question, Dr. Forrest continued:

> So, the global impact to the University is - - really turns on many respects on the quality of the graduate students who have come up through it, and from that comes the better faculty, and the better students, and so on.
>
> So, in terms of - - of course we're investing 25 percent to make the budget whole, but there is a larger mission for the University, and that is one of impact in excellence.

Id. at 100-01. Thus, research is a money-losing proposition for the University.

Also there is no direct financial incentive for researchers to get grants. While grants typically include an amount for the professor's salary, that amount is an offset not a bonus. As Dr. Forrest explained: "The compensation is - - is really an offset. It does not increase the total compensation that the faculty member gets under his relationship with the University. It rather just removes the responsibility of the University for paying that percentage, and that goes to the grantor." February 23, 2012 Transcript at 35.

The revenue received due to the licensing and sales of any discoveries falls far short of the $306 million that would be necessary for the University to break even on research. For example, the fiscal 2011 tech transfer revenue is in the range of $15 million, Ex 9 at 8 (Bates No 000049), or just 1.2% of the amount expended on research ($15/$1236) million. That percentage may be generous, since it is not clear whether the tech transfer number is a gross figure (more likely from the context) or a net number that would include the cost of running the tech transfer office.

The 2011 tech transfer amount is slightly lower than the average from the previous 6 years. The average annual figure from 2005 to 2010 was a little over $22 million. Ex 14 at 5 (Bates No 000222). That included a one-time bump in 2010 to nearly $40 million due to the sale of a FluMist. Ex 14 at 2 (Bates No 000219). Using a rough estimate from reading the bars on Figure 1 of Ex 9 at 3 (Bates No 000044), it appears that the University averaged around $875 million in research expenditures over the last five years. Thus the average percentage of tech transfer revenue to research expenditure during the time period of 2005 to 2010 is around 2.5%.[6]

[6] This is in line with the national average of 2% to 4 %. Lita Nelson, The Role of University Technology Transfer Operations in Assuring Access to Medicines and Vaccines in Developing Countries, 3 Yale Journal of Health Policy. Law & Ethics 301, 302 (2003) ("American universities receive licensing royalties equivalent to approximately two-to-four percent of their research budgets.") Note, however, that the

The ratio of tech transfer revenue to the University's research expenditures shows that the University has not been incentivized to increase research in search of profits. The University of Michigan loses money on research. It does not take in more from outside sources than it spends on the endeavor. There is no profit and there is no profit motive.

The University had pointed at the passage of the Bayh-Dole Act as the event that triggered the tech transfer "incentives." As has been shown above, despite being in place for 30 years, those "incentives" have not led research to becoming a self-sustaining endeavor at the University. The University also points to Standard Practice Guide, 303.4, Ex 5, which deals with the University's tech transfer responsibilities under Bayh-Dole as proof that graduate students are treated as "employees" under certain university policies.

The Supreme Court's June 6, 2011 decision in *Board of Trustees of the Leland Stanford Junior University v Roche Molecular Systems*, 131 SCt 2188 (2011), has clarified the manner in which the Bayh-Dole Act operates. The Supreme Court rejected the arguments of Stanford, which was a party, and the United States, acting as amicus curiae, that any invention created using federal funds does not belong to the inventor, but instead belonged to the

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cited authority precedes the period discussed in the text. Upon information and belief, the national average has not changed in the interim.

federal contractor (most often a university). *Id.* at 2192, 2195. Given that the entity that provides most research funds, the federal government, took the view that all federally funded research was the property of the grantee, it should not be surprising that the University's policy was worded in a broad manner to make certain that the federal policy as understood by the granting federal agencies was implemented.

But the "employee" definition of SPG 303.4 recognizes that in reality we are discussing students, not employees. In pertinent part, it states: "A **student** that is compensated (e.g. financially through a stipend, tuition, etc. **including graduate student research assistants** and graduate student instructors) is considered an Employee under this Policy." First, the definition explicitly indicates that "graduate research assistants" are a subset of "student[s]" and that their inclusion as employees here is an exception to their normal state. Further, there is no indication that the documents' inclusion of students as employees in this singular matter was in any way meant to apply to PERA. For whatever reason, the University while providing the policy as an exhibit did not discuss this definition in its pretrial brief.

