STATE OF MICHIGAN
RICK SNYDER
GOVERNOR

DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
MICHIGAN EMPLOYMENT RELATIONS COMMISSION
BUREAU OF EMPLOYMENT RELATIONS
RUTHANNE OKUN
DIRECTOR

STEVEN H. HILFINGER
DIRECTOR

December 16, 2011

Via Electronic Mail & U.S. Mail

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Re: University of Michigan -and- Graduate Employees Organization/AFT -and- Students Against GSRA Unionization -and- Michigan Attorney General, MERC Case No. R11 D034

Dear Sir/Madam:

Enclosed is a True Copy of the Michigan Employment Relations Commission's Decision and Order in the above-entitled matter.

Please note that this Order may be edited prior to publication in the Michigan Public Employee Reporter or on the MERC website. Readers are requested to promptly notify the Staff Attorney, Bureau of Employment Relations, of any typographical or other non-substantive errors so that corrections can be made prior to formal publication.

Very truly yours,

Ruthanne Okun, Director
Bureau of Employment Relations/MERC

RO:np
enclosure

cc: University of Michigan
Graduate Employees Organization/AFT
casefile

STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

UNIVERSITY OF MICHIGAN,
Public Employer,

Case No. R11 D-034

-and-

GRADUATE EMPLOYEES ORGANIZATION/AFT,
Petitioner-Labor Organization,

-and-

STUDENTS AGAINST GSRA UNIONIZATION,
Proposed Intervenor,

-and-

MICHIGAN ATTORNEY GENERAL,
Proposed Intervenor.
_____/

APPEARANCES:

Christine M. Gerdes, Associate General Counsel, for the Public Employer

Mark H. Cousens, for the Labor Organization

Mackinac Center Legal Foundation by Patrick J. Wright, for Proposed Intervenor Students Against GSRA Unionization

Bill Schuette, Michigan Attorney General; Richard A. Bandstra, Chief Legal Counsel; and Kevin J. Cox and Dan V. Artaev, Assistant Attorneys General for Proposed Intervenor Michigan Attorney General

DECISION AND ORDER ON MOTIONS TO INTERVENE
AND
MOTION FOR RECONSIDERATION OF ORDER DISMISSING PETITION

Pursuant to Sections 12 and 13 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.212 and MCL 423.213, this matter came before the Michigan Employment Relations Commission on a petition for a representation election filed by the

Graduate Employees Organization/AFT (GEO or Petitioner) on April 27, 2011. On July 28, 2011, a Motion to Intervene and for Summary Disposition was filed by Melinda Day. In a Decision and Order issued on September 14, 2011, we dismissed the petition for a representation election and denied Day's motion.

On October 3, 2011, the GEO filed a Motion for Reconsideration of our decision to dismiss its petition for a representation election, accompanied by an affidavit attesting to certain facts that were not previously before us.[1] The University of Michigan (University) filed its Response to Petitioner's Motion for Reconsideration, accompanied by two affidavits, on October 17, 2011. On November 1, 2011, a Motion to Intervene and to Deny Petitioner's Motion for Reconsideration, accompanied by an affidavit and a brief, was filed by Melinda Day's attorney on behalf of an entity identified as Students Against GSRA Unionization. Petitioner (on November 4, November 9, and November 16, 2011) and the University (on November 4) each filed supplemental pleadings objecting to the motion to intervene and supporting the motion for reconsideration. On November 30, 2011, we received a motion from the Michigan Attorney General seeking to intervene in this matter and opposing reconsideration of our September 14, 2011 decision. The Attorney General's motion included a request for oral argument. Petitioner filed a brief in opposition to the Attorney General's motion to intervene on December 5, 2011, and Proposed Intervenor Students Against GSRA Unionization, filed its Brief in Response to Attorney General's Motion to Intervene on December 6, 2011. On December 7, 2011, we received the Attorney General's reply to Petitioner's brief and a letter from Petitioner objecting to the December 6, 2011 brief submitted by Students against GSRA Unionization. On December 9, 2011, we received the University's brief opposing intervention by the Attorney General. Later the same day, we received Petitioner's objection to our receipt of the Attorney General's reply to Petitioner's brief in opposition to the Attorney General's motion to intervene, and shortly thereafter, the Attorney General's reply to the University's brief opposing intervention by the Attorney General.

As indicated below, Proposed Intervenor, Students Against GSRA Unionization, has no standing in this matter. Therefore, their Brief in Response to Attorney General's Motion to Intervene will not be considered. Further, we find that oral argument will not materially assist us in this matter and, therefore, deny the Attorney General's request to argue before us. The General Rules of the Michigan Employment Relations Commission, 2002 AACS, R 423.101 - 423.484 do not provide for the filing of reply briefs. Although such briefs may be considered in the absence of objections, we have received an objection to receipt of the Attorney General's reply brief and, therefore, will not consider it. We have reviewed the remaining filings in accordance with the Commission Rules and after giving each filing appropriate consideration, we are persuaded that the issues raised by the petition for a representation election should be referred to a senior administrative law judge for an expedited evidentiary hearing, and that both motions to intervene should be denied.

Procedural History:

On April 27, 2011, the GEO filed a Petition for Representation Proceedings seeking an

[1] Our decision to dismiss the petition seeking an election occurred at a meeting of the Commission on August 8, 2011. No hearing on the facts preceded that decision.

election among Graduate Student Research Assistants (RAs) at the University of Michigan. On May 19, 2011, the University of Michigan's Board of Regents, by a vote of six to two, adopted a resolution that purported to recognize RAs as employees and to support allowing the RAs to determine whether to organize into a union. Thereafter, a Consent Election Agreement was presented to us for approval in order that the parties might proceed to an election and possible certification of the GEO as the RAs' representative in collective bargaining under PERA.

Subsequently, Melinda Day, a member of the proposed bargaining unit, sought to intervene in this proceeding under Rule 145(3) of the General Rules of the Michigan Employment Relations Commission, 2002 AACS, R 423.145(3). She also asked that the representation petition be dismissed for lack of subject matter jurisdiction. The Petitioner filed a motion in opposition to Day's motion to intervene.

On September 14, 2011, we denied the motion to intervene and dismissed the petition for a representation election. While Commission Rule 423.145(3) provides that an employee, group of employees, individual, or labor organization may intervene in an election proceeding, Day had not offered any evidence that members of the proposed unit supported her petition to intervene; she further lacked standing to participate in these proceedings.

Based on our decision in *Regents of the University of Michigan*, 1981 MERC Lab Op 777, in which we held that RAs are not employees entitled to the benefits and protection of PERA, we declined to conclude that they have become employees based on the University's recent willingness to recognize them as such. We reasoned:

> "Usually, we do not inquire into the nature of an employment relationship or the legality of a bargaining unit 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."

