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**CURRENT COLLECTIVE BARGAINING ISSUES
INVOLVING FACULTY, TEACHING ASSISTANTS,
RESEARCH ASSISTANTS AND GRADUATE
ASSISTANTS:
WHO'S IN AND WHO'S OUT:
THE DETERMINATION OF A BARGAINING UNIT**

By:

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I. Introduction*

Much has been written about the importance of the National Labor Relations Board (NLRB) decision in the *Boston Medical Center* case. The attention is appropriate given that decision overturned twenty years worth of NLRB precedent that medical housestaff (residents and interns) fell outside of the definition of “employee” within Section 2(3) of the National Labor Relations Act. (NLRA) 29 U.S.C §152(3) In *Boston Medical Center Corporation*, the NLRB ruled that most of the housestaff at Boston Medical Center fell within the broad definition of “employee” in Section 2(3) for three primary reasons: 1) The housestaff worked for an Employer within the meaning of the NLRA; 2) They received compensation and benefits reflective of employee status for their work; and 3) Eighty (80) percent of their time at the hospital they were engaged in direct patient care. 330 NLRB No. 30 (1999) The fact that housestaff also derived educational benefits as students did not disqualify them from being included within the definition of “employee.”

In October 2000, the NLRB expanded its ruling to graduate assistants (Teaching Assistants, Research Assistants, and Graduate Assistants) at New York University (NYU) by declaring them eligible as employees within Section 2(3) of the NLRA to be represented for collective bargaining purposes. 332 NLRB No. 111 (2000)

While this issue has been settled in some states for some time, e.g., Wisconsin and Michigan, other state labor boards and state courts have recently been grappling with the same question regarding student v. employee status under state law. Illinois, California, and Pennsylvania make up a non-exhaustive list of recent challenges.

Once it is determined that the status of “student” does not eliminate an individual from being considered an “employee” able to be represented under the public labor statutes, another question is raised. If students are not excluded automatically from the collective bargaining statutes, then which students are eligible to be included in the bargaining unit? This paper will review the experience at the University of Illinois, Urbana-Champaign, with the process of determining whether any students are eligible to be represented. It will also highlight the recent decisions involving other institutions and provide some reflections and practical suggestions to other universities facing a union-organizing campaign.

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II. The Illinois Experience

A recent law review article explained how a bargaining unit determination is necessary both for the purposes of determining who is eligible to vote in a representation election and who will be covered by the terms of a collective bargaining agreement. *Rethinking Bargaining Unit Determination: Labor Law and the Structure of Collective Representation in a Changing Workplace*, 15 Hofstra Labor and Employment Law Journal 419 (Spring 1998) In Illinois, it has taken approximately six years to get to the point where an Administrative Law Judge (ALJ) has been ordered to make such a determination.

In April 1996, the Graduate Employee Organization, IFT/AFT, AFL-CIO (GEO) filed a petition with the Illinois Educational Labor Relations Board (IELRB) to represent, for collective bargaining purposes, approximately 5,800 graduate students at the Urbana-Champaign campus. The petition sought a bargaining unit of “All Teaching Assistants, Graduate Assistants, and Research Assistants at the University of Illinois, Urbana-Champaign” excluding all other employees. Unlike the NLRA, the Illinois Educational Labor Relations Act (Act) specifically excludes students from the coverage of the Act. Section 2(b) of the Act defines “Educational employee” or “employee” as “...any individual, excluding supervisors, managerial, confidential, short term employees, **student**, and part-time academic employees of community colleges employed full or part time by an educational employer...” (Emphasis added) 115 ILCS 5/2(b)

The University submitted a motion to dismiss the petition because of the student exclusion. The University originally argued that the petitioned-for bargaining unit was not appropriate since students were *per se* excluded from the coverage of the statute.

