

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

THE NEW SCHOOL¹

Employer

and

Case No. 02-RC-143009

STUDENT EMPLOYEES AT THE NEW
SCHOOL – SENS/ UAW

Petitioner

SUPPLEMENTAL DECISION AND ORDER DISMISSING PETITION

The New School (the Employer), is a New York not-for-profit corporation which operates institutions for higher education in New York, New York. On December 17, 2014, Student Employees at the New School, SENS/UAW (the Petitioner) filed the petition in this matter seeking a unit of students providing teaching and research-related services to The New School. As amended at hearing, the unit sought by the Petitioner is as follows:²

Included: All student employees who provide teaching, instructionally-related or research services, including Teaching Assistants (Course Assistants, Teaching Assistants, Teaching Fellows, and Tutors), and Research Assistants (Research Assistants and Research Associates), and Student Assistants 3 at the Parsons School

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

On February 6, 2015, I administratively dismissed the petition, finding that it sought an election among graduate students who are not employees within the meaning of Section 2(3) of the Act pursuant to the Board's decision in *Brown University*, 342 NLRB 483 (2004). On March 13, 2015, the Board granted the Petitioner's request for review and remanded the case for hearing.

Upon the petition duly filed under Section 9(c) of the National Labor Relations Act (the Act), a hearing was held before a Hearing Officer of the National Labor Relations Board (the Board) on April 20, 21, 23, and May 4, 6, 11, and 14, 2015.

¹ The name of the Employer appears as amended at hearing.

² The Petitioner desires to proceed to an election in another unit if one is found appropriate by the Board.

Pursuant to Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the Regional Director, Region 2.

Upon the entire record in this proceeding, including the briefs filed by the parties after the closing of the record, I find that:

1. The Hearing Officer's rulings are free from prejudicial error and are hereby affirmed.
2. The parties stipulated, and I find, that The New School, a New York not-for-profit corporation, with a place of business located in New York, New York, operates institutions for higher education. Annually, in the course and conduct of its business operations, The New School derives gross revenues in excess of one million dollars, excluding contributions which, because of limitations by the Grantor, are not available for operating expenses, and purchases and receives at its New York, New York facility products, goods and materials valued in excess of \$50,000 directly from points outside the State of New York. Accordingly, I find that The New School is engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the purposes of the Act to assert jurisdiction herein.
3. The parties stipulated, and I find, that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act.³
4. A question affecting commerce exists concerning the representation of certain employees of The New School within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

The Petitioner seeks to represent a unit of graduate students who assist faculty with teaching, research, and other miscellaneous duties. The Petitioner argues that an election should be directed because *Brown* was wrongly decided and should be overturned, and that the individuals in the petitioned-for classifications are employees. The Petitioner argues alternatively that the classifications sought in the petition are distinguishable from those in *Brown*, and that on that basis, I should direct an election.

The New School argues that the petition should be dismissed because the petitioned-for individuals are not employees within the meaning of §2(3) of the National Labor Relations Act, as amended ("the Act"). The New School asserts that the determination of the Board in *Brown* is controlling with respect to these individuals and that thus, as graduate students enrolled at The New School, they cannot be found to be employees of that institution. The New School argues additionally that even if the petitioned-for individuals were found to be employees, they would not be entitled to collective bargaining rights because they are temporary or casual employees who have no expectation of serving continuously in their positions.

³ The New School notes that should it prevail in its argument that the individuals at issue are not statutory employees, the Petitioner would consequently not be a labor organization.

I have considered the arguments presented by the parties. I conclude that I am constrained by *Brown*, which holds that graduate assistants are not “employees” within the meaning of Section 2(3) of the Act. Because the Petitioner seeks to represent individuals employed in classifications which fall within the term “graduate assistants,” *Brown* is controlling, and therefore I am dismissing the petition.

I. OVERVIEW

A. The New School’s Operations

The New School is an institution of higher learning in New York City, and its principal campus is in Greenwich Village.

There are five distinct divisions within The New School: The New School for Social Research, the Eugene Lang College, the New School for Public Engagement, the Parsons School of Design, and the Performing Arts School, which includes the Mannes College of Music. These institutions offer students 152 courses of study. The New School for Social Research serves only as a graduate school, and the Eugene Lang College operates only as an undergraduate school. The other three institutions offer both undergraduate and graduate programs. Facts relating to each of these divisions will be reviewed in greater detail below.

Approximately 10,000 students are enrolled at The New School: 6,700 undergraduates; 3,400 graduate students. Of the graduate students, about 550 are in doctoral programs, mostly at the New School for Social Research, which offers PhDs in social sciences and humanities. Instructional staff include 420 full-time faculty members and approximately 2,300 part-time, or adjunct, faculty members. According to the Petitioner, there are approximately 350 individuals who work in petitioned-for classifications.⁴

Undergraduate programs offer Associate degrees, Bachelor of Arts degrees, Bachelors of Fine Arts degrees, and Bachelor of Science degrees, as well as other specialized undergraduate degrees such as a BBA in Design Management. Master’s level degrees include the Master of Arts, Master of Science, Master of Fine Arts and Master of Music. Doctoral degrees are offered in a number of fields including Humanities and Social Science and Philosophy.

Students, including those in the petitioned-for unit, are governed by a Student Code of Conduct and other policies which are enforced by the Office of Student Services, the Deans’ offices in the various schools, and/or the Provost. These include disciplinary procedures which differ from those which apply to individuals the New School deems employees.

⁴ It appears that some of the graduate assistants may work in more than one position in a given semester.

Approximately 85% of The New School's core revenue comes from tuition, and of that most of the tuition is from undergraduate students, who make up two-thirds of the student population. Funding from grants at The New School mostly derives from social science and humanities research.

