

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2

THE TRUSTEES OF COLUMBIA UNIVERSITY
IN THE CITY OF NEW YORK
Employer

and

Case 02-RC-143012

GRADUATE WORKERS OF
COLUMBIA-GWC, UAW
Petitioner

SUPPLEMENTAL DECISION AND DIRECTION OF ELECTION

On December 17, 2014, Graduate Workers of Columbia-GWU, UAW (the Petitioner) filed the petition in this matter seeking a unit of students who provide teaching and research-related services to Columbia University. On February 6, 2015, consistent with the holding in *Brown University*, 342 NLRB 483 (2004) that students could not be found to be employees of the schools in which they are enrolled, the petition was dismissed. On March 13, 2015, the Board granted the Petitioner's request for review and remanded the case for a hearing.

On October 30, 2015, constrained by the Board's holding *Brown*, an Order Dismissing Petition issued. On August 23, 2016, the Board issued its Decision on Review and Order in which they reversed the holding in *Brown* and found that students in the petitioned-for classifications herein are employees under the National Labor Relations Act. *Columbia University*, 364 NLRB No. 90 (Aug. 23, 2016). The Board further found the petitioned-for unit is an appropriate unit¹ and remanded the case to determine an appropriate voting eligibility formula.

On October 18, 2016, a hearing was held before a Hearing Officer of the National Labor Relations Board on the issue of the eligibility formula to be applied in the election to be held in the unit found appropriate by the Board.

The Petitioner contends that all those on the Employer's payroll in the fall semester 2016, and, in addition, any doctoral student who has worked at least one semester during the past

¹ The petitioned-for unit, found appropriate by the Board, is as follows:

Included: All student employees who provide instructional services, including graduate and undergraduate Teaching Assistants (Teaching Assistants, Teaching Fellows, Preceptors, Course Assistants, Readers and Graders); All Graduate Research Assistants (including those compensated through Training Grants) and All Departmental Research Assistants employed by the Employer at all of its facilities, including Morningside Heights, Health Sciences, Lamont-Doherty and Nevis facilities.

Excluded: All other employees, guards and supervisors as defined in the Act. *Id.*, at fn 1.

academic year should be entitled to vote. With respect to masters and undergraduate student employees, Petitioner contends that only those on the payroll in the fall semester 2016 should be permitted to vote, and that no additional "look back" period is needed.

The Employer agrees that no special eligibility formula is needed with respect to masters and undergraduate student employees; the traditional eligibility requirement (ie., those employed on the payroll immediately preceding the date of the direction of election) should apply to them. For doctoral students in their second, third, or fourth year of their academic program, the Employer proposes that any student with a prior appointment during any time of their enrollment should be eligible to vote. The Employer contends that doctoral students in their fifth year and beyond who are not currently appointed to unit positions should not be eligible to vote.

Based on the evidence adduced at the hearing and the positions of the parties, for the reasons set forth more fully below, I am directing an election in the petitioned-for unit according to the following eligibility formula:

All unit employees who:

- (1) hold an appointment or a training grant in a unit position in the fall semester 2016, or
- (2) are course assistants, readers or graders who are on the casual payroll and who worked 15 hours per week or more in the fall semester 2016, or
- (3) have held a unit position for either the fall, spring and summer terms during the prior academic year.

On the facts of this case, I believe this eligibility formula is in keeping with Board precedent which seeks to ensure that employees with reasonable expectancy of future employment be able to vote.

FACTS

The sole witness, Vice Provost for Faculty Affairs Christopher Brown, testified that he, along with colleagues, analyzed Employer records pertaining to doctoral students who began their fifth year of enrollment in the fall semesters of the years 2011 through 2015. The analysis involved working with two distinct databases – one showing students enrolled in their fifth year and the other showing which of these students held an appointment in a subsequent semester. This analysis was then reduced to two tables of information about the students. The first table pertains to doctoral students who began their fifth year of enrollment in the fall semesters of the years 2011 through 2015. The table shows that for each cohort in the years examined, between 16% and 21% of students went on to hold instructional positions during any later term, and between 14% and 17% of students went on to hold research positions during any later term.