Discussion and Conclusions of Law:

The Motions to Intervene

While Commission Rule 423.145(3) provides that an employee, group of employees, individual, or labor organization may intervene in an election proceeding, it also states that there must be evidence showing that ten percent of the members of the unit in which the election is sought support the petition to intervene. The affidavit filed in support of the motion to intervene submitted on behalf of Students Against GSRA Unionization simply states that the group has 371 members. There is no assertion as to how many of this number support the motion to intervene and no authorization cards accompanied that motion. Furthermore, intervention in an election proceeding is only granted when, upon a proper showing of interest, a rival to the labor organization seeking representative status wishes to be included on an election ballot. See

Commission Rule 145(3). The group known as Students Against GSRA Unionization does not seek placement on a ballot. Rather, it seeks to intervene in this proceeding for the purpose of expressing its opposition to our conducting an election, a purpose that it lacks standing to pursue in a representation proceeding. For those reasons, we must deny its Motion to Intervene and for Summary Disposition.

The Attorney General seeks to intervene under MCL 14.28. That statute provides:

> The attorney general shall prosecute and defend all actions in the supreme court, in which the state shall be interested, or a party; he may, in his discretion, designate one of the assistant attorneys general to be known as the solicitor general, who, under his direction, shall have charge of such causes in the supreme court and shall perform such other duties as may be assigned to him; and the attorney general shall also, when requested by the governor, or either branch of the legislature, and may, when in his own judgment the interests of the state require it, intervene in and appear for the people of this state in any other court or tribunal, in any cause or matter, civil or criminal, in which the people of this state may be a party or interested.

The right of the Attorney General to intervene is not unlimited and should be restrained where such intervention is clearly inimical to the public interest. *People v Unger*, 278 Mich App 210, 260-61 (2008) citing *In re Intervention of Attorney Gen,* 326 Mich 213, 217 (1949). See also *Federated Ins Co v Oakland Co Rd Comm*, 475 Mich 286 (2006), where the Attorney General was prohibited from intervening to prosecute an appeal from a lower court ruling that had not been appealed by the losing party.

The Attorney General argues that unionization of the University's RAs "may negatively affect" the University's reputation and competitiveness. We are clearly cognizant of the University's national standing and reputation as a major research institution. However, that is not a factor that we may consider in determining whether the RA's are public employees within the meaning of PERA. If the RAs are not public employees, we have no jurisdiction over their relationship with the University and the matter is at an end. If they are public employees, they are entitled, by law, to seek an election to determine whether they will bargain collectively through a representative of their choice. We cannot consider speculation as to the impact on the University by the RAs potential exercise of a statutory right; it is merely our responsibility to determine whether the RA's have the right to organize under PERA. We find opposition to the exercise of a statutory right is inimical to the public interest.

Although there is no dispute between Petitioner and the University over whether an election should be authorized in this matter, we must determine whether, in light of the Commission decision in *Regents of the University of Michigan*, 1981 MERC Lab Op 777, we have jurisdiction to do so. Thus, we must find whether there has been a material and substantial change of circumstances since the 1981 decision that would justify our further review of the RA's status. Such a review is an investigatory and not an adversarial proceeding. *University of Michigan*, 1970 MERC Lab Op 754, 759. MCL 423.212. We must carry out our statutory

responsibility without interference from non-parties opposed to the very rights provided to public employees by PERA.

Furthermore, the Attorney General is not seeking to intervene in order to advocate for the interest of a State agency. Rather, the Attorney General seeks intervention for the purpose of opposing a policy decision made by the Board of Regents of the University of Michigan, an autonomous State institution. Article VIII, Section 5 of the Michigan Constitution vests the University's Board of Regents with sole responsibility for the general supervision of the University. The Board of Regents adopted a resolution supporting "the rights of University Graduate Student Research Assistants, . . . to determine for themselves whether they choose to organize." It is not our role to determine whether the Regents made the correct policy decision in passing that resolution. A Commission proceeding is not the proper forum for the Attorney General to debate the correctness of a policy decision made by an autonomous State institution, which is not determinative of the decision that we will make in this matter. Moreover, we are not bound by the Regents' assessment of the RAs' status under PERA. We find that it would be inappropriate to allow the Attorney General to intervene for the purpose of opposing a policy decision made by the Regents when that policy decision does not determine the results of our investigation in this matter. We find that such intervention would be unduly disruptive of the proceedings and inimical to the public interest. Accordingly, we deny the Attorney General's motion to intervene.

The Petition for Representation Proceedings

In 1981, the Commission determined that RAs were not employees covered by PERA. *Regents of the University of Michigan*, 1981 MERC Lab Op 777. The petition, here, seeks an election to determine whether RAs should be accreted to the unit from which they were excluded in 1981. In support of its petition, the GEO submitted a copy of a resolution by which the University of Michigan Regents has recognized RAs as "employees." As we observed in our September 14, 2011 decision in this matter:

> 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. Just as independent contractor status cannot be conferred upon an employee by agreement between the employee and an employer, employee status cannot be conferred by agreement upon one who is not an employee under the law. *Cf. Detroit Judicial Council*, 2000 MERC Lab Op 7; 13 MPER 31021 (2000) (no exceptions). We cannot find that RAs are employees based solely upon an agreement between the parties. Absent a showing of a substantial and material change of circumstance, we are bound by our previous decision.

We have carefully considered the Petitioner's motion for reconsideration and the affidavit filed with it. In its motion, Petitioner asserts that the doctrine of res judicata does not apply to a representation matter such as this. We agree with Petitioner's argument that the doctrine of res judicata does not apply to this matter. As explained in *Eastern Michigan Univ*, 1999 MERC Lab

Op 550, 560; 13 MPER 31017 (1999):

> [I]t is normally inappropriate to apply the doctrine of res judicata to a representation proceeding such as this case, barring a showing that the identical factual and legal determination is being relitigated in the subsequent proceeding.
>
> Representation proceedings are nonadversary, information gathering procedures, as distinguished from contested, adjudicatory unfair labor practice cases conducted under Chapter 4 of the Administrative Procedures Act, MCL 24.275, MSA 3.560(175). See *Lake County and Sheriff*, 1999 MERC Lab Op 107, 112. . . . [P]reclusion doctrines such as res judicata and collateral estoppel apply to administrative decisions which are adjudicatory in nature. These doctrines are not designed to apply to bargaining unit determinations that rely on the specific facts presented at a particular time, and on the statute and policies applied by the particular administrative agency. Bargaining units tend to change and evolve over time as the employer's work complement and operations change.