D. Dissertation and research responsibilities

The union's belief that research can easily be segregated from a student's educational activities (most importantly pursuit of the doctorate) is not supported by the testimony of its own witnesses. While there are educational benefits in learning the skill sets of a quality researcher, almost all of the union's witnesses indicated either that the data for their dissertation came from their research or was at least inspired by it. Andrea Jokissaari testified that: "My understanding is that most, if not all, most of the data that I would generate or the research that I would generate would go into my dissertation." February 1, 2012 Transcript at 42. She also stated: "There's basically no differentiation between the research for my dissertation and the research or the work for that project." *Id.* at 45. Elaine Lande agreed that "some of the data that [she is] generating or collecting through [her] GSRA work is going to wind up in [her] dissertation." *Id.* at 60. Alix Gould-Werth stated that she would not use the research data, but agreed that her dissertation was "inspired by that" research and that she would use "some of the things you learned while working on the project . . . in constructing [her] dissertation." *Id.* at 96. Jeremy Moore stated that project he is researching "has become the backbone of what's going to be my dissertation." February 2, 2012 Transcript at 16. Colin Slater testified that "all the data" he will use for

his dissertation comes from the research project he is working on. February 6, 2012 Transcript at 13.

One student, Christie Toth, indicated that the research she was doing was "not at all" related to what her dissertation was going to be on. While the broad "topic of writing instruction" was involved, "methodologically, the way I am doing my research for my dissertation is not at all similar to . . . the kinds of research I do at Sweetland." February 1, 2012 Transcript at 79.

The fact that the union presented one witness whose research is not related to her thesis is not sufficient to make her and the approximately 2,199 remaining RAs into public employees. ALJ Sperka already recognized that work and education cannot be segregated: "Evaluating the quality of the work will permit no distinction between evaluation of the student in his progress as a degree candidate and as an employee carrying out research." *Regents of the University of Michigan*, 1981 MERC Lab Op at 809. He also was aware that some RAs did research unrelated to their thesis. *Id.* at 809-10. Then, as now, that fact was/is insufficient to make RAs public employees.

E. <u>GSRAs as cogs and other previously rejected themes</u>

That a limited number of RAs do not work on thesis-related research projects is not the only echo from the facts and the arguments presented in the 1981 hearing. Then, as now, the union argued that professors submitted

the grants without taking a particular student's goals or interests in mind. In 1981, ALJ Sperka set forth the union's arguments in the following manner:

> [The union] stresses that every RA appointment is issued pursuant to the conditions of a grant by an outside funding source. The grant is based on the principal researcher's proposal to conduct certain research, and the granting agency awards its funds on that premise. No matter what relationship the research may have to the thesis of an individual graduate student appointed as an RA, the student is assisting the prime researcher in fulfilling his obligation to the granting source. [The union] sees an employment relationship in this.

Id. at 808. Then, as now, the union highlighted those situations where students were doing research, but "may not have yet selected a thesis." *Id.* at 810. The cog argument was also considered:

> [O]ne may argue that the research assistant is but a cog in the wheel of this vast [research] enterprise, and that when he accepts an appointment as an RA, the obligation of performing the research described in the grant proposal makes him an employee.

Id. at 808-09. That argument was rejected in favor of one that "focuses on the graduate student rather than on the research." *Id.* at 809.

The facts highlighted by the union and the University in the instant matter mirror those highlighted by the union in the 1981 decision:

> The record indicates the broad scope of grant research. A large number of grant sources contribute very large sums to research efforts conducted within the context of the University. Some funds provide for fellowships and unconditional grants. Others support research assistants through grants to prime

> researchers, including funds to be used to support graduate students. Obligations attach to the process. The obligation may be no more than to pursue a line of research to determine if it is fruitful. Here, no results or poor results may be an answer. The size of this funding equals a significant fraction of the [University]'s budget. The availability of this funding eases the burden of the University since faculty research is one of the missions of a research university, as well as a vital professional activity of the individual faculty members.

Id. at 808. It is difficult to imagine a change that would be needed to make that paragraph apply to the instant proceeding.