The second table in the exhibit pertains to doctoral students who were in their fifth year of enrollment in the fall of 2011 and the fall of 2012 who did not hold an appointment of either sort at that time but had held one at some prior point during their enrollment. The table shows that of students starting their fifth year who did not hold an appointment in the fall of 2011, 26%

later held an instructional appointment and 9% later held a research appointment. Of students starting their fifth year who did not hold an appointment in the fall of 2012, 24% later held an instructional appointment and 8% later held a research appointment.

The Union introduced an exhibit (admitted without objection) showing the same data in the tables of the Employer's exhibit and adding columns showing the sums of the instructional and research percentages from the Employer's exhibit. The Union's exhibit thus shows what percentage of students held positions *of any sort* after their fifth year. On the Union's version of the first table, the range of students beginning the first semester of their fifth year in the years 2011-2015 who thereafter held either type of appointment ranges from 31% to 38%, with an average of 34%. On the Union's version of the second table, showing students without an appointment in the first semester of their fifth year, 35% of such fifth-year students in 2011 thereafter appear to have held an appointment of either sort, and 32% of such students in 2012 thereafter appear to have held an appointment of either sort.

It is clear in the record that none of the percentages cited in the exhibits are exact measures of the future employment of the fifth-year students for the years shown. The figures reflect an "under count" in that they do not include summer term appointments. However, they reflect an "over count" in that they double-count those students who held both instructional and research appointments. Thus it is clear that the figures are imprecise, though because many research appointments are for 12 months of a year and summer instructional positions appear to be fewer than those in fall and spring, the numbers and percentages shown on the tables do provide at least a rough estimate of the future employment patterns of fifth-year students in the years covered. Therefore I am satisfied that the tables are useful for the purpose of devising a voting formula.

ANALYSIS

As the Board noted, the goal in crafting an appropriate voting formula in this case is to, "strike a balance between the need for an ongoing connection with a unit and concern over disenfranchising voters who have a continuing interest notwithstanding their short-term, sporadic, or intermittent employment." *Id.*, at 22, citing *Steiny & Co.*, 308 NLRB 1323, 1325 (1992) and *Trump Taj Mahal Casino*, 306 NLRB 294 (1992). The Board explained that, "there are employees in the unit who, despite not being on the payroll at the time of the election, have a past history of employment that would tend to signify a reasonable prospect of future employment. *Id.*

In a thorough analysis, the Board has found all employees in the petitioned-for unit to be appropriately included in the unit based on their community of interest. The record evidence presented on remand demonstrates that fifth-year doctoral students do not have such a low expectation of future employment that they should be subject to less inclusive eligibility criteria than other unit employees. As to undergraduate and master's students, although the parties each proposed that they be subject to a different formula than doctoral students, I do not find any support in the record evidence or the Board's findings indicating that they should be treated differently. Further, the record evidence indicates that second through fourth year doctoral students are likely to be on the payroll during the fall semester 2016 pursuant to the terms of

their five-year funding package. Thus, a look-back period longer than one year as proposed by the Employer would not further enfranchise any significant number of employees.

As noted above, I find that the unit employees eligible to vote are those who:

- (1) hold an appointment or a training grant in a unit position in the fall semester 2016, or
- (2) are course assistants, graders or readers who are on the casual payroll and who worked 15 hours per week or more in a unit position in the fall semester 2016, or
- (3) have held a unit position for either the fall, spring or summer during the prior academic year.

I recognize that this formula expands on that proposed by the Employer in that it allows for doctoral students in their fifth year and any later term to vote, as long as, they meet the same criteria as those in earlier years of their programs. I believe this formula is in keeping with the Board's interest in minimizing disenfranchisement. In *Berlitz School of Languages*, 231 NLRB 776 (1977), the Board expanded on a Regional Director's and petitioner's proposed formulas to include a consideration of past employment within the prior one year rather than the prior six months. The Board noted that while its formula would enfranchise some teachers who have taught much less than others, "given the vagaries of the [e]mployer's employment structure, the formula will also not disenfranchise those who have a reasonable expectancy of future employment" *Id.* at 767.

