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Via E-mail
Paula J. Gomez, Board Agent
National Labor Relations Board, Region 2
26 Federal Plaza, Suite 3614
New York, NY 10278-0104

Re: *The New School (Student Employees at The New School – SENS/UAW)*
Case No. 02-RC-143009

Dear Ms. Gomez:

We are counsel to The New School ("TNS" or "Employer"), and we are responding to your letter, dated February 13, 2017, requesting both the Employer's position on an appropriate "voting eligibility formula" for the holding of an election among Graduate Assistants at The New School, and the Supplemental Brief of the Petitioner to the Regional Director.[1]

As a preliminary matter, TNS maintains that the Columbia University decision is not dispositive of the situation at The New School, particularly with respect to whether any putative graduate assistant "employees" are "temporary" or "casual." The record evidence in both the TNS and Columbia proceedings confirms that Columbia University primarily funds its graduate assistants with long term commitments, while TNS can only, in a number of circumstances, provide partial funding to certain of its graduate assistants, without a recurring promise of future financial aid. Had the Board not overruled Brown University, it would have necessarily upheld the Regional Director's July 30, 2015 dismissal of the Petition. Moreover, TNS's position regarding issues raised in your February 13, 2017 letter, and the Petitioner's Brief, is that the Board recognized this and that the current record is incomplete on whether the petitioned-for unit includes statutory "employees." Further, Petitioner's position that the Regional Director should merely graft the Columbia University rationale underlying its direction of election into this case is inappropriate given the significant differences between TNS's graduate assistants and Columbia University's graduate assistants, and the underlying facts in both proceedings. See Columbia University, 364 N.L.R.B. No. 90.

[1] NLRB Form 505 "Statement of Position" is submitted separately, but consistent with the arguments set forth in this letter response.

1. Even if the Graduate Assistants Are Deemed Statutory Employees, They Are Temporary or Casual Employees, Precluding Them From Being In An Appropriate Unit

Even if it were to be found that TNS graduate assistants are statutory employees, an issue that needs to be determined, as set forth *infra*, the question of temporary or casual employees must still be addressed in connection with a determination of the appropriate unit. Petitioner argues in its brief that Columbia University eliminates the possibility of arguing that graduate assistants are not excludable on the grounds that they are temporary or casual employees. This is simply not the case, as the facts in this case are extraordinarily distinct from those in Columbia University.

In its analysis as to whether an employee should be excluded from a unit as a "temporary employee," the Board focuses on "the critical nexus between an employee's temporary tenure and the determination [of] whether he shares a community of interest with the unit employees." Marian Medical Center, 339 N.L.R.B. 127, 128 (2003). To determine whether an alleged temporary employee shares a community of interest, the Board examines various factors, including "whether or not the employee's tenure is finite and its end is reasonably ascertainable, either by reference to a calendar date, or the completion of a specific job or event, or the satisfaction of the condition or contingency by which the temporary employment was created." Marian Medical Center, 339 N.L.R.B. 127, 128 (2003).

No difference was proven during the hearings in this proceeding; no graduate assistant's service in a continuing role in the putative category was assured. In that regard, Dr. Sanger testified as follows:

> "…[G]enerally speaking, we budget for either TA's or Teaching Fellows for these kinds of courses ahead of time; and so we know within the budgets of divisions of the University, they would budget separately for these kinds of resources which then go to students in the form of this kind of financial aid."

(TR. 85, lines 14-20). Similarly, Vice Dean Kostrzewa testified that there would be no expectation of continuing service:

> "The opportunities generally are offered for one to two semesters. We -- every spring we make announcements about those opportunities and we, together with faculty, select the candidates for these opportunities. So there's no expectation that they will continue."

(TR. 218, line 3-7). Associate Provost for University Curriculum, Adrienne Marcus, confirmed that there was no expectation of recurring service by the graduate students:

> "A. There is a desire to spread the availability of these positions out to as many graduate students as possible. The reason reflects on my other response, which is that we want as many students as possible to have the experience of instructing, being a classroom, because it aids in their learning and also because it serves as aid for them."