Prior to our September 14, 2011 decision, Petitioner did not offer evidence or specific allegations of fact to indicate that there had been a material change in the circumstances of the RAs relationship with the University in the thirty years since the decision was issued in *Regents of the University of Michigan,* 1981 MERC Lab Op 777. However, they have now submitted an affidavit attesting to facts that may provide a basis for finding that there has been a substantial material change in the RAs' status. Some of the facts attested to in the affidavit, which were not before us when we decided to dismiss the petition for election, suggest that some or all of the RAs presently may possess the necessary indicia of employment to distinguish them from the RAs who were the subject of this Commission's 1981 decision.

Representation cases such as this are investigatory proceedings in which it is our duty to try to find the truth. Now that Petitioner has asserted facts that may indicate there has been a substantial and material change in circumstances since the 1981 decision, it is our statutory obligation to send this matter to an administrative law judge to gather facts with which we can make a final determination as to whether a question of representation may exist.[2] We make no finding as to whether the RAs that Petitioner seeks to represent are employees of the University; however, the assertions in the affidavit submitted by Petitioner persuade us that this matter requires further inquiry under §12 of PERA. Therefore, this case must be referred to a senior administrative law judge to conduct an evidentiary hearing at which Petitioner will have the opportunity to attempt to show that there has been a substantial and material change in circumstances since *Regents of the University of Michigan* was issued. As indicated in our order below, it is Petitioner's burden to show that there has been such a change and it is a heavy burden to meet.

[2] If this were an adversarial proceeding, Petitioner's failure to assert sufficient facts in its initial pleading to support a finding that we have jurisdiction over this matter would result in a dismissal with prejudice. Representation cases are information gathering, rather than adversarial, proceedings.

ORDER

The Motions to Intervene filed on behalf of Students Against GSRA Unionization and by the Attorney General are denied.

The motion for reconsideration is granted, the petition for a representation election filed by the Graduate Employees Organization/AFT, is reinstated, and this 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 of circumstances since the decision in *Regents of the University of Michigan*, 1981 MERC Lab Op 777, as to warrant a finding that some or all of the Graduate Student Research Assistants are employees of the University of Michigan 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.

We direct the administrative law judge to issue a detailed pre-hearing order regarding the disclosure of witnesses and exchange of exhibits in response to which both the Petitioner and the University shall provide relevant information and actively participate in the hearing process. The administrative law judge may call any witnesses and receive any evidence, in addition to testimony and other evidence offered by the Petitioner and the University, as may be probative and relevant, and may, by subpoena, compel the production of evidence. The administrative law judge may receive stipulations of fact from the parties, but shall not accept any stipulation as to the ultimate legal issue of employment status.

If, upon the conclusion of the hearing, the Commission determines from the factual record that some or all of the Graduate Student Research Assistants in question are employees of the University and are covered by PERA, the Commission will direct an election by secret ballot as to those positions only, in a new unit, or as an accretion to an existing unit, or take such other action as may be appropriate.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Nino E. Green, Commission Member

Christine A. Derdarian, Commission Member

Dated: DEC 16 2011

COMMISSION CHAIR CALLAGHAN, CONCURRING IN PART AND DISSENTING IN PART:

For the reasons stated in decision of the majority, I agree with that the Proposed Intervenor, Students Against GSRA Unionization, does not qualify as an intervenor under the Commission's rules and their motion to intervene should be denied. However, I disagree with the majority's decision to grant reconsideration of our September 14, 2011 decision dismissing the representation petition. I would deny the motion for reconsideration and dismiss the Attorney General's motion to intervene as moot. Since the majority is granting reconsideration, I disagree with their denial of the Attorney General's motion to intervene.

The basis for MERC's 1981 opinion, which held that RAs are not employees, but are, instead, students, holds true today. Nothing has materially changed the nature of the mentor-mentee relationship that is so critical to the research function of the University of Michigan as a world class research university. Even though the numbers of RAs and the amount of funding have increased, the essential nature of the mentor-mentee relationship between student and faculty member that is at the core of the university research function remains unaltered. However, that crucial relationship would be placed in peril if this Commission were to reverse its 1981 decision.

This is precisely why University of Michigan President Mary Sue Coleman and nineteen University department heads opposed the resolution by the University Regents declaring that the RAs are employees. In urging the Regents not to adopt the resolution, President Coleman told them that characterizing "research assistants as University employees. . . . could fundamentally alter the relationship between faculty and graduate students." President Coleman, a nationally recognized researcher, also warned, "this matching process and the collegial relationship built on it, are the keys to the recruitment of the very best faculty and staff, and essential to the quality of our graduate education overall." This view was echoed by the June 24, 2011 letter to the provost signed by nineteen current and former deans, which said in part, "We believe that such a union would put at risk the excellence of our university and the success of our graduate student assistants."

Indeed, it is for the aforementioned reasons that this Commission unanimously concluded, in September 2011, that we lack jurisdiction to grant the election petition as the matter has already been determined by our 1981 decision. We must not ignore our previous decision unless there has been a material and substantial change in circumstances that would justify a different result. Neither the petition nor Petitioner's motion for reconsideration has persuaded me that there has been "a substantial and material change of circumstance" since this Commission's 1981 decision on the question of whether the RAs are public employees as defined under PERA.

Just as nothing material has changed since 1981 to alter the prior Commission decision, so too, nothing has changed in the arguments made by Petitioner that would allow us to reconsider our September 14, 2011 decision. Rule 167 of the Commission's General Rules, 2002 MR R 423.167 governs motions for reconsideration and states in pertinent part:

> A motion for reconsideration shall state with particularity the material error claimed . . . . Generally, and without restricting the discretion of the commission, a motion for reconsideration which merely presents the same issues ruled on by the commission, either expressly or by reasonable implication, will not be granted. (Emphasis added)

I have thoroughly reviewed Petitioner's motion and the affidavit filed with it. However, I find nothing in Petitioner's arguments in support of its request for reconsideration that differs significantly from the arguments in the petition. Those arguments were considered and discussed in our September 14, 2011 Decision and Order.

I have also carefully read the University's response to Petitioner's motion. While the University's response does not oppose Petitioner's motion, the two affidavits submitted with that response stress the importance of the RAs' work in the graduate students' educational process. Indeed, both affidavits make it clear that the graduate students' work as RAs is an integral part of gaining the knowledge and skills necessary for them to earn their doctorate degrees. Both affidavits confirm that the following language from *Regents of the University of Michigan*, 1981 MERC Lab Op 777, 785-78, remains true today:

> The nature of RA work is determined by the research grant secured because of the interests of particular faculty members and/or by the student's own academic interest. They are individually recruited and/or apply for the RA position because of their interest in the nature of the work under the particular grant. . . . RAs are substantially more like the student in the classroom . . . . They are working for themselves.