The New School's Chief Academic Officer is the Provost; he functions as the Dean of the Faculty. The Provost's office is responsible for academic affairs, including hiring and reviewing faculty and overseeing academic policies and procedures. The Provost represents faculty in the budgeting process which determines salaries and raises. The Provost sets curriculum standards in accord with regulatory and accrediting requirements and best practices in different fields. As will be described below, the Provost's office coordinates the placement of graduate students into many of the classifications at issue.

B. Graduate Degree Requirements

Requirements for Master's and Doctoral degrees vary widely between programs and will be reviewed with more specificity by subdivision below. Generally, candidates must take a prescribed course of study including completion of a minimum number of credits, which is determined by each program.

Most students complete work for a Master's Degree in two or three years. A Ph.D. generally takes six or seven years of study beyond the Master's. Students may apply for admission to doctoral programs after completing at least 30 credits in a Master's Program. Most Ph.D.s require an additional 30 credits beyond the Master's degree and some require more, such as Clinical Psychology, for which the accrediting agencies require 90 total credits.

None of the graduate degrees conferred by the New School require students to hold any of the petitioned-for positions. Admission to a graduate program does not entitle students to serve in any of the petitioned-for positions; however, only graduate students enrolled at The New School are eligible to work in the petitioned-for positions.

C. Duties of Students in the Petitioned-For Classifications

As described more fully below, duties and compensation levels vary among and within the positions. Among the instructional assistants, Teaching Fellows are generally more advanced students than Teaching Assistants. Course Assistants perform mostly administrative functions and have less responsibility with respect to students than the Teaching Assistants or Fellows. Tutors perform one-on-one work with particular students rather than having broad responsibility for class materials generally. Research Associates tend to be more advanced students than Research Assistants.

Positions typically require between 10 and 20 hours of work per week, though tutoring positions seem to have much less regularity in hours. Students are expected to

limit their total time performing tasks in assistant positions to 20 hours per week so as to allow sufficient time to focus on their studies.

Each graduate assistant position typically lasts for one 15-week semester, although some last two, and some involve work in summer classes which are taught over a shorter period. Appointments do not carry with them a guarantee of continued time in the position beyond the appointment term. Students must “apply” for each appointment, but students frequently serve in multiple sequential teaching assistantships, by formally re-applying and because faculty informally ask students to continue to work with them. There is no process for removing Teaching Fellows or Teaching Assistants during their term of service, and no evidence in the record of any such removals. Students are not permitted to hold two Teaching Fellowships at once, though they may hold up to two Teaching Assistantships or one Teaching Assistantship and one Teaching Fellowship concurrently in a given term.

1. Teaching Assistants

Teaching Assistants support a lead faculty member who is the teacher of record for a particular class. The lead faculty member provides the overarching content of the course. A Teaching Assistant’s particular tasks vary depending on the needs of the teacher and the students. They are generally expected to attend weekly lectures, which range in size from 100-400 students, provide support in the classroom, and lead separate weekly discussion sections of about 18-20 students. Sometimes Teaching Assistants help students one-on-one with the material, and they can hold office hours. Teaching Assistants also may prepare written or other materials for the faculty member, and occasionally assist with grading of quizzes or homework assignments. Generally, final grades for a class are assigned by the instructor of record. The performance of a Teaching Assistant is overseen by the instructor of record of the course.

Examples of Teaching Assistants’ classroom support work include updating data and preparation of visual aids for lecture presentation, and collection of readings that a faculty member wants to make available to students. In their break-out sections, Teaching Assistants lead discussions of lecture topics and respond to questions which students may not have a chance to ask in the large lecture.

Teaching Assistants are expected to participate in two professional development pedagogy training seminars during or before their first semester of teaching. Topics include grading and assessment, teaching with technology, and leading discussions. The training seminars are not credit courses. In practice Teaching Assistants do not always participate in these trainings, or do so after having served as a Teaching Assistant. Doctoral student Ingrid Kvangraven is currently taking a pedagogy course to improve her skills but did not take one before she first worked as a Teaching Assistant, nor did she take any other orientation to classroom teaching.

Teaching Assistants work in classes throughout most of The New School. The record included examples of a few specialized areas in which Teaching Assistants work,

and which include particularized duties and requirements. There is no clear evidence of the numbers of Teaching Assistants who work in each of these programs.

Some Teaching Assistants work in cross-curricular University Lecture, or “ULEC” classes. Each undergraduate student is required to take two ULEC courses, and each such course has a number of Teaching Assistants. The ULEC Teaching Assistants work with the faculty member regularly as a team; the faculty member reviews with the Teaching Assistants what should happen in the smaller recitation sessions (which are not attended by the faculty member). Teaching Assistants provide feedback from their sessions to the faculty member and discuss what should be emphasized for the students.

Teaching Assistants also serve in the Riggio Honors Program, in which 50 specially-selected undergraduates focus on “Writing in Democracy.” This program includes financial support for graduate students to serve as Teaching Assistants. The selection process for Riggio Teaching Assistants is conducted by the Riggio program itself, separate from the Provost’s process described below. The Riggio program faculty work closely providing mentorship and assistance in teaching writing, assisting students with reading and developing their writing skills. Teaching Assistants are told to expect to spend 10-25 hours per week preparing and teaching in Riggio classes.

Teaching Assistants in graduate Psychology courses communicate regularly with faculty members about the progress in their discussion sections, with a focus on how students are absorbing specific material. This discussion may be used as a basis for tailoring lessons to particular needs that have become apparent in the small sections. Teaching Assistants and faculty review grading rubrics if the Teaching Assistant is helping with grading. When multiple Teaching Assistants are responsible for multiple sections, faculty hold weekly meetings after the weekly lecture so the faculty member receives feedback concerning what students are and are not understanding from the lectures, and to ensure there is consistency in the way various Teaching Assistants are grading assignments.

