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**FEBRUARY 18, 2002**

**CURRENT COLLECTIVE BARGAINING ISSUES  
INVOLVING FACULTY, TEACHING ASSISTANTS,  
RESEARCH ASSISTANTS, AND GRADUATE  
ASSISTANTS\***

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## **I. FACULTY AND UNIONIZATION**

### **A. Some Numbers**

The Fall 1998 National Survey of Postsecondary Faculty for full-time instructional staff reveals the following information about the unionization of the professoriate:

- 30.6% of full-time instructional staff at four-year institutions are in a collective bargaining unit.
- 62.6% of full-time instructional staff at two-year institutions are in a collective bargaining unit.
- 36.9% of full-time instructional staff at all institutions are in a collective bargaining unit.

The National Center for the Study of Collective Bargaining in Higher Education and the Professions found as of 1997 that more than 250,000 faculty were represented in collective bargaining. Over 96% of union-represented faculty members are in the public sector: public colleges and universities employ nearly 240,000 unionized faculty on more than 1,000 campuses, of which about 125,000 are faculty at four-year institutions. There are about 11,000 unionized faculty at about 70 private higher education institutions.

### **B. Some AAUP Policies**

“The Association . . . affirms that faculties at both public and private institutions are entitled, as professionals, to choose by an election or comparable informal means to engage in collective bargaining in order ensure effective faculty governance.” *Statement on Collective Bargaining*, AAUP POLICY DOCUMENTS AND REPORTS 251 (2001 ed.)

“Collective bargaining should not replace, but rather should ensure, effective traditional forms of shared governance.” *Statement on Academic Government for Institutions Engaged in Collective Bargaining*, AAUP POLICY DOCUMENTS AND REPORTS 253 (2001 ed.)

### **C. Are Full-Time Professors “Employees” Under the National Labor Relations Act?**

Whether professors are “employees” and eligible to bargain collectively if they so choose under the National Labor Relations Act (NLRA), which covers most private colleges and universities, is a determination made on a case-by-case basis at each institution.

In 1970 the NLRB first exercised its jurisdiction over private not-for-profit institutions of higher learning, finding first that staff and service workers and then faculty members at various colleges and universities were “employees” covered by the NLRA.

Almost all faculty unionization efforts in the private sector ceased in 1980, however, when the U.S. Supreme Court ruled in *NLRB v. Yeshiva University* that professors at that institution had sufficient influence in university governance to be categorized as managerial employees and were therefore not covered by the NLRA.

*NLRB v. Yeshiva University*, 444 U.S. 672 (1980): The U.S. Supreme Court ruled in a 5-4 decision that faculty members at Yeshiva University were managerial employees and, therefore, excluded from coverage under the NLRA, which governs collective bargaining in the private sector. The Court noted that “an employee may be excluded as managerial only if he represents management’s interests by taking or recommending discretionary actions that effectively control or implement employer policy.” The determination of managerial status is made on a case-by-case basis, and the “relevant consideration is effective recommendation or control rather than final authority.” The Court reviewed the faculty functions in terms of both academic and nonacademic areas. It concluded:

Their authority in academic matters is absolute. They decide what courses will be offered, when they will be scheduled, and to whom they will be taught. They debate and determine teaching methods, grading policies, and matriculation standards. They effectively decide which students will be admitted, retained, and graduated. On occasion their views have determined the size of the student body, the tuition to be charged, and the location of a school. When one considers the function of a university, it is difficult to imagine decisions more managerial than these. To the extent the industrial analogy applies, the faculty determines within each school the product to be produced, the terms upon which it will be offered, and the customers who will be served. 444 U.S. at 686

Nevertheless, the Court opined that “[w]e certainly are not suggesting an application of the managerial exclusion that would sweep all professionals outside the Act in derogation of Congress’ expressed intent to protect them.” The Court also stated: Because “the Act was intended to accommodate the type of management-employee relations that prevail in the pyramidal hierarchies of private industry . . . principles developed for use in the industrial setting cannot be imposed blindly on the academic world.”

In so doing, the Court declined to rule on whether the Yeshiva University professors were supervisory, although it observed in a footnote that professors at Yeshiva “also play a predominant role in faculty hiring, tenure, sabbaticals, termination and promotion. . . . Since we do not reach the question of supervisory status, we need not rely primarily on these features of faculty authority.”