The fact that RAs paid federal income taxes was considered in 1981. For instance, the Commission stated "Generally, [graduate students'] earnings are subject to federal income tax. . . . " *Regents of the University of Michigan*, 1981 MERC Labor Op at 780. Despite recognizing that RAs had to pay federal income taxes, the Commission still held that RAs were not public employees.

In the instant proceeding, neither the union nor the University had any witnesses describe tax treatment or its relevance to the student/public employee question. Also, none of the hundreds of pages of documents that they submitted shed any light on this subject. Payment of federal taxes was not sufficient to find public employment in 1981, and neither party has indicated why that should change now.

In sum, none of the testimony from the union's witnesses presented any information that was not already known and considered by ALJ Sperka. The methods of obtaining grants remain the same. The activities of professors and graduate students funded by research grants remain the same. Even the arguments presented by the union regarding the facts remain the same. While the amount of research performed has increased, the incentives behind that research remain the same: the University seeks to educate graduate students and to produce "excellent research results," just as it did in 1981.

III. The Union and University's change-in-law claims

Both the union and University cite to the Michigan Whistleblower's Protection Act, 15.361 et seq and to some Title VII cases to argue that graduate students are "employees" in other contexts so they must be public employees under MCL 423.201(1)(e).

The union and University both cite to *McGee v University of Michigan Regents*, unpublished opinion per curiam of the Court of Appeals, decided April 12, 2011.[7] In *McGee*, a GSRA claimed that he was removed from his position due to protected activity. A trial court allowed the case to go to a

[7] This document can be located at 2011 WL 1376281.

jury, which returned a no cause of action. There is no indication that the plaintiff's status as an "employee" under MCL 15.361 was challenged at either the trial court or at the Court of Appeals. Even if it had been challenged on appeal, there was no need for the Court of Appeals to address the issue since it held the jury's no-cause verdict was supported by the evidence. An unpublished decision on another state statute that fails to even address the employment question is not a sufficient basis to overturn a decision that arose after an arduous hearing and that has been in place for over thirty years.

To the extent that McGee is at all dispositive, it can be countered by *People v Powell*, 235 Mich App 557 (1999). There, defendant, a paid graduate student, was operating a chop shop out of his "cell," which is a place to conduct tests and experiments and was big enough to hold two stolen motorcycles. The defendant sought to claim that he had a reasonable expectation of privacy in his cell. The Court of Appeals stated: "we note that although defendant appears to have been a paid graduate student, there is no evidence from which to conclude that defendant was an employee of the University of Michigan or that he used the 'cell' as any type of an office." *Id.* at 561 n 4.

Both the University and the union cite to a couple of Title VII cases involving GSRAs. There are contradictory holdings regarding whether GSRAs are employees for the purposes of Title VII. Compare *Cuddleback v Florida Bd of Educ,* 381 F3d 1230 (11th Cir 2004) (a graduate student paid a stipend and covered by a collective bargaining unit was an employee for purposes of Title VII) with *Pollack v Rice Univ*, 28 Fair Empl Prac Cas 1273 (SD Tex 1982) (plaintiff seeking admission to graduate school program that paid stipend was not an employee under Title VII).[8]

But, more pertinent than decisions from another jurisdiction on employment discrimination would be decisions from other jurisdictions on the collective bargaining question at issue here. Neither the University nor union cites to the latest NLRB decision on whether graduate students (including both GSIs and GSRAs) can unionize under the National Labor Relations Act. In *Brown University*, 342 NLRB 483 (2004), the Board returned to its long-standing rule that unionization any type of graduate students was improper. The board rejected the argument that "changing financial and corporate structures of universities" should impact the analysis. *Id.* at 492. Nor did either cite to *Association of Graduate Student Employees, District 65, UAW v Public Employment Relations Board*, 8 CalRptr2d 275 (1992), where the

[8] This case can be found at 1982 WL 296.

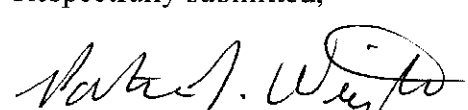
California Court of Appeals held that neither graduate instructors nor GSRAs at University of California at Berkley could unionize. But see *State v New York State Public Relations Bd*, 181 AD2d 391 (1992) (holding that "graduate and teaching assistants" may collectively bargain).