(TR. 520, line 16-25, page 521, line 1). Finally, although others testified similarly, Dean Bourgeois testified as follows:

> "Q. Now at Parsons, does the TA have an expectation that he or she will continue in that role beyond the one semester?
>
> A. No.
>
> Q. Ordinarily, for what period of time is the teaching fellow appointed?
>
> A. Ordinarily, one semester.
>
> Q. Does there ever come a time that possibly a teaching fellow is retained or is serving in that role for less than a semester?
>
> A. Yes. At Parsons, the one difference would be in a boot camp program that we offer in the summer that is a compressed, so a bit shorter. It's an intensive program. The teaching fellows are used in that program."

(TR. 545, lines 10-12, 548, lines 3-14).

The documentary evidence adduced during the hearing before the Regional Director confirmed the testimony that no graduate student assistant could have an expectation that he or she would serve in one of the putative categories on a repeated basis. Employer Exhibit 75, which was prepared by Shawn Ogiba, Director of Human Resources Systems, Reporting and Analysis, starkly presented the expectation that one would not serve in one of the putative categories on a repetitive basis. An analysis of the six semesters or sessions during the period from the summer of 2013 through the Spring of 2015 indicated that of the 1,455 students who served in these roles 523 served in only one semester, 59 students served in two semesters (non-consecutive) and only 659 students (45%) served in two consecutive semesters during those six consecutive semesters. Employer Exhibit 76, which separated the services performed by the graduate assistants into the putative categories, dramatically emphasized the point.

By referring to the schedule set forth in Employer Exhibit 76, which included the summer sessions, so that **each** consecutive summer or session is addressed, the sporadic, casual and non-recurring roles of the students became obvious. In that regard, the number of position titles in which students served during those six semesters (perhaps more than once during the six semesters) in either only **one** semester or in merely two consecutive semesters reflected the fact that the student service was pointedly casual:

	1 Semester Only	2 Consecutive Semesters
Course Assistants	127 out of 180 (71%)	40 out of 180 (22%)
8 Categories of Research Assistants	495 out of 1097 (45%)	436 out of 1097 (40%)
Research Associate	42 out of 84 (50%)	22 out of 84 (26%)
Teaching Fellow	99 out of 173 (57%)	57 out of 173 (33%)
Teaching Assistant	178 out of 436 (41%)	233 out of 436 (53%)
2 Categories of Tutors	52 out of 128 (41%)	60 out of 128 (46%)

In sum, slightly more than 50% of the positions was served by an individual student in only one of the six consecutive semesters, and only 40% of the positions was served by a student in two (2) consecutive semesters.

In St. Thomas-St. John Cable TV, the Board held that a party contesting eligibility based on the temporary nature of employment need only show that the prospect of termination was sufficiently finite on the eligibility date to dispel reasonable contemplation of continued employment beyond the current term:

> "It is established Board policy that a temporary employee is ineligible to be included in the bargaining unit … The critical inquiry on this date is whether the "temporary" employee's tenure of employment remains uncertain … [The] "date certain" eligibility test for temporary employees ... does not require a party contesting an employee's eligibility to prove that the employee's tenure was certain to expire on an exact calendar date. It is only necessary to prove that the prospect of termination was sufficiently finite on the eligibility date to dispel reasonable contemplation of continued employment beyond the term for which the employee was hired."

309 N.L.R.B. 712, 713 (1992). TNS can make that showing here. Regardless of eligibility date, the proffer made by TNS concerning the testimony of Valerie Feuer, Employer Exhibit 67, confirmed the casual nature of the positions, inasmuch as at Mannes, which offers various programs in music, *faculty members* choose tutors who served on an hourly basis appointment, thus, there necessarily could not be any expectation of the duration of the appointment, as there could be no guarantee that the appointment would last on a weekly or semester basis. Moreover, by reason of a faculty member choosing the tutor to work with a

student, the expectation of a continued role diminishes further, as either the faculty member or the tutored student may determine that the need for the tutor's service is no longer necessary. Further, the record reveals that many tutors served very few hours. The majority of the tutors appear to have served between 1 to 4 hours per week over the course of a 15-week semester.

Indeed, while Columbia University addressed the issue of temporary or casual employees, the determination in that proceeding emphasized that "Master's and undergraduate student assistants typically serve more than one semester," and "Ph.D. student assistants typically serve for the longest periods [in their funded roles]." (364 N.L.R.B. No. 90, p. 20). That rationale underlying the decision would not, of course, be more starkly different than the circumstances relating to The New School. As a result, the characteristics of the students serving in the putative categories compel a finding that they should be excluded from collective bargaining.