In July 1996, the Executive Director of the IELRB ruled that a hearing was necessary stating:

“After careful consideration of the parties’ arguments, I deny the Employer’s motion to dismiss. I find that the issues presented require a hearing to develop an evidentiary record of student status. A factual determination, in this case, must be made as to whether the employees in the petitioned for unit are students. In addition, a question of law exists as to whether an individual that has dual status as both a student and as an educational employee may or may not be excluded from coverage under the Act. For the reasons that this case presents material issues of fact and questions of law I direct that a hearing be held before an Administrative Law Judge.”

Hearings began the following month and were concluded in December 1996. For this phase of the case, there were ten hearing days. The ALJ bifurcated the hearing so that the only issue in the first phase was limited to whether teaching assistants (TAs), research assistants (RAs), and graduate assistants (GAs) were “employees” eligible to form a bargaining unit under Section 2(b) of the Act. If the ALJ had determined in the first phase that some or all of the assistants were “employees” then the hearings would move to the next phase and focus on more traditional issues, such as the appropriateness of the bargaining unit and whether any other statutory exclusion would apply.

In April 1997, the ALJ for the IELRB issued a decision recommending that the petition of the GEO to represent TAs, RAs, and GAs be dismissed. The ALJ held that Illinois law expressly excludes students from the definition of employees who may engage in collective bargaining. She reasoned since TAs, RAs, and GAs must be admitted and enrolled as students to hold assistantship appointments (a stipulation entered into by the parties) they were ineligible to form a bargaining unit. *Board of Trustees/University of Illinois at Urbana-Champaign*, 13 PERI 1059, Case No. 96-RC-0013-S (ALJ Recommended Decision and Order, April 23, 1997)

In April 1998, the IELRB affirmed the decision of the ALJ dismissing the petition submitted by the GEO. The IELRB did not accept the ALJ’s reasoning that being a student, by itself, was enough to exclude someone from coverage under the IELRA. The IELRB instead relied on the fact that an assistantship, with its tuition and fee waiver, was a form of financial aid. The IELRB based its conclusion “...on the significant connection that exists between these individuals’ assistantships and their status as students.”

The IELRB outlined additional indicia of a significant connection between the assistants’ employment as TAs, RAs, and GAs and their status as students. As to TAs, two-thirds of all teaching assistantships were awarded in their enrolling department. TAs often taught within their primary field of study. Even when a TA was not teaching within their field of study, the TA appointment caused them “to think more broadly, to develop critical thinking and develop presentation skills.” RAs were engaged in work that was often related to their field of study and sometimes to their dissertations or theses. Even those RAs who were not working in their field of study were being taught “skills of critical thinking or methodology which formed part of their education.” GAs were gaining pre-professional experience, networking opportunities, and access to faculty. Finally, all graduate assistants’ loan payments were deferred while they

continued to be enrolled as students and they were covered by the health insurance plan available to all University students. *Board of Trustees/University of Illinois at Urbana-Champaign*, 15 PERI 1049, Case No. 96-RC-0013-S (IELRB Opinion and Order, April 9, 1998)

GEO filed an appeal with the Illinois First District Appellate Court, and oral argument was held in October 1999. In June 2000, the Appellate Court reversed and remanded the IELRB's decision dismissing the GEO's petition to represent TAs, RAs, and GAs at the Urbana campus. The Appellate Court affirmed the test adopted by the IELRB that there must be a "significant connection" between the duties that assistants perform and their graduate studies for the "student" exclusion to apply. However, the Appellate Court ruled that there was no uniformity between assistantship positions and that the IELRB erred by simplistically declaring that the stipends and fee waivers provided to assistants as a form of financial assistance thereby excluded all assistants from the bargaining unit. The Appellate Court instructed the IELRB to do a "thorough and fair" analysis of which graduate students should be included in a bargaining unit, and that the proper application of the "significant connection" would "exclude from organizing those graduate students whose work is so related to their academic roles that collective bargaining would be detrimental to the educational process." In October 2000, the Illinois Supreme Court refused to hear the University's appeal of the Illinois Appellate Court's decision. Therefore, the Appellate Court's remand to the IELRB was final. *Graduate Employees Organization v. IELRB*, 315 Ill. App. 3d 278, 733 N.E.2d 759, 765 (1st Dist. 2000), appeal denied, 191 Ill. 2d 529, 738 N.E.2d 925

The directions given by the IELRB have guided the process on remand of determining which students should be included. (See Appendix A) The IELRB in April 2001 charged a different ALJ with the task of determining which assistants were doing work significantly connected to their role as students. Those assistants whose assistantships are significantly connected to their role as students are out of the unit; those assistants whose duties lack a significant connection to their role as students are includable in the unit.