Both parties note that the Board's decision in *C. W. Post Center of Long Island University*, 198 NLRB 453 (1972), may be instructive in devising a formula in the instant case, while also noting that there are significant factual distinctions between that case and this one. In *C. W. Post*, a Hearing Officer had sustained challenges to ballots of nineteen adjunct professors who were not on active payroll status during the eligibility period. The Board found that the Hearing Officer had, "failed to give appropriate weight to the history of employment in past academic years of adjuncts in determining whether they had a continuing employment interest warranting their inclusion in the unit." *Id.* at 454. The Board found that adjuncts not in active status were eligible if they had contracts in two of the prior three academic years, including that of the eligibility period, and had taught at least three credit hours in at least one semester in each of two of those years. The Board determined that such a formula was a means of establishing eligibility, "depending upon their continuing interest in the unit rather than fortuity." Application of the formula in *C. W. Post* resulted in sixteen of the nineteen challenged ballots being found valid. *Id.*

The Employer has argued that because sixteen of nineteen ballots were ultimately found valid under the formula in *C. W. Post*, that the Board thereby indicated that a rate of re-employment of over 80% was appropriate in determining whether voters had a reasonable expectation of future employment. However, in my view, the Board in *C. W. Post* was applying its formula only to a group of ballots that had been challenged at an election, not the total number of eligible voters in a unit. The resulting percentages cannot be used to show that the Board was indicating that those percentages would serve as target percentages for voting

eligibility formulas prospectively. Those percentages are also not relevant to the question of how much an employee must have worked in the past to show the likelihood of her working again in the future.

While the cases discussed above involve considerations applicable to eligibility formulas, the Board has also considered the expectation of future employment when evaluating the community of interest of employees for purposes of unit eligibility. The parties have cited some cases in which the Board dealt with unit eligibility issues raised where the unit includes employees with divergent expectations of future employment alongside those whose "permanence" is not in question.² Here, the Board has already analyzed the community of interest in finding the petitioned-for unit to be appropriate. In my view, treating all of the petitioned-for classifications the same is consistent with the Board's finding that they all share a community of interest. Moreover, the parties have not presented a justifiable basis to treat the classifications differently.

CONCLUSION

In conclusion, based on my analysis of the record evidence related to the Board's remand on voting eligibility and the Board's historic approach to fashioning eligibility formulas in cases such as this, I am ordering an election in the following unit of employees, found appropriate by the Board, according to the following eligibility formula.

Included: All student employees who provide instructional services, including graduate and undergraduate Teaching Assistants (Teaching Assistants, Teaching Fellows, Preceptors, Course Assistants, Readers and Graders): All Graduate Research Assistants (including those compensated through Training Grants) and All Departmental Research Assistants employed by the Employer at all of its facilities, including Morningside Heights, Health Sciences, Lamont-Doherty and Nevis facilities.

Excluded: All other employees, guards, and professional employees and supervisors as defined in the Act.

Eligible to vote will be all unit employees who:

- (1) hold an appointment or a training grant in a unit position in the fall semester 2016, or
- (2) are course assistants, graders or readers who are on the casual payroll and who worked 15 hours per week or more in a unit position in the fall semester 2016, or
- (3) have held a unit position for either the fall, spring or summer during the prior academic year.

² *University of San Francisco*, 265 NLRB 1221-1224 (1982).

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those employees in the unit described above.

Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike which commenced less than twelve months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than twelve months before the election date and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining purposes by **Graduate Workers of Columbia-GWU, UAW**.

NOTICE OF ELECTION

Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer at least three working days prior to an election. If the Employer has not received the notice of election at least five working days prior to the election date, please contact the Board Agent assigned to the case or the election clerk.