Only Media Studies graduate students are eligible to be Teaching Assistants in Media Studies Courses at the New School for Public Engagement. These Teaching Assistants are responsible for reading and grading a percentage of the assigned course work of the undergraduates.

2. Teaching Fellows

Teaching Fellows have more advanced responsibility than Teaching Assistants. They are instructors of record, and as such, are responsible for assigning grades and are usually listed as the teacher of a course in the school’s course catalog. Teaching Fellows are responsible for a course’s content and its delivery, though they typically work closely with faculty members in developing syllabi, considering lesson plans, and strategizing about how to approach the material and work with students. Teaching fellows are typically doctoral candidates with academic career aspirations. They are supervised by department chairs and program directors. The New School’s 2015-2016 “University-

wide Call for Applicants” for Teaching Fellowships estimates the time commitment for the position at 10 hours per week. Like Teaching Assistants, Fellows are expected to complete the training and pedagogy seminar when first working in a classroom.

3. Research Assistants

Research Assistants⁵ work under the supervision of a faculty member on an academic project. Their work varies tremendously depending on the area of study, the nature of the project, and the needs of the faculty member. It can include everything from data analysis to literature reviews to administrative duties. Research Assistant appointments last one semester or one year and do not include a promise that the student will continue beyond that appointment. There are no seminars or special training required for Research Assistants; the preparation for the position is the work they have done as a graduate student in their program. Faculty are free to select their own Research Assistants and generally seek students interested in their own fields of study.

Research Assistant positions are funded both internally and externally. In addition to funding provided by The New School, faculty apply for and receive research grants from governmental and private entities which include funding for research assistants, as described further below. Research Assistants who work on grant-funded projects help faculty fulfill the conditions of an awarded grant as described in the grant proposal.

Examples of tasks performed by Research Assistants include data analysis, literature reviews, and development of bibliographies of research sources relevant to a research project. Research Assistants may also create, or help to create, new data sets for analysis in a research project. Thus, a Research Assistant in a psychology lab might prepare a child and parents who are subjects in an attachment study for an interview, ask the questions which test the level of attachment and analyze data resulting from the answers and observations. More administrative tasks performed by Research Assistants could include preparing materials for a conference at which a faculty member may be presenting research, or preparing a website in order to be able to disseminate the research.

Witnesses for The New School testified that often Research Assistants work on projects related to their own academic pursuits. However, student witnesses described Research Assistant positions that had no such connection. Doctoral student Ingrid Kvangraven described a Research Assistant position with Professor Reddy in his capacity as the Director of Undergraduate Studies in Economics at the Eugene Lang College. Her duties are purely administrative. She helps him organize one event per semester for undergraduate students who might be interested in majoring in Economics or are already

⁵ Employer Exhibit 76 indicates that some Research Assistants are classified in The New School’s Human Resources records as Student Assistants 1, 2 and 3; OCSE College Programs, MA; On-Campus Student Worker; Orientation Leader; and Technical Assistant. Other than “Student Assistant 3” at Parsons, it is not clear whether these classifications are also sought in the petitioned-for unit.

doing so. She communicates with administrators about changes in course requirements, supplies lists of Economics undergraduate majors, and responds to requests about the undergraduate program. There is no teaching or research involved in this position. She also previously worked in another Research Assistant position which entailed purely administrative duties including managing a website, collecting information on alumni, and updating a student directory.

4. Research Associates

Students in Research Associate positions are generally drawn from the pool of more advanced doctoral students, although some master's students anticipating doctoral studies also hold the positions. They perform tasks similar to those performed by Research Assistants, but at a level requiring more knowledge and expertise. Most Research Associate positions are supported by externally-generated research grants. As is the case with Research Assistants, Research Associates may only receive funding for work on projects supported by outside grants if they are conducting activities necessary to the goals described in the grant.

As an example, a number of Research Associates performed tasks in connection with a 4-year study about survey data collection on smart phones funded by the National Science Foundation. The project was a collaboration between the New School and the University of Michigan and involved faculty and students from both institutions. Research Associates at The New School were drawn from both the Psychology Department and the MFA Design and Technology Program.

The record also includes an example of Research Associates working on a large grant in the Psychology Department of the New School for Social Research. They joined in frequent team meetings, often via video or phone. They examined methods of online businesses such as Craig's List and Amazon, to analyze recruiting techniques. The project involved constant research and design elements requiring frequent new work assignments for the Research Associates. The Principle Investigators for the grant selected the Research Associates because of their prior experience, as well as, their expectation that work on the grant would be educationally fruitful for them. For example, one Research Associate had prior experience working for a speech dialogue systems company which builds interactive dialogue systems. She was on the team that built the interactive speech survey system and helped map out dialogues and structure for the surveys conducted in the study. This student also benefitted from the mentoring of the faculty Principle Investigator and she used data collected in this project for her dissertation proposal. Her expected Ph.D. will be in Cognitive and Social Developmental Psychology.

5. Course Assistants

The Course Assistant position mostly involves supporting class work that does not entail teaching responsibilities, such as preparation of materials for class and grading. There is no specific training offered or required. Course Assistants generally do not work

with students to the degree Teaching Assistants do; they are unlikely to hold office hours. Course Assistants are paid a fixed stipend. Appointments are for one semester and re-application is required to work again in the position.