Neither Petitioners' motion for reconsideration nor its supporting affidavit contains sufficient allegations to give us reasonable cause to believe that the RAs might be public employees for whom a question of representation exists. Therefore, I find no basis for ordering a hearing under §12 of PERA. Further, I find no need for the Attorney General's intervention unless reconsideration is granted.

The Motion to Intervene by the Michigan Attorney General

The Attorney General seeks to intervene under MCL 14.28. That statute provides:

> The attorney general . . . shall also, when requested by the governor, or either branch of the legislature, and may, when in his own judgment the interests of the state require it, intervene in and appear for the people of this state in any other court or tribunal, in any cause or matter, civil or criminal, in which the people of this state may be a party or interested.

If I agreed with the decision to grant reconsideration in this matter, I would find the Attorney General's intervention appropriate. As discussed at our August 8, 2011 meeting, given

the parties agreement on the underlying issues, there is no case or controversy to put before an administrative law judge. At that meeting, legitimate concern was expressed over whether the University would present evidence at a hearing that might show facts exist contrary to the Regents' resolution. Petitioner has offered no arguments that might persuade me that an evidentiary hearing in this matter would fully disclose the facts necessary to accurately discern whether the RAs' relationship with the University has substantially changed since the decision in *Regents of the University of Michigan*, 1981 MERC Lab Op 777.

If I agreed with the decision to refer this matter to an administrative law judge for a hearing, I would be concerned that testimony regarding the relevant experiences of the University president, numerous deans and faculty members, and hundreds of RAs might not be presented without the Attorney General's intervention. Indeed, a decision to refer this matter for hearing would appear, to all who oppose the Regents' May 19 resolution, to be a sham if we were to permit only one side of this crucial debate to be proffered at hearing. If I had joined in the decision to refer the matter to an administrative law judge, then in the interests of fairness and due process, I would encourage the majority to grant the Attorney General's motion to intervene for the purpose of ensuring that both sides of this issue were fully and fairly examined. However, it is my opinion that we should not grant reconsideration of this matter.

Edward D. Callaghan, Commission Chair

UNIVERSITY OF MICHIGAN
ANN ARBOR, MICHIGAN 48109-1340

June 24, 2011

Confidential
By Hand Delivery

Provost Philip Hanlon
3074 Fleming Building
503 Thompson Street
Ann Arbor, MI 48109-1340

Dear Phil:

We write to express our deep and collective concern about the potential negative impacts that would result from unionization of the University's graduate student research assistants (GSRA). We believe that such a union would put at risk the excellence of our university and the success of our graduate student research assistants.

Research assistantships provide graduate students with opportunities to develop their research skills while working in a lab or on a project under faculty supervision. As students assist with various aspects of scholarly work, they gain in their capacity for independent research. This is an important part of their academic training. A union would be a third party intervening in the educational program, in the middle between faculty mentors and their students. This would compromise the essential nature of doctoral preparation.

We note that graduate student research assistants are not unionized at the peer institutions against whom the University competes for faculty and graduate students. The Board of Regents in their public statement at the June 16, 2011 meeting included a list of other public institutions at which research assistants are unionized; although they are fine institutions, none of them competes in research at the same level as Michigan. It would be a great loss to the state and the nation if our research efforts were to decline to the quality seen at lesser universities. We worry that a GSRA union would make Michigan an outlier when the best and brightest graduate students compare research opportunities, and when we work to recruit excellent research faculty. A vast majority of the faculty members with whom we have spoken do not support GSRA unionization because of the potential negative impact on their one-on-one relationships with students and the University's competitive position among its peers.

We want to make it clear that we respect the Board of Regents' decision to move to an election, and we are fully committed to a fair and open election process. To ensure a fair and open election process, careful thought must be given to the composition of the bargaining unit, and students must be encouraged to educate themselves on the issues related to unionization

and to participate in the election. We must give faculty and the administration the time and opportunity to state their positions to members of the bargaining unit. It will take time for GSRAs to hear both sides of the story and to educate themselves on the issues, and so it is crucial that there be a reasonable time period before an election. It is also crucial that the election take place during a regular (fall or winter) semester so that all GSRAs are in residence and have an equal and fair opportunity to be informed and to participate in the election. We ask that the university leadership do whatever it can in working with the AFT to ensure a fair and open election within a carefully designed bargaining unit.

Yours truly,

Frank J. Ascione

Frank J. Ascione
Dean and Professor of Social and Administrative Sciences
College of Pharmacy

Deborah Loewenberg Ball

Deborah Loewenberg Ball
Dean, School of Education
William H. Payne Collegiate Professor
Arthur F. Thurnau Professor

Rosina M Bierbaum

Rosina M. Bierbaum
Dean and Professor of Natural Resources and Environmental Policy
School of Natural Resources and Environment

Evan Caminker

Evan Caminker
Dean, and Branch Rickey Collegiate Professor of Law
Law School

Susan Collins
Joan and Sanford Weill Dean of Public Policy
Professor of Public Policy and Economics
Gerald R. Ford School of Public Policy

Paul N. Courant
Harold T. Shapiro Collegiate Professor of Public Policy,
Arthur F. Thurnau Professor
University Librarian & Dean of Libraries

Robert J. Dolan
Edward J. Frey Dean
Stephen M. Ross School of Business

Laura Lein
Dean, and Katherine Reebel Collegiate Professor of Social Work
Professor of Anthropology
School of Social Work

Jeffrey K. MacKie-Mason
Dean, School of Information
Arthur W. Burks Collegiate Professor of Information and Computer Science
Professor of Economics and Public Policy

Terrence J. McDonald
Arthur F. Thurnau Professor,
Professor of History, and Dean
College of Literature, Science, and the Arts

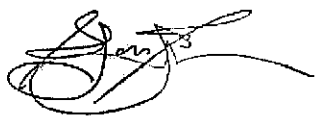
David C. Munson, Jr.
Robert J. Vlasic Dean of Engineering,
Professor of Electrical Engineering and Computer Science,
College of Engineering

Martin A. Philbert
Dean and Professor of Toxicology
School of Public Health

Peter J. Polverini, DDS, DMSc
Professor of Dentistry and Dean
School of Dentistry

Monica Ponce de Leon
Eliel Saarinen Collegiate Professor of Architecture,
Professor of Architecture and Urban Planning and Dean,
A. Alfred Taubman College of Architecture and Urban Planning

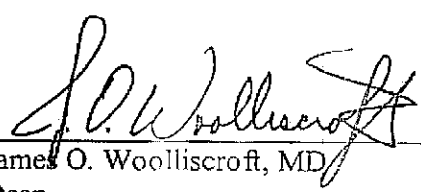
Kathleen Potempa, PhD, RN, FAAN
Dean and Professor
School of Nursing