2. In Any Event, The Record Is Not Sufficient To Identify An Appropriate Unit

Petitioner seeks a unit that would include: Course Assistants, Teaching Assistants, Teaching Fellows, Tutors, Research Assistants and Research Associates. Unlike Columbia University, the question of the appropriateness of the proposed unit was not fully addressed at the hearing in this matter. The entirety of TNS's case at the hearing was that the proposed unit was inappropriate. Before Columbia University the appropriateness of the unit for graduate assistants turned on whether the graduate assistants were "primarily students." TNS cannot be said to have waived any argument regarding the appropriateness of the unit and should not be deprived of the right to develop the appropriate record based on the change in the law.

On the question of the appropriate unit, Petitioner again takes the position that a cut-and-paste approach with Columbia University is appropriate, arguing that because a unit of all the petitioned-for graduate assistants was granted in Columbia University such a unit should be granted here. Petitioner also argues that the graduate assistants at Columbia University are identical to the graduate assistants at TNS. This is clearly not the case. While there are some general similarities between the graduate assistants, there are some significant differences in particular, e.g., Columbia fully funds PhD student assistants for the at least their first five years of study and requires teaching or research duties in the second through fourth years. TNS does not have the luxury of funding its students in this way (except for a relatively small cohort of fully-funded Ph.D. students). As such, their engagements with the graduate assistants are less certain, making it less likely that a student who is a graduate assistant in one semester will be a graduate assistant in the next — or any other semester for that matter.

The Board has an "affirmative statutory obligation to determine the appropriate bargaining unit in each case." Allen Health Care Services, 332 N.L.R.B. 1308, 1309 (2000). The Board considers many factors to determine an appropriate bargaining unit, including:

- whether the employees are organized into a separate department;

- have distinct skills and training;
- have distinct job functions and perform distinct work;
- are functionally integrated with the Employer's other employees;
- have frequent contact with other employees;
- interchange with other employees;
- have distinct terms and conditions of employment; and
- are separately supervised.

Bergdorf Goodman, 361 N.L.R.B. No. 11, slip op. at 9 (2014). Even under the scant evidence in the record, it is unclear that any wall-to-wall unit of graduate assistants is appropriate. The record does make clear that there are at least six categories of graduate assistants that can further be subdivided into more than a dozen categories. Each of the categories of graduate assistants is distinct from the others. While they are all graduate assistants, they also have distinct skills and training, and tasks to perform. The graduate assistants are not functionally integrated with other TNS "employees." The pedagogical nature of their position prevents them from being functionally integrated. Nor are they interchangeable; each category and each department is separately supervised – and each position has distinct terms and conditions of employment.

Indeed, the holding in Columbia University necessarily requires that a fulsome analysis of certain criteria be reviewed by the Regional Director such as whether the "graduate assistant's aid package requires fulfillment of duties…," [whether] students are "not permitted to simply pursue their educational goals at their own discretion," [whether] research assistants "receive appropriate training," and whether TNS undergraduate, Master's and Ph.D. students "suggest a divergence of interests that would frustrate collective bargaining." See Columbia University, 360 N.L.R.B. No. 90, pages 18-22.

Petitioner also incorrectly states that the issue of the scope of any such unit was not previously addressed by the Employer. Yet, TNS specifically contemplated, and argued to the Board, in its November 18, 2015 Brief Upon Review, as follows; at pages 44 and 45:

> "Contrary to Petitioner's assertion, the record in this matter is neither complete nor adequate to enable the Board to rule upon the merits of the petition. As noted above, many of the individuals in the putative categories must be deemed "temporary" or "casual," even if the Board were to hold that certain of the graduate assistants are "employees" – against that backdrop the Regional Director specifically held that the "petitioned-for unit are not employees [and she did] not reach the issue of whether they are temporary or casual." In short, the question remains open as to whether all or certain of the graduate students are "temporary" or not. (Supplemental Decision, page 20). Nor did the Regional Director address the issue whether a "one or two semester" appointment, or upon consecutive, or non-consecutive, semesters, would qualify a student to be eligible to

