

NATIONAL LABOR RELATIONS BOARD

In the Matter of:

THE TRUSTEES OF COLUMBIA IN
THE CITY OF NEW YORK

Employer,

and

GRADUATE WORKERS OF
COLUMBIA-GWC, UAW

Petitioner.

Case No. 2-RC-143012

November 20, 2015

PETITIONER'S OPPOSITION TO
EMPLOYER'S CONDITIONAL REQUEST FOR REVIEW

I. Introduction

The Petitioner, Graduate Workers of Columbia-GWC, UAW (“the Union”) seeks to represent a unit of student employees who provide instructional and research services for Columbia University (“the Employer” or “the University”). The Regional Director initially dismissed this petition, by Order dated February 6, 2015, based on the holding of Brown University, 342 N.L.R.B. 483 (2004), that student employees are not entitled to the protection of the Act. The Board promptly granted the Petitioner’s Request for Review, and a hearing was held on 12 dates between March 31 and June 8, 2015. On October 30, 2015, following the submission of briefs, the Regional Director again dismissed, finding that she was still “compelled” to follow the precedent of Brown. Nevertheless, in her decision, the Regional Director addressed issues related to whether, if the the Board overrules Brown, the petitioned-for unit would be appropriate. Specifically, she found that undergraduate and Master’s Degree students who perform instructional or research services should be included in a unit with Ph.D. students who perform similar services, and that graduate assistants whose compensation is funded by “training grants” should also be included in any unit deemed appropriate (Dec. 29-31).¹

The Petitioner filed a timely Request for Review of the Regional Director’s Supplemental Decision, arguing that the Board should grant review, overrule Brown, and direct an election in the unit sought in the petition. The Employer filed a

¹ References to the record in this proceeding shall be indicated as follows:
Supplemental Decision and Order Dismissing Petition Dec. (followed by page number)
Transcript Tr. (followed by page number)
Employer Exhibits Er. Ex. (followed by Exhibit number)
Petitioner Exhibits Pet. Ex. (followed by Exhibit number)
Conditional Request for Review of [Employer] Er. Req. Rev. (followed by page no.)

“Conditional” Request for Review, contending that, if the Board grants the Petitioner’s Request for Review, the Board should also review the Regional Director’s findings regarding the scope of the unit. The Employer argues that, if Brown is overruled, the unit should exclude Master’s and undergraduate student employees and those whose compensation is funded by training grants. As set forth below, the Regional Director’s findings with respect to the unit involve nothing more than the routine application of traditional community of interest standards. There are no “compelling reasons” to grant review with respect to those questions. Therefore, the Employer’s Conditional Request for Review should be denied.

II. The Regional Director Correctly Concluded that Master’s and Undergraduate Student Employees Share a Community of Interest with Doctoral Student Employees

The Employer argues, variously, that the Regional Director failed to follow applicable precedent when she decided that the Master’s and undergraduate student assistants share a community of interest with doctoral student assistants and that there is no controlling precedent on this issue.² On the contrary, the Regional Director’s decision correctly applies traditional community of interest criteria. Her application of those criteria reveals that existing precedent regarding community of interest standards is adequate to determine the appropriate scope of bargaining units of student assistants. Therefore, review of the Regional Director’s decision on this issue is not warranted.

² At the beginning of this section of its Request for Review, the Employer argues that there is “no direct precedent regarding the standard for determining an appropriate bargaining unit of graduate students...” (Er. Req. for Rev. at 5). Undeterred by this lack of precedent, the Employer argues on the next page that the decision is “contrary to Board precedent...” (Er. Req. for Rev. at 6).

The Regional Director made the following findings with respect to the undergraduate and Master's degree students:

1. On average, they work in petitioned-for positions for a shorter period of time than doctoral student assistants.
2. During the periods when they work in these classifications, they perform "duties identical or nearly identical to doctoral student assistants."
3. They often work "side-by-side with doctoral students."
4. Undergraduate students receiving assistance in "help rooms" cannot tell whether the student providing the assistance is enrolled in a doctoral program.
5. They receive less compensation than the doctoral student assistants.