The record includes a job description for a Course Assistant position in the Media Studies department which appears to be generally consistent with the types of tasks Course Assistants perform throughout the New School:

Student will support teaching and learning outcomes through non-instructional activities. Duties may include: attending class, making photocopies, demonstrating use of equipment, taking attendance, proctoring exams, collecting assignments, assisting with classroom set-up (i.e., coordinating tech setup with Audio/Visual), uploading course content online, tracking students' participation online, assisting students having difficulty with online environment, and grading.

6. Tutors

Tutors are students who assist undergraduates one-on-one. They work with students on writing, foreign languages, and music. Writing tutors are often placed in the Student Learning Center where they provide support for students working with English as a second language. Some Tutors serve as writing assistants for a freshman writing seminar taught at Eugene Lang.⁶

D. Sources of Funding for Graduate Student Positions

The New School provides approximately five million dollars annually to students serving in the petitioned-for classifications. The New School maintains that it seeks to get aid to as many students as they can, given resources' constraints, and that payments to graduate students in the classifications at issue are the bulk of this financial aid.⁷ The funds are provided from the following sources:

1. The New School's allotments to faculty for use in engaging student assistants.

The New School allots up to \$5,100 for each faculty member to use toward engaging student assistants in accord with proposals approved by the appropriate deans, who review proposals to ensure the work will have value to the student. These assistantships are sometimes posted and faculty in some cases interview students who are candidates for the positions. This annual allotment of \$5,100 is apparently available to

⁶ Some Lang freshman writing seminar Teaching Assistants are upper-level undergraduates at Lang – these are an exception to the rule that only graduate students hold the petitioned-for positions. The record does not reflect the number of undergraduates who hold these positions.

⁷ There are a very few graduate students who have full scholarships, including tuition and an additional stipend to live on. Of last year's admitted graduate students two PhD candidates and three master's students were fully funded. Some scholarships at The New School are merit-based and some are need-based.

all full-time faculty in four of the five divisions at The New School. The one in which it is not available is the New School for Social Research, where faculty tend to have larger research budgets.

2. External Research Grants

The New School receives money from grants awarded by private foundations or government agencies. The grants include designated funds for student assistants to perform specified work on the project, lead by a faculty member who serves as a Principle Investigator, as described in the grant proposal. The grant funding is generally awarded to The New School, which administers the distribution of the funds in accord with the approved proposal.

Grant funds include an allocation of money for “indirect costs.” The indirect cost payments are calculated based on the amount of grant money allocated to salaries, including not only salaries of faculty but also those of student researchers working on the grant. The University may spend these indirect cost funds as it sees fit. The New School allocates 60% of this money back to the Principal Investigator – the faculty member who is primarily responsible for fulfilling the terms of the grant – who is expected to use it to support additional student Research Assistant positions. The remaining 40% is split between central administrative offices which provide administrative services relating to the grants and the Deans of each school who use it for a variety of purposes.

Federal guidelines restrict the circumstances in which grant money may be designated to compensate students working on the grant project “as, or in lieu of, wages.” Student assistants may be funded only if they are currently enrolled in an advanced degree program at the institution and the activities of the student on the research project relate to the degree program. The student must be conducting activities necessary to the sponsored agreement, in accordance with a generally fair institutional policy for providing financial support, and the “tuition or other payments are reasonable compensation for the work performed and are conditioned explicitly upon the performance of necessary work.” Guidelines also require that the institution have a practice of similarly compensating students in nonsponsored as well as sponsored activities.⁸

3. Centrally-budgeted funds for interdisciplinary courses

The New School offers University Lecture “ULEC” Courses which are large classes generally taught by the most senior faculty. These courses are designed to cross disciplinary lines. Graduate students run small recitation sections which supplement the lectures by senior faculty. There is a budget of \$250,000 for Teaching Assistants who serve in ULEC courses.

4. Centrally-budgeted funds for Tutors

⁸ The record does not include any discussion of The New School’s adherence to these guidelines or examples of how students in “nonsponsored” activities are compensated.

Funds for Tutors in the University Writing Center and elsewhere come from a central budgeting process.

5. Budgets of divisions within the University

The various divisions of The New School budget certain funds to support Teaching Assistants and Teaching Fellows to serve in classes which pedagogically require these positions to ensure the material is appropriately covered. In some cases classes have technical components that require assistants for students learning the technical aspects.

6. Federal Government Work-Study Grants

These are funds the federal government supplies for needy students, and apparently they are supplemented by The New School. The record is unclear as to whether The New School supplements the grants by enlarging the grants themselves or through appointments to the various assistant positions.

Thus, distribution of financial aid between divisions varies according to the availability of funds from the various sources. Every faculty member has access to the same \$5,100 for use of student assistants for approved proposals. Some divisions may have additional resources within their divisional budget to supplement teaching, i.e., in technical courses, and some divisions may have a larger or smaller number of students eligible for and receiving work-study grants from the government.

E. Compensation to Students in the Petitioned-for Classifications

Teaching Assistants, Teaching Fellows, Research Assistants, Research Associates, and Course Assistants receive stipends which are disbursed to them in biweekly payments over the term of their appointment(s). The stipend amounts are sometimes expressed in terms of hourly rates. However, payments do not vary with respect to how many hours they actually work in a given week. There is no formal monitoring of a student's time in these positions.⁹

Payments to students in the petitioned-for classifications are made through a payroll account and taxes are withheld, whether the students are paid a stipend or an hourly rate. Students must provide I-9 forms to be eligible for these positions. The payments are income without restrictions on how students may use it.

⁹ Tutors appear to be the exception to this rule as evidence indicates they are paid by the hour, though the record does not indicate the specifics of their payment schedules.

The evidence indicates that generally Teaching Assistants are paid \$4,500 per semester while Teaching Fellows receive \$5,500.¹⁰ Riggio Teaching Assistants are paid \$1,000 a month for nine months, through a bi-weekly stipend.