> vote, even if he or she were to be an "employee" (Supplemental Decision, page 21), and she noted that the Board might "devise a standard adopted to the university setting." (Supplemental Decision, page 21). As a result, since the Regional Director did not determine an "appropriate" unit (if Brown were to be modified), it remains open as to what that unit might be, whether the graduate students are "temporary" employees, and whether those individuals along with, as an example, undergraduates, should be excluded from the unit. The Board has found that issues concerning whether disputed employees are excluded from, or included in, a prospective unit are matters best resolved by remanding the case to the Regional Director for further processing, including the possible reopening of the hearing. The Boeing Co., Employer-Petitioner & Soc'y of Prof'l Eng'g Employees in Aerospace, Ifpte, Local 2001, Afl-Cio, 349 N.L.R.B. 957 (2007).

3. Pursuant To The Board's Order The Record Must Necessarily Be Reopened to Determine Whether the Petitioned For Graduate Assistants Are Statutory Employees

On December 23, 2016, the Board issued an Order remanding this matter to the Regional Director for further proceedings consistent with Columbia University, 364 N.L.R.B. No. 90. Petitioner appears to presume that because the Board held that the graduate assistants at Columbia University were statutory employees all graduate assistants, at any institution, are similarly statutory employees. However, that is not Columbia University's holding. Columbia University simply held that it was only when graduate assistants have a common-law employment relationship with their university that they are statutory employees, and this was only after a fulsome hearing was held before the Regional Director.

The Board has specified here, in its December 23, 2016 Order, that the record should be reopened, if necessary, and specifically notes that only one of the three Board members would find that the record was sufficient to assess whether the graduate assistants at issue were statutory employees. In footnote 2, the Order notes that only then Chairman Pearce would find that the record supported sufficient evidence to reach this conclusion, as follows:

> "In light of the Board's holdings in Columbia University, Chairman Pearce would find the record here establishes that student assistants are statutory employees and that it is therefore unnecessary to remand that issue to the Regional Director."

In sum, the Board has necessarily *directed* to the Regional Director and the parties to *initially* address the issue whether TNS graduate assistants are statutory employees, prior to any determination relating to an appropriate unit, if any, and the position of TNS merely reflects the Board's holding.

(a) The Current Record Is Insufficient To Determine Whether The Graduate Assistants Are Statutory Employees

Subsequent to the issuance of the Columbia University decision in August 2016, an order was issued by the Regional Director directing an election for graduate assistants at Duke University. The Duke and Columbia University decisions reveal that there was significantly more evidence about the nature of the graduate assistants' "employment" in those cases than exists in the record here. The hearing in this case was upon the assumption that Brown University was applicable to TNS graduate assistants and, therefore, any evidence adduced as to the alleged "employment" status of graduate assistants was coincidental to the extant law of Brown University that *all* graduate assistants, including those at TNS, were "primarily students."

Notwithstanding that fact, Petitioner's Supplemental Brief to the Regional Director merely addresses this issue with a single sentence: "It is undisputed, and the record establishes, that the student employees in all of the classifications at issue are directed in their work by members of the faculty," and refers to a total of eight transcript pages.[2] In short, the issue is exceedingly more complex than Petitioner would make it out to be and additional evidence is necessarily required.

(b) Additional Evidence is Necessary to Assess Whether The New School's Graduate Assistants are Common Law Employees and, Therefore, Possible Statutory Employees

Moreover, while Petitioner suggests that *Columbia University* is dispositive, it cannot be gainsaid that a discrete review of the role of TNS graduate assistants is required. Indeed, and as an example, the Board and the courts have repeatedly held that a number of categories of individuals did not qualify for "employee" status under the Act. See N.L.R.B. v. Bell Aerospace Co., 416 U.S. 267 (1974) (managerial employees); Allied Chemical & Alkali Workers of Am., Local No. 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157 (1971) (retirees); WBAI Pacifica Foundation, 328 N.L.R.B. No. 179 (1999) (unpaid staff); Goodwill Indus. of Tidewater, 304 N.L.R.B. 767 (1991) (disabled workers). Thus, while Columbia University instructs that graduate assistants may be statutory employees if they are common law employees, this requires, at a minimum, a showing that:

- the person works for a statutory employer in return for financial or other compensation and
- the statutory employer has the power or right to control and direct the person in the material details of how such work is performed.