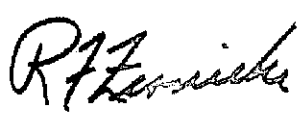
Bryan Rogers
Dean, School of Art and Design

Janet A Weiss

Janet A. Weiss
Vice Provost for Academic Affairs, Graduate Studies, and
Dean, Horace H. Rackham School of Graduate Studies



James O. Woolliscroft, MD
Dean
Lyle C. Roll Professor of Medicine
Medical School



Ronald Zernicke, PhD, DSc
Professor & Dean, School of Kinesiology
Professor, Department of Orthopaedic Surgery &
Department of Biomedical Engineering

TRUE COPY

STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

UNIVERSITY OF MICHIGAN,
Public Employer,

Case No. R11 D-034

-and-

GRADUATE EMPLOYEES ORGANIZATION/AFT,
Petitioner-Labor Organization,

-and-

MELINDA DAY,
Intervenor.
_____/

APPEARANCES:

Christine M. Gerdes, Associate General Counsel, for the Public Employer

Mark H. Cousens, for the Labor Organization

Mackinac Center Legal Foundation, by Patrick J. Wright, for the Intervenor

DECISION AND ORDER DISMISSING PETITION AND DENYING MOTION TO INTERVENE

Pursuant to Sections 12 and 13 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.212 and MCL 423.213, this matter came before the Michigan Employment Relations Commission on a petition for a representation election filed by the Graduate Employees Organization/AFT (GEO or Union). Subsequently, a Motion to Intervene and for Summary Disposition was filed by Melinda Day. Based on the pleadings and briefs filed by the parties on or before August 8, 2011, the Commission finds as follows:

Facts:

On April 27, 2011, the GEO filed a Petition for Representation Proceedings seeking an election among graduate student research assistants (RAs). The GEO seeks to accrete RAs to its existing bargaining unit of graduate teaching assistants (TAs) and

graduate student staff assistants (SAs) at the University of Michigan (U of M or Employer). The petition describes the RAs that Petitioner proposes to include in, and those it intends to exclude from, the bargaining unit as follows:

> A graduate student research assistant (GSRA) is a graduate student who is employed to conduct or assist in the conducting of research of a scholarly nature which benefits the University, a faculty member, academic staff supervisor, granting agency, or any other agent or unit of the University. Duties of GSRAs may include, but are not limited to, the gathering and analyses of data, the development of theoretical analyses and models, the production or publication of scholarly journals and research reports, and the maintenance of laboratories and equipment. Research conducted by such an employee may be academically relevant to his or her academic program and may also benefit the employee and be used in his/her dissertation or other academic work.
>
> Excluded are:
> 1. Graduate students who are compensated to conduct or assist in the conducting of research of a scholarly nature which meets both of the following conditions:
>   a. does not benefit the University, a faculty member, academic staff supervisor, granting agency, or any other agent or unit of the university; and
>   b. is used in his/her dissertation or other personal academic product.
> 2. Supervisors
> 3. Confidential employees
> 4. All other employees.

On May 19, 2011, the University of Michigan's Board of Regents, by a vote of six to two, adopted a resolution supporting the right of RAs to determine for themselves whether to organize into a union. The resolution also stated that the Regents recognized the RAs as "employees." The Employer and the Union have presented a Consent Election Agreement to us for approval in order that the parties may proceed with an election and possible certification of the GEO as the RAs' representative in bargaining under PERA.

Melinda Day is a member of the proposed bargaining unit and seeks to intervene in this proceeding under Rule 145(3) of the General Rules of the Michigan Employment Relations Commission, 2002 AACS, R 423.145(3). She also requests that the representation petition be dismissed for lack of subject matter jurisdiction. The Union filed a motion in opposition to Day's motion to intervene on August 3, 2011.[1]

[1] On the same date, the Employer and the Union executed the Consent Election Agreement, which further defines the proposed bargaining unit and clarifies that it would be a separate unit of RAs rather than an accretion to the existing unit represented by the GEO.

Discussion and Conclusions of Law:

The Petition for Representation Proceedings

In a 1981 unfair labor practice case involving these same parties, the Commission determined the employment status of approximately 2,000 graduate students who had appointments as graduate student assistants. There, the Commission reviewed the nature of the employment of each of the three types of graduate student assistants: the TAs, who teach certain undergraduate courses; the SAs, who counsel undergraduates, advise them on course selections, and provide other professional and quasi-professional support services; and the RAs, who perform research under the supervision of a faculty member who is the primary researcher of a research grant. The Commission majority concluded that the TAs and SAs were employees under PERA, but the RAs were not. *Regents of the University of Michigan*, 1981 MERC Lab Op 777. Their conclusion relied, in part, on the decision in *Regents of the Univ of Michigan and Univ of Michigan Interns-Residents Assn*, 1971 MERC Lab Op 270, in which the Commission explained that the key to determining whether medical residents were employees was whether the "work is being performed in a 'master-servant' relationship or whether the person performing the work does so as his own 'master.'" In the 1981 case, the Commission majority explained at 1981 MERC Lab Op 785 -786:

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

In the instant proceeding, a petition was filed seeking an election to determine whether RAs should be accreted to the unit from which they were excluded in 1981. In support of its petition, the GEO has submitted a copy of the resolution by which the U of M Regents recognize RAs as "employees." Subsequently, the parties signed a Consent Election Agreement that embodies that recognition and seeks our approval of the formation of a separate unit of RAs. Usually, we do not inquire into the nature of an employment relationship or the legality of a bargaining unit 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. Just as independent contractor status cannot be conferred upon an employee by agreement between the employee and an employer, employee status cannot be conferred by agreement upon one who is not an employee under the law. *Cf. Detroit Judicial Council*, 2000 MERC Lab Op 7; 13 MPER 31021 (2000) (no exceptions). We cannot find that RAs are employees based solely upon an agreement between the parties. Absent a showing of a substantial and material change of circumstance, we are bound by our previous decision.

Because Commission jurisdiction cannot be conferred by an agreement between the parties, a certification based upon the Petition that is before us would be vulnerable if challenged in the future. Were we to hold an election and certify the accretion of RAs to the existing unit of TAs and SAs or a separate unit of RAs, the certification would be subject to challenge in the event of a change of sentiment by the Employer as a result of change in the composition of the Employer's governing body or because of conflict between the Employer and the Union. If an unfair labor practice were charged after the parties, believing themselves to be in a legitimate collective bargaining relationship, had embarked on a series of transactions, questions about the Commission's jurisdiction over this matter could call into question the legitimacy of those transactions. On the record before us, we are not willing to allow the parties to proceed at their peril.