A recent U.S. Supreme Court case, which involves nurses, not professors, suggests that this Court would probably view the professors at Yeshiva University as supervisors as well as managers.

*NLRB v. Kentucky River Community Care, Inc.*, 121 S.Ct. 1861 (2001): This case involved the issue of whether nurses were supervisors in a care facility for those suffering from mental illness. Under the NLRA, employees are supervisors when “(1) they hold the authority to engage in any 1 of the 12 listed supervisory functions, (2) their exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment, and (3) their authority is held in the interest of the employer.” The Board ruled that the nurses were not supervisors because they did not exercise “independent judgment.” The Court rejected the

Board's interpretation, which it viewed as follows: "exercis[ing] a sufficient degree of discretion is not independent judgment if it is a particular kind of judgment, namely, ordinary professional or technical judgment in directing less-skilled employees to deliver services." In its analysis, the Court, citing *Yeshiva*, observed that "[e]xcluding decisions based on professional expertise would risk the indiscriminate recharacterization as covered employees of professionals working in supervisory and managerial capacities." The dissent noted, however, the tension between the inclusion of professionals under the NLRA and the exclusion of supervisors. It observed: "if the term supervisor is construed too broadly, without regard for the statutory context, then Congress' inclusion of professionals within the Act's protections is effectively nullified."

#### **D. Some Recent NLRB Cases Involving Full-Time Faculty and Collective Bargaining**

In the last few years there have been a number of attempts by faculty members at private institutions to organize collectively under the NLRA. See Courtney Leatherman, "Union Movement at Private Colleges Awakens After a 20-Year Slumber," *The Chronicle of Higher Education* (Jan. 21, 2000). The results have been, at best, mixed.

*The Sage Colleges*, Case No. 3-RC-11040 (July 31, 2001): The NLRB Regional Director (RD) ruled that faculty members at The Sage Colleges constitute managerial employees. The RD found that the faculty had significant control in student admissions--from establishing standards to "veto power" over the admission of undergraduate arts students and graduate students. The RD also found that the faculty exercised "effective control" over curriculum and academic programs, including "graduation requirements, course loads, cross-registration, core courses, internships, grading policies, dishonesty policies, course withdrawals, attendance, independent study, course changes, leaves of absence, transfer credits, academic warning, suspension, dismissal, major and minor requirements, and honors." The RD also ruled that the faculty was managerial in non-academic matters. For example, the faculty recommended sabbatical and education leaves, approved a voluntary phased retirement plan, and its recommendations regarding promotion and tenure were rarely overturned. The RD decided that the faculty also had a significant role in governance, such as the authority to make changes in the faculty handbook and in the selection of division chairs. In so ruling, the RD rejected the professors' assertion that "the process of consensus-building has been used to disguise the administration's implementation of a governance system that provides for strict administrative oversight."

*Sacred Heart University*, Case No. 34-RC-1876 (May 25, 2001): The RD decided that faculty members were managerial at this Roman Catholic institution in Connecticut. The RD ruled that "[t]he faculty as a whole effectively determine and implement the curricular and academic policies of the university, as well as such nonacademic matters as faculty hiring, leaves, promotion, and tenure." The Director reasoned that "a finding of managerial status will not be overcome simply by the fact that faculty decision making is occasionally subjected to the approval and/or veto power of the administration, . . . or because the faculty has no involvement in decisions involving non-academic affairs." The RD found that "neither the University's failure or refusal to approve all faculty recommendations in all matters, nor the University's ability to unilaterally decide and

implement certain matters, is a basis to deny managerial status.” See “Sacred Heart Professors Lost Bid to Unionize,” *The Chronicle of Higher Education* (July 6, 2001).

*Manhattan College*, Case No. 2-RC-21735 (Nov. 9, 1999): The RD ruled that professors at Manhattan College, a Roman Catholic institution in Riverdale, New York, were not managerial employees because they exercise “advisory, not actual, governance authority.” The Director’s ruling relied on a number of findings, including that: (1) various curricular committees were made up primarily of department chairs, who were found to be “supervisors,” and deans, not faculty members; (2) department chairs, not faculty, play a major role in a number of academic arenas, such as establishing graduation requirements and developing new degree programs; and (3) the college senate lacked “majority” faculty representation, and its powers were merely advisory. In so doing, the RD emphasized that academic decisions were largely made up of committees comprised of nonfaculty. The numerous delays in holding the election contributed to the professors’ rejecting union representation in a faculty-wide election.