(Dec. 30). These are all appropriate factors to consider in a community of interest analysis. E.g., Specialty Healthcare & Rehabilitation Center of Mobile, 357 N.L.R.B. No. 83 (2011), *enfd. sub nom. Kindred Nursing Centers East v. NLRB*, 727 F.3d 552 (6th Cir. 2013). After considering these factors, the Regional Director concluded that all of the student employees who provide instructional or research services share a sufficient community of interest to be included in an appropriate unit. There are no "compelling reasons" for the Board to second guess this conclusion.

The Employer argues that the Regional Director erred in finding that the Master's and undergraduate student assistants perform duties that are nearly identical to the duties performed by doctoral student assistants. This argument lacks merit for several reasons. First, the Employer has not requested review of the Regional Director's factual findings and does not contend that they are "clearly erroneous on the record." Rules

and Regulations of the National Labor Relations Board, Sec. 102.67(c)(2). Second, there is extensive evidence on the record to support the Regional Director's factual finding on this point. The Vice Provost for Academic Affairs testified, "Teaching Assistants perform functions which are very similar to a Teaching Fellow.... In other parts of the University, they will be Master's students." (Tr. 69). He further testified that Readers are Master's students "specifically appointed to grade papers and exams." (Tr. 70). These are duties that are also performed by doctoral student assistants classified as Preceptors and Teaching Fellows, who are included in the unit (Dec. 10-12). The Employer has a category of student officers, Teaching Assistants III ("TA III"), reserved for undergraduate students who provide teaching services. TA IIIs lead recitation sections and laboratory sections and assist other undergraduate students (Tr. 69-70). Again, these are duties performed by Teaching Fellows ("TFs") in GSAS, and Teaching Assistants ("TAs") at the Fu School (Dec. 10-11, 22-23).

There are numerous more specific examples in the record of Master's and undergraduate student employees fulfilling similar functions to Ph.D. students who teach. Master's students and TA IIIs in the Math Department serve as assistants in the classroom and help with grading (Tr. 221-22). These are functions performed by some TFs and by TAs at the Fu School. TA IIIs also work in the Math Department "help room" alongside Ph.D. students (Tr. 222, 228). When asked about differences between the work of TA IIIs and Ph.D. students in the help room, the Chair of the Math Department succinctly replied, "None." (Tr. 228). Master's students in the School of Fine Arts serve as instructors for undergraduate students within the School of Fine Arts, and they also may be appointed as instructors in the University Writing Program that is a requirement

for undergraduate students in Columbia College (Tr. 361-63). Ph.D. Teaching Fellows also serve as instructors in the University Writing Program (Tr. 185-86, 856, 868). Master's students at the School of International and Public Affairs ("SIPA") can be appointed to Instructional Assistantships, which include Teaching Assistants, Departmental Research Assistants, and Readers (Er. Ex. 90, p. 1). Students in all of these categories assist with the instructional mission of the school, performing duties that are also performed by TFs in GSAS (Er. Ex. 90, pp. 2-3).³ Thus, the duties of Master's and undergraduate students with teaching assignments are remarkably similar to those of Ph.D. students with Teaching Fellow appointments. As the Vice Provost put it at another point in his testimony, "there is considerable similarity between what they do..." (Tr. 107-08).

Moreover, the Employer's own arguments in its Conditional Request for Review confirm that the duties of the Master's and undergraduate student assistants are similar to the duties of the doctoral student assistants. The Employer argues that the duties performed by doctoral student assistants are "more advanced and varied." (Er. Req. Rev. at 7). The Employer asserts that "Teaching Fellows have more teaching responsibilities than Master's and undergraduate student assistants" (Er. Req. Rev. at 8). "[D]octoral students perform far more sophisticated tasks and have greater responsibilities than Master's and undergraduate students." (Er. Req. Rev. at 9). Thus, the Employer's argument confirms that the Master's and undergraduate student employees perform similar duties to the doctoral student assistants. Similarity in duties