Research Assistants paid out of funds provided by The New School to faculty may earn up to \$5,100 per semester; payments are linked at least in part to the expected hours required in the role. Research Assistants funded by other sources can earn far more. Appointment letters in the record show Research Assistants earning as much as \$18,000 over a semester for 20 hours of work on a project for a full academic year, and as little as \$3,000 for a 7.5-hour-per-week position in the 2012-2013 term.

Both Teaching Assistant and Research Assistant positions are sometimes granted as half-time appointments in which the student assistant shares duties with another and earns half of the stipend amount. In other cases students are appointed to work what would typically be a semester's worth of hours over the course of a full academic year, with payments spread accordingly. Doctoral student Zoe Carey was awarded a Teaching Fellowship in which she will co-teach a class with another instructor who will be leading the studio portion of the course. She will be paid \$5,683.50 for the position. Carey was also awarded a half-Research Assistant position for the full academic year. She will be paid a stipend of \$2,615, paid in biweekly installments during the semesters she is working, with an expected workload of five hours per week.

Research Associate positions appear on average to pay the highest of all the petitioned-for positions. Research Associates on a major Psychology grant received stipends of between \$30,000 and \$40,000 per year from the federal government. The funds were designated in the grant for Research Associates to perform services in connection with the grant. Other Research Associate positions appear to pay far less, though it is not clear from the record what the lowest-paid Research Associates earn.

The records reflect recent semester payments to Course Assistants of \$1,500 for one semester in which the student worked approximately 8 hours per week

As noted, The New School's records appear to indicate that tutors are paid an hourly rate, with payments dependent on completed time sheets. In one instance the rate for a Tutor at the NSPE was \$17.00 per hour. At the Mannes School of Music, aggregate semester pay for tutors in recent semesters ranged from around \$200 to around \$1,000, although at least one tutor seems to have earned significantly more – upwards of \$5,000 per semester.

Witnesses for The New School tended to describe money provided to students as stipends or financial aid. However, selection criteria for students seeking the petitioned-for positions does not include assessment of financial need. Documentary records indicates that the funds are referred to variously as financial aid, salaries, and wages.

¹⁰ Witnesses for The New School asserted that hiring an outside adjunct instructor to run a small section of a course would cost less – in the range of \$4,000.

Graduate assistants on federal grant projects are listed among the “personnel” whose “costs” are covered as part of the funding of the project.

Financial aid available for New School for Social Research students includes a very few tuition scholarships as well as payments to students in the graduate assistant classifications. There are a number of Ph.D. students who do not receive any financial aid at all, though the record does not reflect how many.

F. Application and Appointment of Students to the petitioned-for classifications

1. Evidence about the formal application and Selection Process

The formal selection process for Teaching Assistants and Teaching Fellows throughout the New School is centralized in the Provost’s office. The Provost’s office compiles information from the various divisions and departments about which courses will need Teaching Assistants, how many will be needed, and the average number of hours a Teaching Assistant is expected to work in a week over the course of a 15-week semester. The Provost’s office website sets forth standards for all Teaching Assistant and Teaching Fellow applicants. Applicants must have a minimum cumulative GPA of 3.5 and be within their time limit for earning their degree. They may not have more than one third of their courses as incomplete. Prospective Teaching Fellows must be in or accepted into a doctoral program, or have over 50% of their terminal master’s degree completed.

Most Teaching Assistant positions across the university are open to all graduate students. The application process is opened once a year, by email from the Provost’s office to all graduate students. The Provost’s office forwards a list of applicants from each department and the department Deans review candidates’ eligibility. The Provost’s office then forwards the eligible candidates’ applications to lead faculty who have requested a Teaching Assistant. Faculty then review applications, interview students, and submit selections to the Provost’s office. Lead faculty make the ultimate selection of Teaching Assistants for their classes. The selections are reviewed to ensure no student will hold more than the maximum allowed two Teaching Assistant positions or one Teaching Fellowship position in a single semester. If a student is offered more positions than allowed, the student is asked to rank their preferences. The Provost’s office notifies students who have been selected to serve as Teaching Assistants

The process of selection and review is essentially the same for Teaching Assistants and Teaching Fellows. Candidates’ academic records and resumes are reviewed in order to assess their qualifications for the position(s) they seek. Some faculty may choose to interview candidates before making selections. Students selected as Teaching Assistants or Teaching Fellows through the formal process receive appointment letters from the Human Resources department.

In addition to the Provost's office process, some schools and divisions have their own process for selecting Teaching Assistants, though generally there is an evaluation of the candidate's qualifications prior to selection.

2. Student Testimony about Obtaining Assistant Positions

In contrast with the testimony of witnesses for The New School, two graduate students testified to obtaining graduate assistant positions via a much less formal process. It is not clear from the record what percentage of students are placed formally as opposed to informally.

Economics doctoral student Ingrid Kvanraven has worked as both a Teaching Assistant and Research Assistant. Sociology doctoral student Zoe Carey has worked several semesters as a Teaching Assistant and has been awarded a Research Assistant position and a Teaching Fellowship for the next academic year.

Kvanraven's first Teaching Assistant position was in the fall of 2014, in a master's level course in Development Economics at the New School for Public Engagement. Kvanraven first heard about the opening through a friend who had been offered the position but could not take it. She sent an email expressing interest directly to the lead faculty member for the course, Professor Sakiko Fukudaparr. The Professor responded immediately, and offered her the position during their initial meeting. There was no application involved, apart from her discussion with the Professor.¹¹ Since that first semester, Kvanraven has repeatedly served as a Teaching Assistant in the same class for consecutive semesters. Each semester, the Professor has offered her the position directly without any application or review process -- she has already emailed Kvanraven about continuing to serve as a Teaching Assistant again next fall. Kvanraven has not received an appointment letter for her Teaching Assistant position, but understands that each appointment has been for one semester.