*University of Great Falls*, 325 NLRB 83 (1997): The Board in this case ruled that faculty members were not managerial employees, noting that: (1) faculty members constituted a majority only on university committees that were solely advisory in nature; (2) the university administration had unilaterally established academic rules without faculty input; and (3) deans rather than faculty determined course schedules, approved students for graduation, and made other decisions relating to students’ academic progress. Where a faculty committee recommendation conflicted with that of the provost, the provost’s decision generally trumped. In terms of hiring, the faculty did not constitute a majority of the search committee, and its recommendations were not accepted without independent review and evaluation by the administration. In December 1997 professors at the institution voted for a union by a narrow 20-19 margin. The case is on appeal on religious freedom grounds to the U.S. Court of Appeals for the Ninth Circuit, after the Board asserted its jurisdiction over the university, which it contended did not conflict with the Religious Freedom Restoration Act (RFRA). 165 LRRM 1150 (NLRB 2000).

In cases involving faculty members at religiously-affiliated institutions, an issue is not only whether professors are “employees” under the NLRA (*Yeshiva*), but also whether the college or university is religiously operated and, therefore, not covered by the Act. *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979) (ruling that in light of First Amendment’s Establishment Clause, the National Labor Relations Board (NLRB) lacked jurisdiction over “teachers in church-operated schools”).

#### **E. Other Post-*Yeshiva* Cases: 1980-1998**

Between 1980-1997 the NLRB allowed elections for at least seven private institutions: College of Insurance (union won election), Edward Waters College (union won election), Delaware Valley College (union won election), American University’s English Language Institute (union won election), Berkeley College of Music (union won election), Bradford College (union lost election), and St. Thomas University (union lost election). Richard Hurd and Amy Foerster with Beth Hillman Johnson, *DIRECTORY OF FACULTY CONTRACTS AND BARGAINING AGENTS IN INSTITUTIONS OF HIGHER EDUCATION*, Vol. 23 (1997). In addition post-*Yeshiva* collective bargaining units at private sector higher education institutions that were either NLRB-supervised or via consent agreements exist at New Hampshire College, Bank Street College, Pierce College, and San Francisco Art Institute. *Id.*

In 1998 faculty members at Goddard College voted to unionize, and the board declined to legally challenge that faculty decision. According to the Barbara C. Mossberg, president of the college: “To affirm democratic principles of majority votes determining the will of the people, the trustees voted to ‘waive’ *Yeshiva* so as not to make legal issues prevent an election.” Alison Schneider, “Goddard College Allows Faculty to Unionize,” *The Chronicle of Higher Education* (Dec. 4, 1998).

1. Faculty members were deemed to be non-managerial in the following post-*Yeshiva* cases, which are listed in reverse chronological order:

*David Wolcott Kendall Memorial School v. NLRB*, 866 F.2d 157 (6th Cir. 1989) (adjuncts), enforced, 872 F.2d 1025 (6<sup>th</sup> Cir. 1989)  
*Spencer v. St. John’s University*, 1989 U.S. Dist. LEXIS 3421 (E.D.N.Y. Mar. 28, 1989)  
*Marymount College of Virginia*, 280 N.L.R.B. 486 (1986)  
*NLRB v. Cooper Union for Advancement of Science & Art*, 783 F.2d 29 (2d Cir.), cert. denied, 479 U.S. 815 (1986)  
*Trustee of St. Joseph’s College*, 282 N.L.R.B. 65 (1986)  
*Loretto Heights College v. NLRB*, 742 F.2d 1245 (10th Cir. 1984)  
*Bradford College*, 261 N.L.R.B. 565 (1982)  
*Stephens College*, 260 N.L.R.B. 1049 (1982)  
*University of San Francisco*, 265 N.L.R.B. 1221 (1982) (part-time professors)  
*New York Medical College*, 263 N.L.R.B. 903 (1982)

2. Faculty members were deemed to be managerial in the following post-*Yeshiva* cases, which are listed in reverse chronological order:

*Elmira College*, 309 N.L.R.B. 842 (1992)  
*Lewis & Clark College*, 300 N.L.R.B. 155 (1990)  
*University of Dubuque*, 289 N.L.R.B. 349 (1988)  
*Boston University Chapter, Am. Ass’n of Univ. Professors v. N.L.R.B.*, 835 F.2d 399 (1st Cir. 1987)  
*Livingstone College*, 286 N.L.R.B. 1308 (1987)  
*American International College*, 282 N.L.R.B. 189 (1986)  
*University of New Haven*, 267 N.L.R.B. 939 (1986)  
*NLRB v. Lewis University*, 765 F.2d 616 (7th Cir. 1985)  
*College of Osteopathic Medicine & Surgery*, 265 N.L.R.B. 295 (1982)  
*Duquesne University of Holy Ghost*, 261 N.L.R.B. 587 (1982)  
*Ithaca College*, 261 N.L.R.B. 577 (1982)  
*Thiel College*, 261 N.L.R.B. 580 (1982)

## **F. Part-Time Faculty and Collective Bargaining**

While full-time faculty who are interested in collective bargaining must clear the *Yeshiva* hurdle, as described above, part-time professors are not so hampered. See *University of San Francisco*, 265 NLRB 1221 (1982) (holding that part-time faculty members at this university were not “temporary” employees, shared a “community of interest” among themselves, and were not “managerial employees” because, unlike the full-time faculty at *Yeshiva University*, they were “hired essentially as consultants to perform a specific task”); see also Courtney Leatherman, “Faculty Unions Move to Organize Growing Ranks of Part-Time Professors,” *The Chronicle of Higher Education* (Feb. 27,

1998); Courtney Leatherman, "Part-Time Faculty Members Try to Organize Nationally," *The Chronicle of Higher Education* (Jan. 26, 2001).

Today 43 percent of all faculty are part-time, which is more than double the percentage that existed 20 years ago. AAUP, *Background Facts: Part-Time Faculty* (www.aaup.org). A 1999 survey by the Coalition on the Academic Work Force, which was sponsored by nine disciplinary associations, found that part-time faculty are paid by the course, and most receive less than \$3,000 per course. Of these so-called "freeway fliers"--because of their shuttling to and from campuses--nearly one-third receive \$2,000 or less per course. (The disciplines surveyed included anthropology, art history, foreign languages, English, history, linguistics, and philosophy.)

According to the National Center for the Study of Collective Bargaining in Higher Education and the Professions, as of 1996 about 80 institutions had separate bargaining units for some or all of their part-time professors. Courtney Leatherman, "Faculty Unions Move to Organize Growing Ranks of Part-Time Professors," *The Chronicle of Higher Education* (Feb. 27, 1998). Of those 80 units, about 30 had been formed since 1990. According to the Center, approximately 36 of the institutions with separate unions for part-time professors are four-year institutions. Around 225 higher education institutions have unions that jointly represent full- and part-time professors.

In the past few years, part-time professors have unionized at a few private institutions, such as Chicago's Columbia College and Illinois' Roosevelt University. Courtney Leatherman, "Part-Time Instructors Vote to Unionize at Chicago's Columbia College," *The Chronicle of Higher Education* (February 13, 1998); Alison Schneider, "Adjuncts at Roosevelt U. Vote to Unionize," *The Chronicle of Higher Education* (April 14, 2000). Most recently, in April 2001, part-time professors chose to unionize at Emerson College in Boston: 150 ballots were returned from the eligible 245 part-time professors, and of those 150, 75 percent voted to establish a union. See Robin Wilson, "Part-Time Faculty Members at Private College in Boston Vote to Form Union," *The Chronicle of Higher Education* (April 19, 2001).

## **II. GRADUATE STUDENT AND TEACHING ASSISTANT UNIONIZATION EFFORTS**

### **A. The NLRB Position Prior to Boston Medical Center and New York University**

For a period dating back to 1979, the NLRB had consistently held that the definition of "employee" under Section 2(3) of the NLRA did not include students who perform services at their educational institutions that are directly related to their educational program. See *Adelphi Univ.*, 195 N.L.R.B. 639 (1972); *Leland Stanford Junior Univ.*, 214 N.L.R.B. 621 (1974); *St. Clare's Hosp. and Health Ctr.*, 229 N.L.R.B. 1001 (1977); *Cedars-Sinai Med. Ctr.*, 223 N.L.R.B. 252 (1976), overruled in *Boston Med. Ctr. Corp.*, 330 N.L.R.B. No. 30 (Nov. 26, 1999).