³ Program Assistants, on the other hand, perform administrative functions (Er. Ex. 90). As they do not provide instructional or research services to the Employer, the Petitioner agrees that they shall be excluded from the bargaining unit. Despite the parties' agreement on this point, the Employer nevertheless points out that they perform different duties from the unit employees (Er. Req. Rev. at 7).

supports a finding of a community of interest, regardless of whether the duties are identical. E.g., Johnson Controls, 322 N.L.R.B. 669, 671 (1996); Dezcon, Inc., 295 N.L.R.B. 109, 112 (1989).

The Employer argues that the Master's and undergraduate student assistants are compensated in a different fashion from the doctoral student assistants. The Regional Director took that into consideration in making her finding. Certainly, this is an element of the community of interest analysis that could support a finding that a unit limited to doctoral student assistants is also appropriate. More than one unit may be appropriate. The question is whether the unit sought by the Petitioner is appropriate, not whether some other unit might be more appropriate. Specialty Healthcare, supra. The Regional Director's analysis is sufficient to establish that the petitioned-for employees share a sufficient community of interest to constitute one such appropriate unit.

There is one other significant factor, in addition to those relied upon by the Regional Director, that supports a finding that the student assistants share a community of interest. All of them have a dual relationship to the University: they are both employees and students. The Board has recognized that student employees have a separate community of interest from other employees. The Board has therefore taken student status into consideration in considering the community of interest of academic employees. It is also appropriate to consider student status in deciding that a group of student assistants share a community of interest.

The most significant case to take student status into consideration in a community of interest analysis was Adelphi University, 195 N.L.R.B. 639 (1972). The labor organizations in Adelphi sought to represent a unit of full-time and regular part-

time faculty members. The university argued that 125 graduate assistants, including teaching assistants and research assistants, should be included in the faculty unit. The Board discussed the similarity of their duties to the duties of faculty members and the close and regular contact between graduate assistants and the faculty members that they worked with. Despite these factors, which would favor inclusion of the graduate in the faculty unit, the Board excluded them because their status as student assistants differentiated them from faculty members. The Board in Adelphi began its discussion of the differences between graduate assistants and faculty members by referring to the status of the former as students. “The graduate assistants are graduate students working toward their own advanced academic degrees, and their employment⁴ depends entirely on their continued status as such.” 195 N.L.R.B. at 640. The Board continued by listing a variety of differences in the terms and conditions of graduate assistants from those of faculty members which resulted from their status as students. The Board concluded, “In view of the foregoing, we find that the graduate teaching and research assistants here involved, although performing some faculty-related functions, are primarily students and do not share a sufficient community of interest with the regular faculty to warrant their inclusion in the unit”. 195 N.L.R.B. at 640. In other words, because they are students, they had a separate community of interest.

In a footnote in Adelphi distinguishing other cases, the Board emphasized that the status of graduate assistants as students was what distinguished them from other university employees. “For, unlike the graduate assistants, the research associate [in C.W. Post Center of Long Island University, 189 NLRB 905 (1971)] was not

⁴ The use of the word “employment” in this context confirms that the Board did not see any inconsistency between employment and being a student. The Board simply recognized that status as a student had a major impact on their working conditions.

simultaneously a student but already had his doctoral degree....” Adelphi at 640 fn. 8. Similarly, in the same footnote, the Board distinguished Federal Electric, 162 N.L.R.B. 512 (1966), where the Board had included other classifications of employees in a bargaining unit with academic teachers, by again emphasizing that because graduate assistants are students, they “therefore do not share a similar community of interest with the faculty members....” Ibid. On the other hand, the Board likened the graduate assistants at Adelphi to the laboratory assistants who had been excluded from a professional teaching unit in Long Island University (Brooklyn Center), 189 N.L.R.B. 909 (1971). These laboratory assistants worked in the science laboratories with faculty members, but they were excluded from the bargaining unit because they were Master’s students working toward their graduate degrees. See Adelphi at fn. 8. Similarly, the Board has considered “student status” in several other cases in excluding student employees from units of other employees at the universities where they were enrolled. See, e.g., Saga Food Serv. of Cal., 212 N.L.R.B. 786 (1974); Barnard Coll., 204 N.L.R.B. 1134 (1973); Cornell Univ., 202 N.L.R.B. 290 (1973); Georgetown Univ., 200 N.L.R.B. 215 (1972).