Kvanraven currently holds two Research Assistant positions, both with Professor Sanjay Reddy in the Economics Department. Reddy's prior Research Assistant put him in touch with Kvanraven and he offered the position after meeting with her. Kvanraven's first Research Assistant position with Reddy is a one-year appointment which started in December 2014. Kvanraven was offered the second Research Assistantship with Reddy when she was seeking an increase in scholarship money. It seems to have been offered by the Assistant Dean of Academic Affairs in an effort to help Kvanraven financially. Professor Reddy has recently expressed interest in having Kvanraven continue in both of her Research Assistant positions with him but she declined because she does not have enough time.

Zoe Carey applied for graduate assistant positions in the Spring of 2013 via the university-wide application process. That June, she received an offer to teach a section of the fall, 2013 semester of Global Issues in Design and Visuality at the Parsons School of

¹¹ Kvanraven recalled filling in an application for the 2014-2015 school year, but that application covered openings in undergraduate classes, while her position is in a graduate class.

Design. The offer was in the form of an email from Scott Amens, a Director of Operations at Parsons, notifying her that she had been awarded the Teaching Assistant position. She recalled that a former lead Teaching Assistant recommended her for the position.

The following Fall, Amens emailed the Teaching Assistants for the Global Issues course to offer them all positions as Teaching Assistants in the same course in the Spring, 2014 semester. Carey asked for and was granted two sections as a Teaching Assistant. She did not fill out a separate application; the offer, request for two sections, and grant of two sections was all in an exchange of emails with Amens.

Carey filled out the university-wide application in the spring of 2014, indicating that she wanted to continue her Teaching Assistant position with Global Issues, since she had already developed a lesson plan and knew how to present the material effectively. She received an email in the summer offering her the position again for the fall of 2014. Again via emails with Amens she requested two sections because she needed more money and assisting with two sections of the same class is less work than two separate classes. Amens agreed to have her teach two sections. All of the Fall 2014 Teaching Assistants for the Global Issues course served as Teaching Assistants for the same class again in the Spring 2015. Although Carey had again requested two sections, she only received one. She was told this was because course enrollment had declined and there were going to be fewer sections requiring Teaching Assistants.

This year, Carey applied for Teaching Assistant and Research Assistant positions via the University-wide application system and has been awarded a Teaching Fellowship for the Spring, 2016 Semester for a class at Parsons. She was also awarded a half-Research Assistant position with a newly-hired Professor for the full academic year.

G. The frequency and duration of student appointments to the petitioned-for classifications

The New School introduced evidence of payments made to students who held appointments in the petitioned-for classifications from Summer 2013 to Spring 2015, as well as summaries of that evidence. These documents indicate that a slight majority of the 1,454 students in the classifications at issue worked two or more consecutive semesters during that time period, and an additional small percentage of students worked two nonconsecutive semesters. There is no evidence reflecting numbers of students in these positions prior to the Summer of 2013.

Zoe Carey testified that it is common for Sociology students to continue in Teaching Assistant roles for several semesters in a row in the same class as long as they remain enrolled students. Her four consecutive terms as a Teaching Assistant thus are not an aberration but a regular occurrence, not only in the class in which she assisted but in others, and is especially common in large lecture courses such as the History of Fashion and History of Design. Carey testified that it is common for Teaching Assistants

to serve as the Teaching Assistant for more than one semester. Kvangraven likewise testified that for graduate students working as Research Assistants in the Economics Department renewal of an appointment for a second year is “very common.”

II. EVIDENCE SPECIFIC TO THE FIVE DIVISIONS OF THE NEW SCHOOL

A. Graduate Assistants at Eugene Lang College

The Eugene Lang College is a Liberal Arts undergraduate institution. It offers BAs in liberal studies and the arts, including Theater, Music, Philosophy, Sociology, Anthropology, Economics, Literary Studies, Urban Studies, Journalism and Design, among other majors. No graduate degrees are offered at Lang.

Graduate students hold positions at Lang as Research Assistants, Teaching Assistants, Teaching Fellows, and Course Assistants, who are called “Graders” at Lang. There are no Tutors or Research Associates.

The number of Teaching Fellows allotted for each program at Lang is determined annually by an Associate Dean. Students apply through the provost’s system. The Chair of each department then reviews applications for familiarity with subject matter and indications of teaching ability and selects candidates. The Dean’s office asks candidates whether they have taught before. If they have, and they have stellar course reviews, no appointment is scheduled. Otherwise, they are invited in to discuss what they will face in the classroom and to determine what they know about Lang students.

Some Teaching Fellows at Lang are assigned to a first-year writing program – Writing the Essay 1 and 2. These classes have a unique pedagogical framework, with goals determined by the Chair. The Teaching Fellows for these classes determine the subject matter. For example, a Teaching Fellow who is an anthropology student writing a dissertation on post-traumatic stress syndrome might design her writing class around the effect of the Iraq war on soldiers. A Teaching Fellow studying politics might choose immigration as a topic for her class.

Each semester an orientation is held for new faculty at Lang. It includes introductions to key academic and administrative personnel and a review of important deadlines for syllabi, guest speaker request due dates, and the academic calendar. Teaching Fellows are invited to this orientation along with full-time and adjunct faculty, because they run their own classes. Teaching Assistants do not participate in the orientation program (Lang has only two or three Teaching Assistants).