Having previously determined that RAs are not employees entitled to the benefits and protection of PERA, we decline to declare that they have become 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. However, if the parties agree that we should do so, we are willing to conduct an election as a service to the parties, and tabulate the results of that election without certifying representative status under PERA. The parties also remain free to utilize the services of the American Arbitration Association, or any other agency of their choosing, to conduct such an election.

The Motion to Intervene

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. For that reason alone, we

must deny Day's Motion to Intervene and for Summary Disposition.

ORDER

The petition for representation election filed by the Graduate Employees Organization/AFT, in this matter is hereby dismissed. The Motion to Intervene filed by Melinda Day is denied.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Edward D. Callaghan, Commission Chair

Nino E. Green, Commission Member

Christine A. Derdarian, Commission Member

Dated: SEP 14 2011

STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

REGENTS OF THE UNIVERSITY OF MICHIGAN

Respondent,

Case No.: R11 D-034

and

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

Petitioner.

Mark H. Cousens (P12273)
Attorney for Graduate Employees Organization, AFT, AFL-CIO
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MOTION FOR RECONSIDERATION

The Petitioner moves for reconsideration of the decision of the Commission dated September 14, 2011. The reasons this motion should be granted are set forth in the annexed brief and affidavit.

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October 3, 2011

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STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

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Brief in Support of Motion for Reconsideration

Introduction

A.

The Graduate Employees Organization, AFT MI, AFT, AFL-CIO, requests that the Commission reconsider its decision to dismiss this petition. The Commission is not bound by *res judicata*; even if it were, the present facts are not the same as those existing in 1981. The role of the Research Assistant is vital to the University's goals as a research institution. The work these individuals do is part of the University's objectives; they are employees.

B.

In dismissing the petition, the Commission reacted incorrectly only to job *titles* while disregarding what the parties had told it about job *duties*. The consent election agreement confirmed the parties mutual understanding that the job duties of Research Assistants made

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them employees. These parties are closest to the facts. And both the University and the Union know that Research Assistants are employees based on the nature of their job duties and the manner of their relationship with the University.

The parties did not present facts to support the consent agreement because they were not asked to do so. Instead, the Commission acted spontaneously. Neither party was able to inform the Commission regarding the nature of the Research Assistant; the process did not permit a presentation of facts.

This motion, and the supporting affidavit, presents the Commission with the facts which justify the statement of the University Regents regarding Research Assistants. These facts–available to the public–confirm what both the Regents and the Petitioner know. Research Assistants are employees because their job duties and their job obligations are those of an employee. The affidavit, coupled with the statement of the Board of Regents, provides an ample factual basis to grant reconsideration and order an election.

Facts

A. The Facts

1.

An affidavit has been provided which presents to the Commission facts of which the Commission should take official notice. These facts demonstrate why this case is different than that previously considered. The University has always emphasized research; but research now is a principal product of the institution. As the affidavit reflects, research grants to the University now exceed 1.5 billion dollars. Research is conducted in virtually every department

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of every College or School. The University has a Vice President for Research. This officer presides over a large department, overseeing multiple research units which emphasize a vast variety of different matters. Research is not just adjunct to the University. It is at the core of the institution's existence.

2.

Research Assistants are essential to the research goals of the University. These persons are graduate students, to be sure. But the work they do is of critical importance; it is not just make-work. The research assistants may well be working on projects which are related to their area of study. It is possible that these projects will be used as parts of Ph.D. dissertations. But the research product produced by Research Assistants is always part of the overall goal of the University.

B. New Facts

While this issue was addressed in the 1981 decision, the circumstances surrounding use of Research Assistants have changed. In 1981, Research Assistants were very often focused on their own dissertations. Research funding was found to, essentially, finance a Ph.D. thesis. Now, the University's focus on research is so substantial that the research would be done whether the University used Research Assistants or not. The research projects are part of the University's mission. Funding graduate students is important but that is not why the research is done.

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Argument

A. Official Notice of Common Facts

MERC may take "...official notice of judicially cognizable facts...". MCL 24.277. See e.g., *76th Judicial District Court*, 8 MPER ¶ 26047; 1995 WL 17944115. It should do so here

The University has used the internet to make comment about itself and its activities. These comments include a vast amount of information on many different matters. The affidavit which is attached cites to the Commission the University's own words and its own rules. The Commission should readily presume that what the University says about itself is true.

B. *Res Judicata* Does Not Apply

The Commission voted to dismiss the petition here because it felt bound by the doctrine of *res judicata*. The doctrine does not act as a bar to a court or agency considering an issue previously addressed. Rather, *res judicata* is an *affirmative defense* which may be plead against a party. Moreover, the doctrine does not apply because the parties recognize that the facts now are not the same as the facts existing in 1981.

1.

Res judicata is a defense to an action, not a restriction on judicial decision making. *Sloan v. Madison Heights,* 425 Mich. 288, 292-293 (1986) ("The trial court granted FOP's motion to intervene on September 8, 1982. In an amended answer, the city alleged the affirmative defense of *res judicata*."). An affirmative defense may be waived or disregarded as long as it is non-jurisdictional. Indeed, an affirmative defense has to be asserted.

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Here, the Employer is not asserting that the 1981 decision binds either party. Absent the assertion of that defense, the Commission is free to accept the stipulation. And it is not required to follow its 1981 decision because neither party is making that request.

2.

The facts today are different than those extant in 1981. Thus the doctrine of *res judicata* would not apply even if it were asserted. In *Labor Council, Michigan Fraternal Order Police v Detroit*, 207 Mich. App. 606, 608 (1994) the Court of Appeals affirmed a decision of this Commission (1992 MERC Lab Op 76, 78) in which it declined to apply the doctrine as facts had changed:

> "Res judicata is the doctrine that bars a subsequent action between the same parties when the facts or evidence essential to the maintenance of the two actions are identical. *Old Kent Bank of Holland v Chaddock, Winter & Alberts*, 197 Mich. App 372, 379; (1992). However, if the facts change, or new facts develop, res judicata will not apply. *In re Pardee*, 190 Mich. App. 243, 248 (1991).
>
> "In this case, there was a change in circumstances after the 1986 opinion was released. In 1988, a contingency plan was adopted to provide for certain action to be taken in the event of a work slowdown or stoppage by the DFOs. The change in the new plan was significant enough to warrant full review of the dispute and render the doctrine of *res judicata* inapplicable."

C. Research Assistants are Employees

1.

Applying common law principles, Research Assistants are employees. PERA states that an employee is:

> "...a person holding a position by appointment or employment in the government of this state, in the government of 1 or more of the political subdivisions of this state, in the public school service, in a public or special

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> district, in the service of an authority, commission, or board, or in any other branch of the public."
>
> MCL 423.201(e)

Research Assistants meet this definition. First, it is clear that they hold positions of employment. They are not simply given money without the obligation to earn it. Funding of Research Assistants is provided only in exchange for services.