While there are some decisions that each side of this debate can highlight, the legal decisions that postdate 1981 tilt in favor of a holding that GRSAs are not public employees. Whatever case law there is in Petitioner's favor is not enough to show a material change because there is abundant case law to the contrary.

IV. Conclusion

This tribunal was to hold that GSRAs were public employees only if Petitioner was able to meet its heavy burden of showing that there has been a material change in either the law or the facts. Petitioner was unable to do so. Therefore, this tribunal should hold that GRSAs are not public employees, just as they have not been for the last 30 years.

Respectfully submitted,



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February 28, 2012

Reports to the Board.

(5) Such Committee shall render an annual report to the Board, and such other reports as it may deem necessary, summarizing its activities and making such recommendations as it may deem appropriate. Minority views and recommendations, if any, of members of the Executive Committee shall be included in such reports.

Other committees.

(c) The Board is authorized to appoint from among its members or otherwise such committees as it deems necessary, and to assign to committees so appointed such survey and advisory functions as the Board deems appropriate for the purposes of this Act.

DIVISIONS WITHIN THE FOUNDATION

SEC. 7. (a) Until otherwise provided by the Board there shall be within the Foundation the following divisions:

(1) A Division of Medical Research;

(2) A Division of Mathematical, Physical, and Engineering Sciences;

(3) A Division of Biological Sciences; and

(4) A Division of Scientific Personnel and Education, which shall be concerned with programs of the Foundation relating to the granting of scholarships and graduate fellowships in the mathematical, physical, medical, biological, engineering, and other sciences.

(b) There shall also be within the Foundation such other divisions as the Board may, from time to time, deem necessary.

DIVISIONAL COMMITTEES

SEC. 8. (a) There shall be a committee for each division of the Foundation.

(b) Each divisional committee shall be appointed by the Board and shall consist of not less than five persons who may be members or nonmembers of the Board.

(c) The terms of members of each divisional committee shall be two years. Each divisional committee shall annually elect its own chairman from among its own members and shall prescribe its own rules of procedure subject to such restrictions as may be prescribed by the Board.

(d) Each divisional committee shall make recommendations to, and advise and consult with, the Board and the Director with respect to matters relating to the program of its division.

SPECIAL COMMISSIONS

Ante, p. 149.

SEC. 9. (a) Each special commission established pursuant to section 3 (a) (7) shall consist of eleven members appointed by the Board, six of whom shall be eminent scientists and five of whom shall be persons other than scientists. Each special commission shall choose its own chairman and vice chairman.

(b) It shall be the duty of each such special commission to make a comprehensive survey of research, both public and private, being carried on in its field, and to formulate and recommend to the Foundation at the earliest practicable date an over-all research program in its field.

SCHOLARSHIPS AND GRADUATE FELLOWSHIPS

Post, p. 157.

SEC. 10. The Foundation is authorized to award, within the limits of funds made available specifically for such purpose pursuant to section 16, scholarships and graduate fellowships for scientific study or scientific work in the mathematical, physical, medical, biological, engineering, and other sciences at accredited nonprofit American or nonprofit

foreign institutions of higher education, selected by the recipient of such aid, for stated periods of time. Persons shall be selected for such scholarships and fellowships from among citizens of the United States, and such selections shall be made solely on the basis of ability; but in any case in which two or more applicants for scholarships or fellowships, as the case may be, are deemed by the Foundation to be possessed of substantially equal ability, and there are not sufficient scholarships or fellowships, as the case may be, available to grant one to each of such applicants, the available scholarship or scholarships or fellowship or fellowships shall be awarded to the applicants in such manner as will tend to result in a wide distribution of scholarships and fellowships among the States, Territories, possessions, and the District of Columbia.