The IELRB's remand order went further: It declared, based on its findings in its 1998 decision outlined above, that TAs and RAs have a presumptive significant connection between their duties as assistants and their status as students. A shifting burden of proof was outlined. In order to rebut these presumptions, GEO must prove based on clear and convincing evidence that the duties performed by a TA or an RA are peripheral to, and thus unrelated, to teaching or

research duties. The IELRB gave precise definitions or descriptions about what teaching and research duties are:

Teaching includes such academic duties as teaching class, grading student assignments, leading lab or discussion groups, developing instructional materials, advising and/or tutoring students, etc.

Research duties include mastering and applying research concepts, practices or methods by conducting experiments, analyzing data, presenting findings in a publication or dissertation, assisting faculty in preparing publications, or in doing research, etc.

The University believes that these duties encompass what the vast majority of TAs and RAs do on the Urbana campus. In making 5,000+ appointments each year, it is possible that a few appointments are mistaken, i.e., people are appointed as TAs when they should be RAs or vice versa; or maybe they lack the indicia of TAs or RAs at all, but our review of the appointments indicate there are relatively few exceptions to the IELRB's instructions on TAs and RAs.

The IELRB created a different test for GAs. A GA is primarily a title for assistants who are not doing teaching or research, e.g., Graduate School of Library and Information Science (GSLIS) students appointed in the University library, or Psychology and Social Work students working in Student Affairs' units like the Counseling Center and the student health center. The IELRB said that GAs who work in their discipline presumptively fall within the "student" exclusion under the IELRA. The IELRB gave an expansive definition of work within their "discipline" to mean not only the department or other academic entity where the student is enrolled, but also other entities within the University related to the students' field of study or an interdisciplinary program. The University has labeled these GAs as engaging in "pre-professional" duties.

Sometimes, the significant connection is obvious and intuitive, like Library students working in the University's libraries. They also can be shown by comparing the attributes of the students' program of study, the duties of the assistantships, and the nature of the careers that the students pursue upon graduation.

Again, a shifting burden of proof was developed. As to GAs, the University would provide evidence on GAs working within their discipline and then the burden of proof shifts to

the GEO to rebut the presumption of the significant connections of GAs working within their discipline.

The final and perhaps most important element of the IELRB's remand order is its direction to the parties to present evidence and argument concerning categories of assistants rather than individual assistants. The parties were directed to focus on objective ways for determining whether there is a significant connection between a program of study and duties of an assistant. Among the things that the University and GEO agreed to going into these hearings, is that we must have a precise, objective way of defining the bargaining unit now, and into the future. The roster of assistants change each semester and appointments are made and completed even during semesters. We recognized early on that there would be chaos if decisions about bargaining unit status rest on individual testimony of each assistant's duties and subjective judgments about whether the duties are significantly connected to the educational program.

In order to prepare for the hearings on remand, the University reviewed almost all of approximately 5,500 graduate assistants (TAs, RAs, and GAs) appointed for the spring term 2001. It was a daunting task. The ALJ ruled that the parties should focus on this timeframe with the hope that general principles will be developed which would ultimately allow the parties to identify future graduate assistants as either eligible or ineligible to vote on union representation.

