**STATE OF MICHIGAN**
**IN THE COURT OF APPEALS**

IN THE MATTER OF:

Court of Appeals No. 307959

UNIVERSITY OF MICHIGAN,
Appellee Public Employer,

Michigan Employment Relations Commission No. R11 D-034

And

GRADUATE EMPLOYEES ORGANIZATION/AFT,
Appellee Petitioner Labor Organization,

And

STUDENTS AGAINST GSRA UNIONIZATION,
Proposed Intervenor,

And

MICHIGAN ATTORNEY GENERAL,
Appellant Proposed Intervenor.
_____/

# APPELLEE PUBLIC EMPLOYER UNIVERSITY OF MICHIGAN'S ANSWER TO THE ATTORNEY GENERAL'S EMERGENCY MOTION TO STAY ADMINISTRATIVE PROCEEDINGS, AND MOTION FOR IMMEDIATE CONSIDERATION OF STAY MOTION AND EMERGENCY APPLICATION FOR LEAVE TO APPEAL UNDER MCR 7.211(C)(6)

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Dated: January 20, 2012

TABLE OF CONTENTS

NOW COMES the Appellee Public Employer University of Michigan and in answer to the Attorney General's Emergency Motion to Stay Administrative Proceedings, and Motion for Immediate Consideration of Stay Motion and Emergency Application for Leave to Appeal Under MCR 7.211(C)(6), states as follows:

## INTRODUCTION

The Attorney General seeks leave to appeal from an interlocutory order of the Michigan Employment Relations Commission ("MERC" or "Commission") denying his intervention in representation proceedings between the Graduate Employees Organization/AFT ("GEO" or "Petitioner") and the Public Employer, the University of Michigan. The Attorney General asks this Court to stay the administrative proceedings while his Application for Appeal is pending. That request should be denied because (1) the Rule cited by the Attorney General does not support the relief sought; (2) it is unlikely that the Attorney General will prevail on the merits; (3) there has been no showing of irreparable harm in the absence of a stay; and (4) granting a stay would be contrary to the public interest.

## LEGAL ARGUMENT

### A. MCR 7.209(H)(2) Does Not Support Imposition of a Stay

MCR 7.209(H)(2) – the Rule upon which the Attorney General relies – does not provide the relief he seeks. MCR 7.209(H)(2) concerns the "Stay of Execution" of an "order or judgment" of a lower court, the type of stay that preserves the status quo. The Attorney General does not ask for a stay to preserve the status quo. Quite the contrary, the status quo precedent to the order denying the Attorney General's intervention did not allow the Attorney General to intervene. Here, the Attorney

General is not asking that any order or judgment be stayed; he seeks instead a stay of the trial court proceedings, so that he can seek to change the status quo.

Furthermore, MCR 7.209(A)(2) prevents the Attorney General from filing a Motion for Stay before this Court. *See* MCR 7.209(A)(2)("A motion for bond or for a stay pending appeal may not be filed in the Court of Appeals unless such a motion was decided by the trial court.") Because the Commission has not entered an order denying a Motion to Stay, the Rules do not permit him to request a stay from this Court.

B. **The Attorney General is Not Likely to Prevail on the Merits.**

It is axiomatic that a stay should not be granted if the moving party is not likely to prevail on the merits. For all of the reasons set forth in Appellee's Answer to the Attorney General's Application for Leave to Appeal, a stay would be improvident. Most significantly, the Attorney General's intervention would arrogate the University of Michigan Board of Regents' Constitutional mandate to protect the interests of the University. *See* Mich Const. 1963 Art. VIII, § 5. As is clear from his arguments, the Attorney General wants to intervene in order to save the University from itself. He would intervene to oppose the Regents on a matter of University policy. Even assuming that he is correct in asserting that the Regents' decision is harmful to the University and thus the public – he is not correct – the Attorney General is constitutionally prohibited from intervening in the administrative proceedings to argue those assertions

C. **There is No Risk of Irreparable Harm to the Moving Party**

The Attorney General's request for a stay should also be denied because he has not demonstrated that any harm—let alone irreparable harm—would occur if the administrative proceedings continued. The Attorney General argues that the Commission erred in denying his request to intervene as an adversary to the union, who would present evidence in opposition. But,

the administrative proceedings are representation proceedings, and the Commission has clearly explained that the review "is an investigatory and not an adversarial proceeding." (December 16, 2011 Order at 4). Thus, the Commission held:

> 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. (December 16, 2011 Order at 7).

In keeping with this instruction, Administrative Law Judge Julia C. Stern specifically advised the Attorney General that as part of her fact-finding role she will:

> solicit the Attorney General's input, after the parties have presented their evidence at the hearing, as to whether there is other evidence which might be of assistance to the Commission in making its decision. (ALJ Stern Correspondence to Assistant Attorney General Kevin J. Cox, December 27, 2011).

Because the proceedings are investigative and not adversarial, the Attorney General's participation as an "adversary" to the union was wholly unnecessary. Thus, the Commission and Judge Stern made it clear that the Attorney General can participate in the fact-finding process in a manner befitting a fact-finding process. (Id.).

Moreover, as the Commission has made clear, there are no foregone conclusions here. The Commission could decide that GSRA's are not employees under PERA, rendering the Attorney General's concerns moot. Conversely, even if this Court were ultimately to conclude that the Attorney General is correct, both with respect to his right to intervene and with respect to the hypothesized "one-sided" presentation of facts leading the Commission to find that GSRA's are employees under PERA, this Court would have the power to remand this matter to the Commission for further proceedings with the involvement of the Attorney General.

### D. **A Stay Would be Contrary to the Public Interest**

The Regents of the University of Michigan have determined that Graduate Student Research Assistants should be allowed to vote to determine if they should be represented by a union. The Michigan Employment Relations Commission, pursuant to PERA, has begun a process mandated by law to determine if these individuals are entitled to the benefits of that Act. The public interest, as determined by the People, through the powers vested in the Regents under the Constitution of the State of Michigan and by our State Legislature in its enactment of PERA, would be harmed by any Order delaying that process.

## CONCLUSION AND RELIEF REQUESTED

The University of Michigan respectfully requests that this Court deny the Attorney General's request to stay the administrative proceedings.

Respectfully submitted,

FINK + ASSOCIATES LAW

By: /s/ David H. Fink

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**PROOF OF SERVICE**

I hereby certify that on January 20, 2012, I electronically filed the foregoing paper with the Clerk of the Court using the electronic court filing system which will send notification of such filing to Mark Cousens, Esq., who is included in the List of Approved E-mail Addresses for E-Service, and upon the following, via US Mail:

| | |
|---|---|
| Bill Schuette, Esq.<br>Michigan Attorney General<br>525 W. Ottawa Street<br>P.O. Box 30212<br>Lansing, Michigan 48909 | Richard A. Bandstra, Esq.<br>Chief Legal Counsel<br>525 W. Ottawa Street<br>P.O. Box 30212<br>Lansing, Michigan 48909 |
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I declare under the penalty of perjury that the statements made above are true to the best of my knowledge, information, and belief.

/s/ Cheryl A. Pinter___

Dated: January 20, 2012 Cheryl A. Pinter