A party shall be estopped from objecting to the non-posting of notices if it is responsible for the non-posting. An Employer shall be deemed to have received copies of the election notices unless it notifies the Regional office at least five working days prior to 12:01 a.m. of the day of the election that it has not received the notices. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure of the Employer to comply with these posting rules shall be grounds for setting aside the election whenever proper objections are filed.

LIST OF VOTERS

To insure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them.³ *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is directed that two copies of an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the undersigned within

³ I recognize that the Employer is constrained by the Family Educational Rights and Privacy Act (FERPA) (20 U.S.C. § 1232g; 34 CFR Part 99) from releasing certain information related to unit employees. I will therefore issue a subpoena for the required information, returnable on the due date of the voter list.

seven days from the date of this Decision. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The undersigned shall make this list available to all parties to the election. In order to be timely filed, such list must be received in Region 2's office, 26 Federal Plaza, Room 3614, New York, New York, 10278, on or before **November 7, 2016**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

ELECTION DETAILS⁴

The election will be held on Wednesday and Thursday, December 7 and 8, according to the following schedules at each of the following locations:

Morningside Heights Campus – Earl Hall

Wednesday, December 7, 2016: 10:00 a.m. – 8:00 p.m.
Thursday, December 8, 2016: 10:00 a.m. – 8:00 p.m.

Columbia University Medical Center – Alumni Auditorium Lobby (Plaque Building Entrance)

Wednesday, December 7, 2016: 10:00 a.m. – 8:00 p.m.
Thursday, December 8, 2016: 10:00 a.m. – 8:00 p.m.

Lamont-Doherty - Sutton House⁵

Wednesday, December 7, 2016: 10:00 a.m. – 3:00 p.m.

Nevis Laboratory, Irvington, NY – conference room at 136 South Broadway

Thursday, December 8, 2016: 10:00 a.m. – 12:00 noon

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street NW, Washington, DC, 20570. This request must be received by the Board in Washington by **November 14, 2016**.

⁴ In an effort to expedite the election, the parties' positions on the election details were solicited and I have decided on the details of the election in this Decision.

⁵ The parties notified the Region in post-hearing communications that this location was mutually agreeable. Other locations were mutually agreed-upon at the hearing.

In the Regional Office's initial correspondence the parties were advised that the National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with its offices. If a party wishes to file one of the documents which may not be filed electronically, please refer to the Attachment supplied with the Regional Office's initial correspondence for guidance in doing so. Guidance for e-filing can also be found on the National Labor Relations Board website at www.nlr.gov. On the home page of the website, select the E-Gov⁶ tab and click on E-Filing. Then select the NLRB office for which you wish to e-file your documents. Detailed e-filing instructions explaining how to file the documents electronically will be displayed.

DATED at New York, New York this 31st day of October 2016



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

⁶ To file the request for review electronically, go to www.nlr.gov and select the E-Gov tab. Then click on the E-Filing link on the menu. When the E-File page opens, go to the heading Board/Office of the Executive Secretary and click on the "File Documents" button under that heading. A page then appears describing the E-Filing terms. At the bottom of this page, check the box next to the statement indicating that the user has read and accepts the E-Filing terms and click the "Accept" button. Then complete the filing form with information such as the case name and number, attach the document containing the request for review, and click the "Submit Form" button. Guidance for e-filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under "E-Gov" on the Board's website.

1. The first part of the document discusses the importance of maintaining accurate records of all transactions. It emphasizes that every entry should be clearly documented and verified.

2. The second section details the various methods used to collect and analyze data. It notes that consistency in data collection is crucial for reliable results.

3. The third part of the document describes the challenges faced during the data collection process. It highlights the need for patience and persistence in gathering sufficient data points.

4. The fourth section discusses the results of the data analysis. It shows that there is a clear trend in the data, which supports the initial hypothesis.

5. The final part of the document concludes with a summary of the findings and a recommendation for further research. It suggests that more extensive data collection would provide even greater clarity.