The University believes that applying the template established by the IELRB, a bargaining unit emerges of GAs who have assistantships outside their discipline; the GAs who lack the "pre-professional" characteristics of those GAs working in their discipline. To identify those whose duties were not significantly connected, the University submitted to the GEO and to the ALJ lists of assistants who we believe are includable in the bargaining unit. The GEO accepted the University's list, covering 2 areas: First, those GAs whose duties are primarily clerical/administrative support, technical and support services, advising, or outreach. Second, the TAs and RAs who were are not performing teaching or research duties. We think this is the group of assistants who the IELRB referred to as GAs working outside their discipline. In the process of reviewing all of the assistantship appointments, the University has identified 235 positions whose duties are not significantly connected to the students' education, and has stipulated that these positions would be eligible to vote in a union representation election.

The hearings on remand began in August 2001 and continue as of the writing of this paper. To date, 10 hearing days have been held with at least one more contemplated.

III. Realities and Suggestions

Recent press clips confirm that unionization efforts among graduate students will continue. Reasons for this trend appear to be the increase in the length of time to obtain a degree in some of the disciplines, graduate students have less of a relationship with their professors, and the downturn in job prospects upon graduation. Scott Smallwood, "Success and New Hurdles for T.A. Unions," *The Chronicle of Higher Education*, (July 6, 2001) Within the past year, unionization efforts have put the following universities in the news; New York University, Brown University, Temple University, University of Pennsylvania, and Columbia University. A review of recent decisions and my personal experiences at the University of Illinois, Urbana-Champaign lead me to several observations and suggestions in the face of a union organizing effort.

1) **You will need an administrative team to respond to a unionization effort.**

It is impossible to have a coherent, reasoned approach without the collaboration and cooperation of various offices on campus. At Illinois, we have had a working group of campus administrators that has proven to be invaluable in gathering information and determining strategy. Representatives from the Chancellor's office, the Graduate College, the Provost's office, University Counsel's office, and some of our larger colleges have staffed this working group. Early on in the case at Illinois, we gathered key faculty across disciplines to advise the working group on graduate student issues and appointment practices for graduate assistants.

Suggestion: Identify the offices and the administrators who would need to be involved in policy decisions on graduate student issues, and keep them engaged in the process.

2) **While I do not expect most institutions will have cases that span six years similar to Illinois' (and counting), these cases have a life of their own.**

For example, the Student Association of Graduate Employees (SAGE) at UCLA filed a representation petition in 1994. A final decision from the California Public Employment Relations Board occurred in 1998. In March 1999, the administration at UCLA agreed to recognize SAGE depending on the outcome of the election. If it was in favor of union representation (which it was), then UCLA decided it would accept the results. Courtney Leatherman, "U. of California Opens Door to Recognition of Teaching

Assistants' Union," *The Chronicle of Higher Education* (March 26, 1999) At the outset, depending on your campus administration's position on unionization, the fact that these administrative processes with possible court involvement take time, should be acknowledged and accepted.

Reality: Short of voluntarily recognizing a union as representing a group of employees, understand that this kind of case is a commitment in time and resources usually beyond the current academic year.

3) **A university is a dynamic place and do not assume that strategic decisions remain the same.**

Given that these cases can span a number of years, as an adviser to an institution you need to make sure that the strategy identified at the beginning of a case continues to reflect the will of the governing board and campus administration.

The experiences at NYU and Temple University are instructive.

The Graduate Students Organizing Committee (GSOC), an affiliate of the United Auto Workers (UAW), began an organizational effort in 1997. In the fall of 2000, the NLRB followed its decision in *Boston Medical Center* and held that graduate assistants were eligible to be represented. NYU officials contemplated whether to challenge the NLRB ruling. An election had been held in April 2000, but the ruling cleared the way for the ballots to be counted. Apparently, after months of talks with the UAW, NYU agreed to commence bargaining with the union. A turning point in the relationship was a March 1, 2001 letter from the UAW limiting the scope of the items to be bargained and agreeing to remove certain graduate students (MBA candidates) from inclusion in the unit. Courtney Leatherman, "Teaching Assistants and Universities Plot Strategy in Union Battle," *The Chronicle of Higher Education* (November 17, 2000), and the UAW agreement can be found at www.nyu.edu/publicaffairs/newsreleases/agreement.html