Second, Research Assistants may benefit from their work both in an academic and economic sense but so does the University. The work of the Research Assistant is of special value to a project. A grant might be secured to fund a Ph.D. dissertation. *Nevertheless, the grant was awarded because the funding entity wanted the research performed.* Money is not just given to the University as charity. A grant must be awarded; it cannot be demanded. So, a faculty member may well submit a grant application knowing that the funding will help a graduate student earn a Ph.D. But the research performed is provided to the funder pursuant to the provisions of the grant. In short, the funder pays for a product; the University–with the help of the Research Assistant–provides it.

Third, no one should assume that all Research Assistants are working on matter that is essential to their graduate studies. Many Research Assistants are just that–Research Assistants. They do the work necessary to the project to which they are assigned even though the grants under which they are funded may have nothing to do with their areas of study. Some Research Assistants perform the work because they need the money. They are hired because they are qualified.

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2.

Michigan applies the "economic reality" test to determine whether a person is an employee. This common law test is used in all circumstances outside that of Worker's Disability Compensation claims as that statute has its own definition. But, for all other purposes, the common law test is applied:

> "The courts of this state generally apply the economic reality test when determining the employment status of an individual. Id. That test requires the consideration of the following factors: "(1) [the] control of a worker's duties, (2) the payment of wages, (3) the right to hire and fire and the right to discipline, and (4) the performance of the duties as an integral part of the employer's business towards the accomplishment of a common goal." Id., quoting *Askew v Macomber*, 398 Mich. 212, 217-218; 247 NW2d 288 (1976). None of the individual factors of the economic reality test are determinative. *Id.*

Hill v. Sears Roebuck & Co., 2011 Mich. App. LEXIS 979 (2011)

In *Hoste v. Shanty Creek Mgmt., Inc.*, 459 Mich. 561, 568 (Mich. 1999) the Court of Appeals summarized the common law standards to separate an independent contractor from an employee as follows:

> "First, what liability, if any, does the employer incur in the event of the termination of the relationship at will?
>
> "Second, is the work being performed an integral part of the employer's business which contributes to the accomplishment of a common objective?
>
> "Third, is the position or job of such a nature that the employee primarily depends upon the emolument for payment of his living expense?
>
> "Fourth, does the employee furnish his own equipment and materials?
>
> "Fifth, does the individual seeking employment hold himself out to the public as one ready and able to perform tasks of a given nature?
>
> "Sixth, is the work or the undertaking in question customarily performed by an individual as an independent contractor?

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> "Seventh, control, although abandoned as an exclusive criterion upon which the relationship can be determined, is a factor to be considered along with payment of wages, maintenance of discipline and the right to engage or discharge employees.
>
> "Eighth, weight should be given to those factors which will most favorably effectuate the objectives of the statute. [*Id.* at 208-209.]"

Of these, 2, 3, 4, 6 and & are especially relevant. The work performed is critical to the University. The work performed by Research Assistants is of value to the Employer even if it is also of value to the employee. However, the existence of a "common objective" does not contraindicate employment status.

The Research Assistants need the income from the project to support their living expenses. The money paid to them is not an honorarium; it is a wage that is determined by the pattern set by the collective bargaining agreement covering Graduate Student Instructors and Staff Assistants.

The Research Assistants are provided tools and equipment by the University. The items needed for a project will vary widely; some will require a screwdriver, others a computer. But in each case the Research Assistants are issued the tools and material needed; the Research Assistants do not provide it themselves.

No Research Assistant claims to be an independent contractor.

3.

The University acknowledges that Research Assistants are employees; it treats them like employees. The University's own rules provide Research Assistants with benefits that can only

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be offered to persons who are employees. Perhaps no test is more dispositive than the University's recognition of the Family Medical Leave Act. Http://www.hr.umich.edu/acadhr/grads/gsra/benefits.html#vacation. The University acknowledges that Research Assistants may obtain FMLA leave if they otherwise qualify (i.e. hours worked and the existence of a serious health condition). This statutory right is *only* available to employees. CFR 825.110 (a). No student has a right, under FMLA, to take leave from studies; the statute only applies to employment. The University's recognition of this right confirms that the University recognizes the employment status of Research Assistants.

The University requires that Research Assistants take the oath that is required only of employees. SPG 201.17. No student is required to take an oath but *all employees–including Research Assistants* – are so required.

The University, in its electronic representation of itself and through the Board of Regents' resolution of May 19, 2011, has acknowledged that Research Assistants are employees. None of this information was included in the record adduced prior to the 1981 decision because the internet did not exist and the University was less than forthcoming about its employment practices. This information, now, provides an adequate basis for the Commission to decline to be bound by its 1981 decision; that ruling is simply obsolete. Things have changed in thirty years.

D. The Regents' Resolution is Authoritative

The May 19, 2011 resolution of the Board of Regents of the University is authoritative with regard to its factual basis. It is not an effort to confer jurisdiction; it is an exercise of the Regents' responsibility to superintend the affairs of the University.

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1.

Article VIII, sec. 5 of the Constitution of 1963 states in pertinent part:

> "The regents of the University of Michigan and their successors in office shall constitute a body corporate known as the Regents of the University of Michigan; the trustees of Michigan State University and their successors in office shall constitute a body corporate known as the Board of Trustees of Michigan State University; the governors of Wayne State University and their successors in office shall constitute a body corporate known as the Board of Governors of Wayne State University. *Each board shall have general supervision of its institution and the control and direction of all expenditures from the institution's funds.* (Emphasis added)"

The resolution of May 19, 2011 was an exercise in the plenary authority of the Regents. In declaring that Research Assistants were employees, the Regents did not seek to confer jurisdiction on the Commission. Rather, this was an express *finding* and an express *determination of fact*. The Regents have the responsibility to supervise the institution. In adopting the resolution, the Regents confirmed facts known to them. They were aware of the factual basis for their determination.

The Commission should not go behind the determination of the University. The ultimate authority with regard to the actions of the University has informed the Commission that Research Assistants are employees. That conclusion should, in this instance, be sufficient.

2.

The Commission will customarily defer to the determination of an employer with regard to placement of employees in a bargaining unit if the decision is reasonable. *Detroit Public Schools 24* MPER ¶ 8.2011 WL 2178624. The Commission does not micro-manage unit placement because an employer is presumed to know whether a position has a community of interest with a bargaining unit. This situation is not dissimilar.

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Here, the University of Michigan has stated that it has concluded that the Research Assistants are employees. This determination is bottomed on the Regents' authority to supervise the institution. No party is disputing the accuracy of this conclusion. The Employer and the Union have told the Commission that there is an adequate factual basis for the Regents' decision. Given, that, and with respect, the Commission should not have *sua sponte* dismissed the petition.