GENERAL AUTHORITY OF FOUNDATION

SEC. 11. The Foundation shall have the authority, within the limits of available appropriations, to do all things necessary to carry out the provisions of this Act, including, but without being limited thereto, the authority—

(a) to prescribe such rules and regulations as it deems necessary governing the manner of its operations and its organization and personnel;

(b) to make such expenditures as may be necessary for administering the provisions of this Act;

(c) to enter into contracts or other arrangements, or modifications thereof, for the carrying on, by organizations or individuals in the United States and foreign countries, including other government agencies of the United States and of foreign countries, of such basic scientific research activities as the Foundation deems necessary to carry out the purposes of this Act, and, at the request of the Secretary of Defense, specific scientific research activities in connection with matters relating to the national defense, and, when deemed appropriate by the Foundation, such contracts or other arrangements, or modifications thereof, may be entered into without legal consideration, without performance or other bonds, and without regard to section 3709 of the Revised Statutes;

(d) to make advance, progress, and other payments which relate to scientific research without regard to the provisions of section 3648 of the Revised Statutes (31 U. S. C., sec. 529); 41 U.S.C., Sup. III, § 5.

(e) to acquire by purchase, lease, loan, or gift, and to hold and dispose of by sale, lease, or loan, real and personal property of all kinds necessary for, or resulting from, the exercise of authority granted by this Act;

(f) to receive and use funds donated by others, if such funds are donated without restriction other than that they be used in furtherance of one or more of the general purposes of the Foundation;

(g) to publish or arrange for the publication of scientific and technical information so as to further the full dissemination of information of scientific value consistent with the national interest, without regard to the provisions of section 87 of the Act of January 12, 1895 (28 Stat. 622), and section 11 of the Act of March 1, 1919 (40 Stat. 1270; 44 U. S. C., sec. 111);

(h) to accept and utilize the services of voluntary and uncompensated personnel and to provide transportation and subsistence as authorized by section 5 of the Act of August 2, 1946 (5 U. S. C. 73b–2) for persons serving without compensation; and 44 U. S. C., Sup. III, § 111. 60 Stat. 808.

(i) to prescribe, with the approval of the Comptroller General of the United States, the extent to which vouchers for funds

Public Law 93-348

July 12, 1974
[H. R. 7724]

AN ACT

To amend the Public Health Service Act to establish a program of National Research Service Awards to assure the continued excellence of biomedical and behavioral research and to provide for the protection of human subjects involved in biomedical and behavioral research and for other purposes.

National Research Act.
42 USC 289*l*-1 note.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. This Act may be cited as the "National Research Act".

National Research Service Award Act of 1974.

TITLE I—BIOMEDICAL AND BEHAVIORAL RESEARCH TRAINING

SHORT TITLE

42 USC 289*l*-1 note.

SEC. 101. This title may be cited as the "National Research Service Award Act of 1974".

FINDINGS AND DECLARATION OF PURPOSE

42 USC 289*l*-1 note.

SEC. 102. (a) Congress finds and declares that—

(1) the success and continued viability of the Federal biomedical and behavioral research effort depends on the availability of excellent scientists and a network of institutions of excellence capable of producing superior research personnel;

(2) direct support of the training of scientists for careers in biomedical and behavioral research is an appropriate and necessary role for the Federal Government; and

(3) graduate research assistance programs should be the key elements in the training programs of the institutes of the National Institutes of Health and the Alcohol, Drug Abuse, and Mental Health Administration.

(b) It is the purpose of this title to increase the capability of the institutes of the National Institutes of Health and the Alcohol, Drug Abuse, and Mental Health Administration to carry out their responsibility of maintaining a superior national program of research into the physical and mental diseases and impairments of man.

BIOMEDICAL AND BEHAVIORAL RESEARCH TRAINING

Ante, p. 135.

SEC. 103. The part H of the Public Health Service Act relating to the appointment of the Directors of the National Institutes of Health and the National Cancer Institute is redesignated as part I, section 461 of such part is redesignated as section 471, and such part is amended by adding at the end the following new sections:

"NATIONAL RESEARCH SERVICE AWARDS

42 USC 289*l*-1.

"SEC. 472. (a)(1) The Secretary shall—

"(A) provide National Research Service Awards for—

"(i) biomedical and behavioral research at the National Institutes of Health and the Alcohol, Drug Abuse, and Mental Health Administration in matters relating to the cause, diagnosis, prevention, and treatment of the disease (or diseases) or other health problems to which the activities of the Institutes and Administration are directed,

"(ii) training at the Institutes and Administration of individuals to undertake such research,