Graduate students who serve as “Graders” at Lang are classified as Course Assistants for payroll purposes. Generally they are selected to work one semester at a time with no presumption of reappointment. A Grader is assigned to a class if there are at least 75 students enrolled in it. Graders grade papers, working closely with the faculty member to ensure consistent evaluation of what counts as a good argument, what level of quality counts for each grade level, and the like.

B. Graduate Students at the Other Divisions of The New School

1. The New School for Social Research - NSSR

For the 2015-2016 academic year the NSSR has 76 Teaching Assistant openings and 76 Research Assistant openings. An additional 20 or so positions are expected to be offered. Only students enrolled at the New School for Social Research may hold these positions in that division. There are no other petitioned-for classifications at the New School for Social Research.

2. New School for Public Engagement

There are about 45 Teaching Assistants at The New School for Public Engagement, and 50 Teaching Fellows, mostly in Psychology but throughout other undergraduate programs as well. There are about 250 Research Assistants and between 15 and 20 Tutors. There is evidence of Course Assistants serving in various classes but no indication of how many.

3. Mannes College of Music

There are currently nine Tutors at Mannes who assist students in the Techniques of Music class. They are selected by faculty based on their demonstrated excellence with the subject matter. One student, Sigmar Thor Mathiasson, is identified in payroll records as a Research Assistant in the Payment Budget Area identified as, "Jazz." There is no further record evidence about this position. There are also two Department Assistants at Mannes. The Department Assistants perform some tutoring and some administrative duties; they are paid a stipend of \$2,250 per semester. It is not clear whether the Petitioner is seeking to represent Department Assistants. There is no further evidence about these titles in this department.

4. Parsons School of Design

There are about 190 graduate student Teaching Assistants at Parsons and 43 Teaching Fellows. They are enrolled as students throughout the New School. As a general rule, the positions are filled through the provost's application process.

There are approximately 240 Research Assistants at Parsons and 24 Research Associates. Research Associates tend to be graduate students at Parsons in an MFA program, most commonly in Design and Technology. The faculty member who is the PI or otherwise in charge of the grant makes the selection of Research Associates to work on the project.

Parsons has three Tutors. They all serve in the first year program in the area of the "learning portfolio." The positions were established based on a direct need related to the learning portfolio.

III. ANALYSIS

A. Brown University is controlling

In *Brown University*, 342 NLRB 483 (2004), the Board held that graduate students performing work related to their studies at an educational institution at which they are enrolled as students are not “employees” under Section 2(3) of the Act. The Board majority in *Brown* reasoned that the graduate student assistants have a predominantly academic, rather than economic relationship with their school. The Petitioner submits that the current Board has remanded to me the instant petition and a similar case in *Columbia University*, 02-RC-143012, to hold an evidentiary hearing on the status of graduate assistants. Additionally, the Petitioner notes that the current Board had previously invited briefs in a case involving student athletes which also indicates an interest in reconsidering *Brown*. The Petitioner argues that these signals suffice to support a finding by me that graduate assistants are employees. I do not agree. To date, *Brown* remains controlling on the issue of graduate assistants as employees and I am compelled to follow that precedent.

1. Differences between Brown and The New School do not suffice to distinguish this case.

The Petitioner argues that even if *Brown* is considered controlling law, the instant case is distinguishable. The instant record demonstrates that the classifications at issue herein differ in several significant ways from those considered by the Board in *Brown*. Perhaps the most significant distinction is that most of the doctoral candidates at issue in the *Brown* decision were required to teach in order to obtain their degrees. The New School has no such requirement for any of its degrees. In *Brown*, a large percentage of incoming graduate students received financial support from the school upon admission, and in some cases students were told in initial award letters that they would continue to receive some form of financial aid during their studies, “most probably as a teaching assistant or research assistant.” *Brown*, at 485. The amount of payments received by the student assistants at Brown was generally the same regardless of the nature of their duties. By contrast, almost none of the graduate students at The New School are provided financial aid packages concurrent with admission to their academic program. At Brown, stipends were apparently awarded in similar amounts to students who performed research and teaching tasks and others who were not required to do so. However, at The New School there is no evidence of such equivalent payments made to non-working students, despite some very limited scholarship grants.

Finally, all of the classifications at issue in *Brown* appear to have had at least some duties which could be regarded as overlapping with academic pursuits; whereas, the classifications at issue here do not consistently demonstrate such overlap. Course Assistants do not regularly perform any teaching or research tasks. Some Research Assistants’ duties are wholly administrative. While such work does put students in

contact with faculty members, there is nothing inherent in the tasks performed which would seem to foster a mentoring relationship between a faculty member and a student.

Thus, the record provides some basis on which to distinguish this case from *Brown*, both because of the different way The New School has positioned the petitioned-for classifications within its administrative and academic structures, and based on the tasks associated with certain positions. However, as I explain below, I am constrained by the *Brown* decision which broadly eliminated graduate students from the coverage of the Act.

2. *Brown* policy-related factors at The New School

The *Brown* decision was premised largely on the Board's finding that the graduate student assistants at issue in that case were performing tasks which were part and parcel of their status as students at Brown. The Board in *Brown* distinguished this activity from that of individuals laboring for economic rewards. The Board found that the graduate students' role as students by its nature controlled their relationship with their school in such a manner that they could not also be considered employees under the Act. Because this policy determination was so central to the holding in *Brown*, there was a significant amount of testimony in the instant case about the witnesses' perception of the academic and other non-monetary benefits to students in the petitioned-for classifications. Further, in its brief, the Employer raised the concern that providing Section 9(a) representation rights to graduate assistants will impinge on academic freedom. To the contrary, the Petitioner urged that collective bargaining experience and academic studies of collective bargaining at NYU and public universities have produced no evidence of impinging on academic freedom. Accordingly, the Petitioner submits that the Board consider the studies that post-date *Brown*.