Columbia University, 364 N.L.R.B. 90, n. 100 (citing Seattle Opera, 292 F.3d at 762).

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[2] See Petitioner's Supplemental Brief, dated February 13, 1017, page 8.

In Columbia University there was record evidence regarding: the university's ability to correct, remove and counsel inadequate performance; the university's ability to withhold payment for failure to perform services; the requirement to work; and, the requirement of research assistants to perform the duties outlined in grants. Columbia University, 364 N.L.R.B. No. 90, 207 LRRM 1089, 2016 BL 273040. In Duke University, the record contained evidence about: pay and pay instruction; vacations; requirements to remain on campus to receive funding; an analysis of how work was assigned; conditions of receiving payment; discipline and counseling; restrictions on research assistants' scope of work; ownership of intellectual property; the assignment of work; an analysis of university's manuals and handbooks as to how compensation is referred to; and circumstances under which pay is reduced.

In this case, the question of the right to control and direct the graduate assistants was not addressed in the hearing. So even if there could be an assessment of the first prong of the common law employee test, the second prong cannot be answered upon the current record.

Petitioner also fails to note in its Supplemental Brief that inasmuch as there has been a substantial change in the law, pursuant to settled Board law, the impact of Columbia University, by itself, necessarily warrants a hearing before the Regional Director to determine an appropriate unit. That point was emphasized by TNS in its Brief Upon Review, at page 45, as follows:

> "Moreover, where there is a substantial change in the state of the law affecting the appropriateness of the unit the Board will remand the matter to the Regional Director to arrange for a hearing concerning the appropriate unit. Milton Coll., 260 N.L.R.B. 399, 400 (1982). In Milton Coll., the Board concluded that the Supreme Court's decision in Yeshiva constituted a substantial change in the state of the law regarding the supervisory and/or managerial status of faculty members. The Board denied the General Counsel's Motion for Summary Judgment, and remanded the matter to the Regional Director to arrange for a hearing concerning the appropriate unit. Similarly, here, if the Board were to modify Brown that finding would result in a substantial change in the law regarding graduate students. Thus, as in Milton Coll., it is necessarily appropriate that the Board remand this matter to the Regional Director for a hearing and/or submission of briefs on the appropriateness of the unit, as the Regional Director did not reach that issue based upon current Board law (Brown) at the time of her Supplemental Decision."

4. An Eligibility Formula Can Only Be Reached After A Hearing

The open questions about which graduate assistants, if any, will be included in the bargaining unit (if at all) preclude an analysis of any eligibility formula. TNS cannot effectively set forth appropriate eligibility criteria until it is aware of the categories of employees to be

included in the unit. A review of recent decisions relating to differing eligibility formulas for graduate assistants is instructive; each of those decisions underscores the need for a complete examination of the criteria, both temporal and factual, which might indicate a community of interest for purposes of determining the eligibility for voting in an election:

(a) Loyola University: Eligible were those in the unit who were enrolled during Fall Semester 2016, and "received compensation" by December 15, 2016. (Mail);

(b) Columbia University: Eligible were those who held an appointment in Fall Semester 2016, or a position and were on the payroll and worked 15 hours per week or more in a unit position in fall semester 2016, and those who held a unit position during the 2015-16 academic year (Secret Ballot);

(c) Yale University: (nine petitioned-for units) Eligible were those on the payroll in the payroll period immediately prior to decision and direction of election. (Ballot);

(d) Duke University: Eligible were those who had a 12-month stipend and held a position in Spring 2017, or a 9-month stipend and held a position during Spring 2016, Fall 2016, or Spring 2017 semesters. (Mail)

In short, as confirmed by these recent Regional Director decisions, "eligibility" to vote depends upon a myriad of circumstances relating to a community of interest among graduate assistants, with those circumstances necessarily to be determined during a hearing in this matter.

CONCLUSION

For the foregoing reasons, the Regional Director should establish hearing dates to establish a record sufficient to address the outstanding issues in this matter, including first, pursuant to the Board's December 23, 2016 Order, whether the graduate assistants are statutory employees, and if so, whether they are temporary or casual employees, and, if necessary, the appropriateness of any unit, and an eligibility formula.

Respectfully Submitted,

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By: Douglas P Catalano
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