In summary, the Board has long recognized that graduate student employees have a separate community of interest because they are students. Their student status does not mean that they are not employees, only that they have interests that differ from those of other teaching and research faculty. Student employees are a readily identifiable group of employees whose terms and conditions of employment differ from other employees. Because they are all students, the Master’s and undergraduate student assistants have this interest in common with doctoral student assistants. This

factor, in addition to those relied upon by the Regional Director, supports a finding that Master's and undergraduate student assistants should be included in the unit. Thus, the Regional Director's decision is consistent without existing precedent.

III. **Undergraduate and Master's Students Should not be Excluded from the Unit as Temporary Employees**

The Board has long recognized that employees hired for a limited period of time with a defined endpoint have the right to organize. Daniel Construction, Inc., 133 N.L.R.B. 264 (1961) (construction industry); Pulitzer Publishing Co., 101 N.L.R.B. 1005 (1952) (camera operators and sound technicians⁵ at a television station); Hondo Drilling Co. 164 N.L.R.B. 416 (1967) (employees of an oil drilling company); Berlitz School, Inc., 231 N.L.R.B. 766 (1977) (on call teachers); Avis Rent a Car, 173 N.L.R.B. 1366 (1968) (employees hired to drive rental vehicles from one rental car center to another). The Board recently reaffirmed the right of temporary employees to organize in Kansas City Repertory Theater, 356 N.L.R.B. No. 28 (2010). On the other hand, the Board routinely excludes temporary employees from units of full-time and regular part-time employees. The reason for this exclusion is that temporary employees lack a community of interest because the term of their employment is different from regular employees. As the Board explained in Kansas City Repertory, temporary employees are customarily excluded from units of full-time and regular part-time employees because they have different interests as a result of their temporary status. They are excluded from the bargaining unit because they lack a community of interest with employees whose employment is indefinite and ongoing, not because they do not have the right to bargain.

⁵ Then known as cameramen and soundmen.

The Employer argues that Master's and undergraduate student assistants are temporary employees. This does not, however, differentiate them from doctoral student assistants. All student assistants can be regarded as temporary employees, since their employment will end when they complete their studies. In determining whether a student employee is employed for a sufficient period of time in order to be permitted to vote in an election, the touchstone should be whether the duration of their employment is for such a short period of time that their interests are substantially different from the interests of other graduate student employees. As discussed above, student assistants share a community of interest separate from other employees because their employment is related to their education and to their professional careers. The customary practice is for student assistants to receive appointments of at least one semester. An appointment of at least one academic semester reflects the dual interest in employment and education that defines the community of interest among student assistants. Thus, student employees who receive appointments of at least one academic semester should be included in a unit of student assistants.

San Francisco Art Institute, 226 N.L.R.B. 1251 (1976) and Saga Food Service of California, 212 N.L.R.B. 786 (1974), support a finding that student assistants appointed to jobs lasting at least one semester share a community of interest. In San Francisco Art Institute, the Board found that art students working as janitors at the school in which they were enrolled did not have the right to organize because they lacked a "sufficient interest in their conditions of employment to warrant representation..." 226 N.L.R.B. at 1252 (1976). In Saga Food Service, students at UC Davis were found to lack sufficient interest in jobs as cafeteria workers. It is questionable whether this aspect of the

holdings of those two cases can be reconciled with Kansas City Repertory, where the Board held that it is for the employees to decide whether they have enough interest in their jobs to engage in collective bargaining. It is not necessary to reach that issue in this case. The principal holding of San Francisco Art and Saga, that student employees lack a community of interest with regular employees because they are students, remains good law. That holding is consistent with our argument that student status should be recognized as a significant factor in defining bargaining unit scope. Thus, it is consistent with Board precedent to define eligibility to vote on the basis of the academic calendar, and to include Master's and undergraduate student assistants in a unit with doctoral student assistants.