### **B. Boston Medical Center**

In *Boston Medical*, cited above, the NLRB expressly overruled *Cedars-Sinai* and *St. Clare's*, in a split decision, holding that interns and residents are employees within the meaning of Section 2(3) of the NLRA. As a direct result, "house staff" at private teaching hospitals are subject to collective organization. The Board noted that there was no explicit statutory exception for students, and that the law generally defined employees as any "person who works for another in return for financial or

other compensation.” The Board found no policy reasons to exclude interns and residents, reasoning that there were three “essential elements” of the house staff’s relationship with the hospital that created an employer-employee relationship. These elements were (1) they work for an employer as defined by the NLRA; (2) they receive compensation for their services in the form of a stipend and fringe benefits; and (3) they spend up to 80 percent of their time at the hospital engaged in patient care.

### C. New York University

In *New York University and UAW*, Case 2-RC-22082 (Oct. 31, 2001), the NLRB ruled that New York University (“NYU”) graduate assistants are “employees” within the meaning of Section 2(3) of the NLRA, and therefore eligible to unionize. The Board found that the NYU graduate students “perform services under the control of the Employer, and they are compensated for these services by the Employer.” Consistent with its reasoning in *Boston Medical*, the Board therefore found no reason to conclude that the NLRA’s definition of employee intended to exempt graduate assistants from statutory coverage.

NYU and *amici* maintained that this case should be distinguished from *Boston Medical* because graduate assistants (“GAs”) only spent 15 percent of their time teaching (as opposed to the 80 percent time spent on patient care); because GAs receive financial aid as opposed to “compensation”; and because the nature of GA appointments was primarily educational rather than employment related, and unionization would infringe upon academic freedom.

The AAUP filed an *amicus* brief on behalf of the UAW, contending that the unionization of GAs would not violate NYU’s institutional academic freedom, disrupt graduate student involvement in university governance, or interfere with the mentoring relationships between faculty members and their graduate students. The brief argued that collective bargaining is consistent with academic freedom, shared governance, and mentoring relationships. The brief can be accessed at [www.aaup.org](http://www.aaup.org).

The Board rejected the arguments advanced by NYU and *amici*, finding that GAs performed work under NYU’s control; that assistantships constituted work in exchange for pay rather than educational benefits; that the educational benefits to GAs were no different than those to the house staff in *Boston Medical*; and that given the Board’s asserted jurisdiction over private universities for thirty years, and experience with faculty collective bargaining representatives, there would be no infringement of NYU’s academic freedom. In so doing, the Board found that the administration’s concern about infringement of academic freedom because of graduate student unionization turned “largely on speculations” and that “[s]uch conjecture does not...establish infringement.” The Board reasoned:

“While mindful and respectful of the academic prerogatives of our Nation’s great colleges and universities, we cannot say as a matter of law or policy that permitting graduate assistants to be considered employees entitled to the benefits of the Act will result in improper interference with the academic freedom of the institution they serve.”



In November 2000 the votes were counted from an election held in April. Of 1,460 eligible voters, 619 voted for UAW representation; 551 voted against. In March 2002 the parties agreed to commence negotiations. The letter agreement from the UAW to NYU Associate General Counsel Terrance Nolan, dated March 1, beginning this process, provided that certain academic decisions would not be mandatory subjects of bargaining:

“The UAW recognizes that certain issues involving the academic mission of the University lie outside the scope of bargaining as defined by the National Labor Relations Act. The UAW recognizes that the University’s bargaining obligation is limited to ‘wages, hours and other terms and conditions of employment’ of graduate assistants. Finally, the UAW recognizes that the collective bargaining obligations of the university do not encompass matters that pertain exclusively to degree requirements of any University student.”

For further reading about the NYU decision, see “*The University Works Because We Do: Collective Bargaining Rights for Graduate Assistants*,” 69 Fordham Law Review 1233 (2001); “*NLRB Holds that Graduate Assistants Enrolled at Private Universities are “Employees” Under the NLRA*,” 114 Harvard Law Review 2557 (2001).