Conclusion

The Commission should reconsider the decision announced on September 14, 2011 and direct an election for the unit described in consent election agreement and in the manner described in that agreement. The Commission is not bound by *res judicata* given that neither party is asserting that doctrine. And, as the Regents have found, there is sufficient disparity of facts between the 1981 record and that extant today. Research Assistants are employees.

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STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

REGENTS OF THE UNIVERSITY OF MICHIGAN

Respondent,

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and

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

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Affidavit of Andrea M. Jokisaari

STATE OF MICHIGAN)
)ss
COUNTY OF WASHTENAW)

A. This Affidavit

1. My name is Andrea M. Jokisaari. I am a graduate student research assistant at the University of Michigan

2. I make this affidavit based upon personal knowledge and I am competent to testify to the matters stated.

3. The University of Michigan maintains a very large number of internet sites which contain considerable information about the University, its Colleges, Schools and Departments.

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4. I have examined many of these sites to determine what information the University makes available to the public at large.

5. What follows is a compilation of statements the University makes about itself and its programs.

6. Each statement is cited to its source.

7. The Commission should take official notice of these statements.

B. Research at the University of Michigan

1. The University of Michigan is a publicly-chartered, state-assisted institution with its main campus located in Ann Arbor.

http://research.umich.edu/quick-facts/overview-of-u-m-research-and-scholarship/

2. The Ann Arbor campus enrolls about 41,000 students and includes professional schools in Dentistry, Law, Medicine, and Pharmacy. Two branch campuses conduct research and provide undergraduate education. UM-Dearborn has about 8,725 students, four schools and colleges. UM-Flint has four schools, 6,500 students.

Id.

3. Research is central to the University's mission and permeates its schools and colleges.

Id.

4. The Office of the Vice President for Research (OVPR) and the Division of Research Development and Administration (DRDA) have central responsibility for administration and support of research activity by the faculty. *(http://research.umich.edu/ovpr/)*

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5. University research expenditures for 2009-2010 totaled $1.14 billion, an increase of 12% over the previous fiscal year. (See Annual Reports for details.) These expenditures were divided by source as follows:

   a. United States Government — $751 million

   b. University of Michigan Funds — $282 million

   c. Industry — $39 million

   d. Foundations — $25 million

   e. State, Local, and Other Governments — $3.8 million

(http://research.umich.edu/quick-facts/)

6. The disciplinary reach of the University's research programs is exceptional. Research is conducted within the nineteen academic schools and colleges. Only agriculture is not represented among them, and even this discipline receives basic research attention in the biology units and the School of Natural Resources and Environment.

Id.

7. The University of Michigan is noted for its interdisciplinary research initiatives, such as nanoscience and technology, energy, and life sciences that involve faculty from many units on campus, including the Medical School, College of Engineering and the College of Literature, Science, and the Arts.

Id.

8. Several large-scale research institutes outside the academic units conduct full-time research, usually focused on long-term interdisciplinary problems. The Life Sciences Institute is one, with a new building that opened in 2004. The Michigan Memorial

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Phoenix Energy Institute is another all-campus interdisciplinary effort launched in 2006.

Id.

9. These institutes join numerous research museums, libraries, laboratories, centers, and other units to form a vast network of research resources. Notable resources include astronomy observatories in Michigan, Arizona, and Chile, and the Biological Station on Douglas Lake in Northern Michigan.

Id.

10. Excellence in research is a crucial element in the University's high ranking among educational institutions. National surveys consistently rank the University's professional schools among the top 10, reflecting a research record of important publications and other contributions to the advancement of scholarship

Id.

C. Research Assistants Are Treated As Employees

1. There are about 2200 Graduate Student Research Assistants employed at the University in the several Colleges and Schools.

2. The University maintains a "Standard Practice Guide" which relates to a wide variety of activities. *http://spg.umich.edu/*

3. Certain employment standards are incorporated into the Guide

4. Some of these standards apply to Research Assistants. This includes that Research Assistants:

   a. Have the right to access to the non collective bargaining grievance procedure (201.08);

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b. Have the right to be protected against discrimination based on race, gender and other factors (201.35);

c. Have the right the right to be provided protective clothing and equipment when necessary for completion of a task (201.45);

d. Have the obligation to obtain a security clearance if required for work on the project to which they are assigned (201.53);

e. Have the obligation to avoid conflicts of interest (201.65);

f. Have the obligation to comply with rules prohibiting sexual harassment (201.89-0);

5. Research Assistants are required to execute the oath required of all employees to support the Constitution of the United States. SPG 201.17 states:

Consistent with the constitutional requirement of the State of Michigan, all University staff members, as a condition of employment, shall swear to and sign the following employee oath:

> "I do solemnly swear (or affirm) that I will support the Constitution of the United States of America and the Constitution of the State of Michigan. And that I will faithfully discharge the duties of my position, according to the best of my ability."

6. Research Assistants are paid a wage. The amount paid is usually patterned after the wage scale contained in the collective bargaining agreement between the Graduate Employees Organization and the University.

7. Taxes and FICA are deducted from the wage. This is required by law.

http://www.finops.umich.edu/system/files/Tax_Help_2011.pdf

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8. Research Assistants are eligible for leave under the Family Medical Leave Act if they otherwise meet the requirements of the statute.

http://www.hr.umich.edu/acadhr/grads/gsra/benefits.html#vacation.

9. Only employees are eligible to access rights under FMLA See CFR 825.110 [(a) An "eligible employee" is an employee of a covered employer who: (1) Has been employed by the employer for at least 12 months...]

10. Research Assistants are provided emoluments of employment. These include employer paid health care and, sometimes, paid vacation.

http://www.hr.umich.edu/acadhr/grads/index.html

11. Research Assistants do not own the product of their research. The research product is provided as required by the research grant. Standard Practice Guide 303.4(D) states:

> "The University will not generally claim ownership of Intellectual Property created by students. (A "student" is a person enrolled in University courses for credit except when that person is an Employee.) However, the University does claim ownership of Intellectual Property created by students in their capacity as Employees. Such students shall be considered to be Employees for the purposes of this Policy. Students and others may, if agreeable to the student and OTT, assign their Intellectual Property rights to the University in consideration for being treated as an Employee Inventor under this Policy."

12. Not all Research Assistants work in areas which are directly related to their academic interests. Some Research Assistants are performing work which will be of no value to their graduate studies or their Ph.D. dissertation. For example, Research Assistant J.P. has been employed on projects that are unrelated to his academic interests. Research

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Assistant I.I.O. is working on a project which will be used in part for his academic interests but will also be published in scholarly journals unrelated to his area of study.

ANDREA M. JOKISAARI

Subscribed and sworn to before me
this _____ day of October, 2011

_____

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