The Temple University Graduate Students Association ("TUGSA"), an affiliate of the American Federation of Teachers (AFT), began its organizational campaign under the Pennsylvania Public Employee Relations Act in 1999. Temple University challenged the status of Graduate Assistants as "employees" under Pennsylvania state law. Prior to the NLRB decision in *Boston Medical Center*, a Hearing Examiner agreed with Temple University and dismissed the petition. On review by the Pennsylvania Public Employee

Relations Board (and after the *Boston Medical Center* decision), the Board vacated the Hearing Examiner's conclusions and remanded the case for the determination of the bargaining unit. *In the Matter of the Employees of Temple University of the Commonwealth System of Higher Education*, Docket No. PERA-R-99-58-E (October 17, 2000 and August 21, 2001)

Temple University continued its challenge in court until its Board of Trustees voted on September 26, 2001 to recognize TUGSA as the collective bargaining representative for certain of its teaching and research assistants. Board action followed an agreement with AFT as to the scope of topics to be bargained and the bargaining unit. "Temple University Votes to Recognize 'TUGSA' as Bargaining Representative for Teaching and Research Assistants", *Temple Times* (September 28, 2001) and Scott Smallwood, "Temple U. Agrees to Negotiate with Teaching Assistants' Union," *The Chronicle of Higher Education* (October 12, 2001)

Suggestion: Continue to inform the governing board and key campus administrators of the progress of a case and request periodic approval of your case strategy.

4) **You need to understand the political environment at the national, state, and local level.**

It is clear that the national trend in these labor representation cases is to expand the definition of "employee". NLRB Member, J. Robert Brame III, made an interesting observation in his dissent in *Boston Medical Center*:

"Today's decision exemplifies an inherent weakness in our statute and our process. Congress entrusted us with the first responsibility of interpreting and applying the Act. In theory, we have the accumulated experience of the agency and bring that to bear in understanding and applying the policies of the Act. Today, however, the majority focuses on isolated parts of existing methods of clinical education to support a finding that residents are statutory employees but refuses to recognize their essential role in the larger process of graduate medical education. The majority thereby demonstrates yet again that the Board is more enticed by expanding its jurisdiction than by a reasoned analysis of the Act's policies. [FN60] The Supreme Court has previously had occasion to instruct the

Board on the congressional policies that necessarily exclude core business decisions from collective bargaining, [FN61] and exclude managerial employees from the ambit of Section 2(11). [FN62] Once again, however, we are like a foolish repairman with one tool – a hammer – to whom every problem looks like a nail; we have one tool – collective bargaining – and thus every petitioning individual looks like someone’s “employee.” 330 NLRB No. 30 (1999)

However, there is some danger in assuming that someone’s political leaning results in a predetermined outcome. A Republican appointee to the NLRB, Mr. Peter Hurtgen, wrote a forceful dissent in the *Boston Medical Center* case arguing against overturning twenty years worth of precedent that medical housestaff were not employees under the NLRA. It is interesting to note that Mr. Hurtgen joined the NLRB majority in the NYU case, writing a concurring opinion, finding that the NYU graduate students did not perform services as a necessary and fundamental part of their studies, and should therefore qualify as employees under the NLRA with the right to bargain collectively.

In the first year of his presidency, President George Bush had the opportunity to make five appointments to the NLRB – four board members and a new general counsel. “Attorneys Cite Issues to Watch as Board Undergoes Political Shift,” *Daily Labor Report*, (March 6, 2001) 44 DLR B-1 (2001) University administrators should continue to watch for developments in this area.