#### **D. AAUP Policy**

“Graduate student assistants, like other campus employees, should have the right to bargain collectively ....Graduate student assistants must not suffer retaliation from professors or administrators because of their activity relating to collective bargaining.” *Statement on Graduate Students*, AAUP POLICY DOCUMENTS AND REPORTS 268 (2001 ed.).

#### **E. Other Recent Organizational Efforts**

##### **1. Temple University**

In March 2001 the more than 500 graduate assistants at Temple voted to be represented by the Temple University Graduate Students’ Association. The university appealed a ruling of the Pennsylvania Labor Relations Board finding that the TAs were “employees” under Pennsylvania law. As reported in *The Chronicle of Higher Education* on August 27, the PLRB rejected the university’s decision. The Board held that there was no evidence that giving collective bargaining rights to TAs “will or has in any way infringed upon an institution’s ability to carry out its core educational mission.” The Board followed the NLRB in finding that collective bargaining would not infringe upon the university’s academic freedom, pointing out the university’s long relationship with its faculty union. The *Chronicle* quoted a Temple spokeswoman as saying that the university’s general counsel was examining the decision.

##### **2. Michigan State University**

The Graduate Employees Union (GEU) filed a petition to represent of in excess of 1000 graduate teaching assistants at Michigan State University. At an election held in April, the GAs voted by a substantial majority to be represented by the GEU. Presumably because of prior decisions of the Michigan Employment Relations Commission, the GEU did not seek to represent graduate research assistants. Bargaining is expected to commence sometime this fall.

## **F. Application of the Family Educational Rights and Privacy Act (“FERPA”)**

The Department of Education (“DOE”) has unequivocally taken the position that certain records maintained by a university regarding teaching assistants are “education records” which cannot be disclosed to third parties (such as, for example, the union) without either (a) the teaching assistant’s consent; or (b) a lawfully issued subpoena, and notice to the student before the subpoena information is returned. This position is set forth in two letters: (1) August 21, 2000 Letter from LeRoy S. Rooker, Director, Family Policy Compliance Office, DOE, to David Strom and Stephanie Baxter, American Federation of Teachers ([www.ed.gov/offices/OM/OMltrs/aft.html](http://www.ed.gov/offices/OM/OMltrs/aft.html); September 17, 1999); (2) Letter from LeRoy S. Rooker to Edward Opton, Jr., The Regents of the University of California ([www.ed.gov/offices/OM/OMltrs/oaklandca.html](http://www.ed.gov/offices/OM/OMltrs/oaklandca.html)).

These letters taken together stand for the following propositions:

- a. Records maintained by a university regarding TAs are “educational records” under FERPA, since students’ employment as TAs is contingent on the fact that they are enrolled as students.
- b. Such records can be disclosed with the student’s prior consent.
- c. Such records can be disclosed pursuant to a subpoena issued from a state labor board if such a subpoena was authorized by state law.
- d. Although in the first letter, the DOE found that a student’s status as a TA could not be considered “directory information,” in the second letter, the DOE relaxed its narrow prior interpretation and stated that a TA’s status as assistant, as well as her or his teaching assignment, may, at the option of the university, be designated as directory information. Under FERPA such directory information may be shared with third parties.
- e. If a university publishes or posts the names of TAs with course selection information, it should designate that information as directory information.
- f. Information including a student’s social security number, rate of pay, and bargaining unit status, cannot be designated and disclosed as directory information.

As a result of the DOE’s interpretations, NYU obtained a subpoena from the NLRB before releasing information to the UAW, and Michigan State University obtained a subpoena from the Michigan Employment Relations Commission before releasing information to the GEU.

## **G. Examples of TA/GA Contracts**

For some examples of “mature” contracts between Universities and TA/GA unions, see the following contracts:

- The University of Michigan and the Graduate Employees Organization/American Federation of Teachers, AFL-CIO Local 3550 can be found at

[www.umich.edu/%7Eumgeo/contract/currentcontract/index.html](http://www.umich.edu/%7Eumgeo/contract/currentcontract/index.html). The GEO was certified by the Michigan Employment Relations Commission Order in Case No. R74 B-70, April 15 1974, as amended by a MERC Order in Case No. C76-K-370. The latter case and order, which can be read at 1981 MERC Lab.Op. 777, amended the original Order by excluding graduate research assistants from the unit on the grounds that they were primarily students rather than employees.