There are no compelling reasons to grant review with respect to this issue.

IV. The Regional Director Correctly Included Student Researchers Funded by Training Grants in the Unit

The Regional Director concluded that students who conduct research for the Employer but are paid with funds received by the Employer from “training grants” should be included in the unit. She found that “students on training grants, when working in labs, perform the same functions as those appointed [to other unit positions].” The Employer does not dispute this finding. Rather, the Employer argues that the National Institutes of Health, which provides the grants, mandates that the students funded by the grants receive an educational benefit from the work that they perform to receive the benefits of that funding. The intent of the funding source is irrelevant to the terms and conditions of employment of the student employees. As the Regional Director found, “those who are performing research or instructional tasks equivalent to GRAs or other

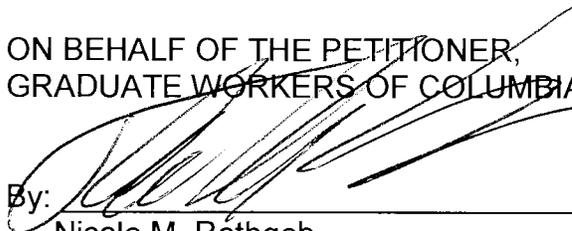
included classifications should not be excluded merely because their funding is sourced from training grants.” (Dec. 31).

Student assistants funded by training grants perform the same duties as other unit employees, sometimes in the same laboratories (Tr. 995). Student employees are often funded by a research grant in one semester and a training grant in the next, or vice versa (Tr. 994, 1012-13). They are paid the same compensation (Tr. 1019-20). If the training grant provides for a lower stipend, the University provides additional compensation to bring them to the same stipend as GRAs (Tr. 993). Like GRAs, they help to fulfill the mission of the University to conduct research and produce new knowledge. They thus share a community of interest with GRAs whom the Employer concedes should be included in the Unit. There is no reason to grant review with respect to this issue.

V. Conclusion

The Employer’s Conditional Request for Review does not raise any compelling issues with respect to the scope of the unit. Therefore, the Request for Review should be denied.

ON BEHALF OF THE PETITIONER,
GRADUATE WORKERS OF COLUMBIA-GWC, UAW

By: 

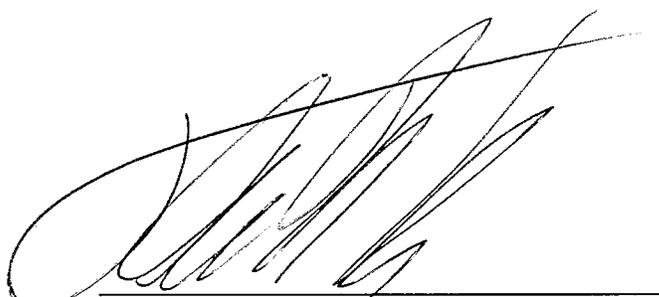
Nicole M. Rothgeb
Thomas W. Meiklejohn
Livingston, Adler, Pulda, Meiklejohn
& Kelly, PC
557 Prospect Avenue
Hartford, CT 06105-5922
(860) 570-4628
nmrothgeb@lapm.org
twmeiklejohn@lapm.org

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Petitioner's Opposition To Employer's Conditional Request For Review was sent via email, on this 20th day of November, 2015, to the following:

Karen P. Fernbach, Regional Director
National Labor Relations Board, Region 2
26 Federal Plaza, Room 3614
New York, New York 10278
Karen.fernbach@nrb.gov

Edward A. Brill
Bernard M. Plum
Proskauer Rose LLP
Eleven Times Square
New York, NY 10036
ebrill@proskauer.com
bplum@proskauer.com



Thomas W. Meiklejohn