Graduate Student Assistants as "students"

The New School's witnesses stressed that student assistants in instructional and research roles benefit from contact with faculty, whose mentorship can be critical in attainment of the student's degree. The instructional assistants deepen their own knowledge of the material by teaching it to others. Students working in research classifications are building on the skills developed in classes and preparing for increasingly independent research which is the essence of many academic careers. Sometimes, research performed as an assistant or associate may relate directly to a student's own academic work by introducing the student to data which can be analyzed from an original perspective or sparking a question which could lead to a dissertation topic. Witnesses for The New School asserted that often a student's doctoral dissertation topic arises as a spinoff of a larger project on which he or she worked at the direction of a faculty member.

Student testimony provided a counterpoint to this description. Doctoral candidate Kvangraven noted that while her Teaching Assistant position for Development Economics at the New School for Public Engagement is a good fit for her generally as an Economics student, Development Economics is not her particular field of studies. Her Research Assistant positions, as noted above, have involved mostly administrative tasks not related her studies or her personal research pursuits. Likewise, none of Zoe Carey's work as a Teaching Assistant relates at all to her original research, which concerns policing methods.

Graduate Student Assistants as "employees"

In some respects the evidence shows that the work performed by the graduate students benefits The New School as an institution in the same way as the work of faculty or support staff. Graduate assistants support the New School's mission by educating the undergraduate students. Research Assistants help fulfill the conditions of grants awarded to The New School, which contribute generally to the financial health of The New School, as well as, its academic reputation.

The New School's other students benefit from the instruction provided by the graduate student assistants in classrooms and one-on-one encounters. Break-out sections of large lecture classes provide a chance to ask questions in a smaller group setting and allow time for discussion. Some classes are specifically designed with roles for Teaching Assistants and Teaching Fellows. In its offer letters to graduate students for Teaching Assistant positions in the Riggio Honors Program, The New School expresses its belief that, "The work of the Teaching Assistants is vital to the success of the students in the Riggio Honors Program."

Witnesses for The New School distinguished between the value of the service student assistants provide to the school and their rates of pay. They asserted that although student assistants perform some of the functions of faculty members, The New School could hire fewer part-time faculty members for slightly less than it pays graduate assistants to serve in teaching positions. This is apparently owing to transaction costs and a mentoring "burden" on the faculty who work with the student assistants. The New School's witnesses stated that nevertheless The New School does not wish to replace Teaching Fellows with part-time faculty members because of the financial aid function of the graduate student positions. The New School appears to argue that because the payments do not reflect the market value of services but rather exceed them, they are appropriately classified as "financial aid" rather than wages in the traditional employment sense.

B. The Employer's Claim that the Petitioned-for Classifications are Temporary or Casual Appointments.

Finally, having found that the petitioned-for unit are not employees, based on the holding in *Brown*, I do not reach the issue of whether they are temporary or casual, as asserted by the Employer. However, I note that while the record demonstrates that



graduate students are offered positions for only one or two semesters at a time, the testimonial evidence and payroll records show that a significant number of students are offered repeat appointments.¹²

In conclusion, I am dismissing the petition on the basis that it seeks an election among graduate students who are not "employees" within the meaning Section 2(3) of the Act pursuant to *Brown*, for the reasons stated therein.

THEREFORE, based on the foregoing reasons, further proceedings on the petition are not warranted, and

IT HEREBY IS ORDERED that the Notice of Hearing issued herein be revoked and that the petition be dismissed.

RIGHT TO REQUEST REVIEW

Right to Request Review: Pursuant to the provisions of Section 102.67 of the National Labor Relations Board's Rules and Regulations, Series 8, as amended, you may obtain review of this action by filing a request with the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. This request for review must contain a complete statement setting forth the facts and reasons on which it is based.

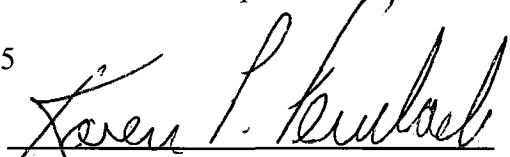
Procedures for Filing a Request for Review: Pursuant to the Board's Rules and Regulations, Sections 102.111 - 102.114, concerning the Service and Filing of Papers, the request for review must be received by the Executive Secretary of the Board in Washington, DC by close of business on August 13, 2015 at 5 p.m. (ET), unless filed electronically. Consistent with the Agency's E-Government initiative, parties are encouraged to file a request for review electronically. If the request for review is filed electronically, it will be considered timely if the transmission of the entire document through the Agency's website is accomplished by no later than 11:59 p.m. Eastern Time on the due date. Please be advised that Section 102.114 of the Board's Rules and Regulations precludes acceptance of a request for review by facsimile transmission. Upon good cause shown, the Board may grant special permission for a longer period within which to file.¹ A copy of the request for review must be served on each of the other parties to the proceeding, as well as on the undersigned, in accordance with the requirements of the Board's Rules and Regulations.

Filing a request for review electronically may be accomplished by using the E-filing system on the Agency's website at www.nlrb.gov. Once the website is accessed, select File Case Documents, enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt of the request for review rests

¹² In this regard, I note that the Board may determine that a voting eligibility formula is appropriate and devise a standard adapted to the university setting. *Kansas City Repertory Theater*. 356 NLRB No. 28 (2010).

exclusively with the sender. A failure to timely file the request for review will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off line or unavailable for some other reason, absent a determination of technical failure of the site, with notice of such posted on the website.

Dated at New York, New York, July 30, 2015


Karen P. Fernbach, Regional Director
National Labor Relations Board,
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New York, New York 10278