At the state level, the Illinois House of Representatives has been supportive of GEO’s effort to gain voluntary recognition. This support recently took the form of a House Resolution calling on the Board of Trustees to voluntarily recognize the union and to start negotiations. (See Appendix B.) In New York, Senators Hillary Clinton and Charles Schumer wrote a letter of support to Columbia University’s President George Rupp for the UAW’s efforts to organize teaching and research assistants at Columbia. They encouraged Columbia to take a neutral position on unionization and to allow a vote to go forward. “New York Senators Support Union Vote,” *The Daily Pennsylvanian* (June 14, 2001)

At the local level, community groups and municipal authorities may also weigh in with their opinions. On the Urbana campus, an alliance of clergy has been an active proponent of GEO’s organization effort.

Reality: Unions and universities operate in a political environment; decisions may be made for political reasons.

5) **Do you know who your graduate assistants are?**

If a union came knocking on your door today, would you know how your academic departments, administrative units, and your Human Resource departments categorize graduate students receiving financial aid in the form of tuition and fee waivers and stipends? Do you know how these units classify others whose employment is not dependent on their student status? Is your information on appointments centralized in some database or dependent on human recall? Do you conduct a self-audit to check on whether your appointment practices match the titles given and established categories? If an individual student holds more than one appointment, do you understand the logic behind the appointments, does anyone? Do you know the funding mechanism for graduate assistant appointments?

The greatest challenge during the course of the administrative processes in Illinois has been to understand the appointment practices for graduate assistants. We were compelled to apply a bargaining unit framework to a group of students who never had traditional personnel practices applied to them, e.g., job descriptions, hours of work, standardization of duties and titles. We have an open issue in our case whether graduate hourlies should be included in the bargaining unit. These positions are usually short-term and relate to a specific project, e.g. proctoring an exam, and do not carry a tuition and fee waiver. These kinds of positions were not included in the unit at UCLA. Whether a position was funded by an external grant made a difference in the composition of a bargaining unit at UCLA, NYU, and Temple.

NYU also was forced to look at its appointment practices, and consistent with some initiatives taken at Illinois, attempted to standardize duties with titles and separate out administrative and clerical duties from those eligible to hold assistantships. 332 NLRB No. 111 (2000) at Footnotes 20 and 22.

Suggestion: Even without a current unionization effort on campus, a review of all appointment practices is critical.

6) **There are strategic decisions in bargaining unit determinations.**

The union gets the initial opportunity to define the bargaining unit and it is an

important tactical decision. In filing the representation petition the union will define the unit in a way it believes it enjoys support. It is understandable and important, for an institution to also review the proposed bargaining unit and make a decision whether a larger or smaller unit would support the administration's position on unionization.

Two major issues for Brown University in its challenge of the NLRB's Region One Director's ruling that some graduate assistants can be represented by the Brown Graduate Employee Organization (BGEO), an affiliate of the UAW, were: 1) Where teaching is a requirement for a degree, whether an assistant can be considered an "employee" under the NLRA; and 2) A concern that the Regional Director drew an arbitrary line between RAs in humanities and in the sciences, including only about 15 out of over 200 RAs. Andy Golodny, "Union's Appeal to N.L.R.B. Delays Final Word on Grad Union," *Heraldsphere [BREAKING NEWS]* (December 6, 2001) and Brown University President Ruth J. Simmons' letter dated November 27, 2001 to Brown University Graduate Students at www.brown.edu/webmaster/union1/

NYU also objected to the NLRB Regional Director's decision to exclude a number of research assistants in biology, physics, and chemistry, and in the Sackler Institute of Graduate Biomedical Sciences. John Beckman, NYU spokesman, called the decision, 'gerrymandering'. Courtney Leatherman, "Teaching Assistants and Universities Plot Strategy in Union Battle," *The Chronicle of Higher Education* (November 17, 2000)

Both Brown University and NYU objected to a significant number of assistants being prevented from voting in the election. One can only speculate as to how these assistants might have voted if given the opportunity.

Reality: Who's in and who's out does matter.

IV. Conclusion

Representation cases have taken on a life of their own, both at the national and state level. Developments on the political stage, e.g. President Bush's appointments to the NLRB, may result in different decisions. For those of us fortunate enough to practice in the area of labor relations, it's never boring.