- The State of Wisconsin and the Teaching Assistants' Association can be found at [www.ohr.wisc.edu/polproced/TAAContract/taamain00-01.html](http://www.ohr.wisc.edu/polproced/TAAContract/taamain00-01.html). The TAA was certified as the bargaining representative by the Wisconsin Employment Relations Commission Certification, Case 242, No. 37747, SE-92, Decision No. 24264, dated April 29, 1987.

### **III. SOME BASIC ADVICE FOR UNIVERSITY ADMINISTRATORS ON PERMISSIBLE/IMPERMISSIBLE CONDUCT DURING A UNION ORGANIZATIONAL CAMPAIGN**

The following advice is consistent with many years of decisions by the NLRB. If the campaign is conducted under a state labor law, the decisions of the state labor board should be consulted, but the following would be generally consistent with the decisional law of most, if not all, states.

#### **A. Permissible, Lawful Conduct**

The law generally permits employers to engage in the following conduct:

- Respond to questions initiated by potential bargaining unit members about factual matters;
- To state matters of fact and opinion, so long as they are stated without any threat or promise of benefit;
- Conduct informational meetings and distribute information.

#### **B. Impermissible, Unlawful Conduct**

The law prohibits employers from engaging in the following conduct:

- Do not threaten;
- Do not promise a benefit if the association/union is not selected;
- Do not coerce;
- Do not intimidate;
- Do not interrogate, survey, or poll;

- Do not retaliate against anyone for participating in the association/union organizational effort.

Some more specific examples illustrating what the law prohibits include:

- Do not ask potential bargaining unit members whether they are for or against the association/union;
- Do not ask potential bargaining unit members whether they signed an authorization card;
- Do not solicit from potential bargaining unit members their views about the association's/union's efforts;
- Do not ask potential bargaining unit members for their opinions concerning the attitude of others about the association/union;
- Do not initiate discussions with potential bargaining unit members about the association/union;
- Do not tell potential bargaining unit members that the university will make improvements if the association/union is defeated;
- Do not directly or indirectly threaten potential bargaining unit members with a loss of benefits or a negative change in working conditions or any other negative consequences because of their involvement with the association/union;

#### **IV. THE “WEINGARTEN” DOCTRINE IS EXTENDED TO NON-ORGANIZED EMPLOYEES**

In the recent case of *Epilepsy Foundation of Northeast Ohio*, 331 NLRB No. 92 (July 10, 2000), the NLRB extended *Weingarten* rights to non-unionized employees.

*Weingarten* rights derive from a landmark U.S. Supreme Court case in the 1970s, in which the Court ruled that union employees have a right under the National Labor Relations Act (“NLRA”) to have a union representative with them in any meeting with the employer that may result in discipline.

In *Epilepsy Foundation* a non-union employee was fired for refusing to meet with his superiors without a coworker present to discuss a possible disciplinary situation. The employee did not want to meet alone with his superiors because he had been harshly reprimanded in a previous meeting and he had reason to believe that he might be subject to discipline again – this time for writing a memo that was highly critical of his direct supervisor.

The NLRB ruled that the employer had violated the NLRA by refusing to allow the employee to have a representative with him to meet with his superiors to discuss a possible disciplinary situation.

The Board held that the right to do so, even in a non-unionized setting, was guaranteed for all employees – unionized or not:

“... the right to the presence of a representative is grounded in the rationale that the [National Labor Relations] Act generally affords employees the opportunity to act together to address the issue of an employer’s practice of imposing unjust punishment on employees.”

From a practical standpoint, here is the scope and impact of the Board’s new ruling:

- if he or she requests it, an employee must be given *the option* to have a coworker representative present with him or her at any “investigatory interview” – there does not appear to be any new affirmative obligation on the employer to make the offer if the employee does not make the request;
- the employee is not obligated to request the presence of a Weingarten representative, but instead is free to choose whether to request or forego such representation;
- at this time the employer is under no obligation to deal with the employee’s representative in any other fashion or setting outside of “dealing with” him or her in an “investigatory interview”; and
- the employer is free to forego the investigatory interview and pursue other means of resolving the issue.

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