

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

In the Matter of:

THE NEW SCHOOL,

CASE NO. 02-RC-143009

Employer,

and

STUDENT EMPLOYEES
AT THE NEW SCHOOL-SENS/UAW,

Petitioner.

**REQUEST FOR REVIEW FROM THE
SECOND SUPPLEMENTAL DECISION
AND DIRECTION OF ELECTION**

Douglas P. Catalano, Esq.
CLIFTON BUDD & DEMARIA, LLP
350 Fifth Avenue, 61st Floor
New York, New York 10118
Telephone: (212) 687-7410
Facsimile: (212) 687-3285

*Attorneys for Employer
The New School*

TABLE OF CONTENTS

	<u>Page</u>
PRELIMINARY STATEMENT	1
POINT I	
PROCEDURAL HISTORY	2
POINT II	
THE STANDARD UPON THIS REQUEST FOR REVIEW	4
POINT III	
THE REGIONAL DIRECTOR’S DECISION RELATING TO SUBSTANTIAL FACTUAL ISSUES IS CLEARLY ERRONEOUS.....	6
A. THE REGIONAL DIRECTOR’S FINDINGS	6
B. TEMPORARY OR CASUAL EMPLOYEES.....	12
1. THE TEMPORARY AND CASUAL NATURE OF THE POSITIONS AND STUDENT EMPLOYMENT	15
2. THE COURSE ASSISTANT POSITION IS TEMPORARY AND CASUAL AND SHOULD BE EXCLUDED FROM THE BARGAINING UNIT	17
3. ALL UNDERGRADUATE STUDENT ASSISTANTS ARE TEMPORARY AND CASUAL AND SHOULD BE EXCLUDED FROM THE BARGAINING UNIT	20
4. OTHER CATEGORIES OF MASTERS AND PHD STUDENT ASSISTANTS ARE TEMPORARY OR CASUAL AND SHOULD BE EXCLUDED FROM THE UNIT	23
POINT IV	
VAST DIFFERENCES BETWEEN COLUMBIA UNIVERSITY AND THE NEW SCHOOL, AS MANIFESTED BY THEIR STUDENT ASSISTANT PROGRAMS, PRECLUDE THE SAME APPLICATION OF THE COLUMBIA UNIVERSITY DECISION	27
POINT V	
BECAUSE THE REGIONAL DIRECTOR MISTAKENLY CONCLUDED THAT THERE WERE NO TEMPORARY AND CASUAL CATEGORIES, THE VOTING ELIGIBILITY FORMULA IN THE DIRECTION OF ELECTION IS INCORRECT	31
CONCLUSION.....	33

TABLE OF AUTHORITIES

Page

CASES

Brown University,
342 NLRB 483 (2004) 2, 3

Correale-Englehart v. Astrue,
687 F.Supp.2d 396 (S.D.N.Y. 2009)..... 6

Duke University, Decision and Direction of Election,
Case 10-RC-187957 (Jan. 18, 2017)..... 14

EF Drew,
133 NLRB No. 155 (1961) 12, 17

In re Kamehameha Sch. Bernice P. Bishop Estate,
213 NLRB 52 (1974) 5

In re Video Tape Enters., Inc.,
214 NLRB 1037 (1974) 5

In re Walker-Roemer Dairies, Inc.,
196 NLRB 20 (1972) 5

Marian Medical Center,
339 NLRB 127 (2003) 13

MGM Studios of New York Inc.,
336 NLRB No. 129 (2001) 12

Sands Bethworks Gaming, LLC,
361 NLRB No. 102 (Nov. 12, 2014) 5

St. Thomas-St. John Cable TV,
309 NLRB 712 (1992) 7, 8, 13

Standard Dry Wall Products, Inc.,
91 NLRB 544 (1950) 5

Steiny & Co.,
308 NLRB 1323 (1992) 13

Tim v. Colvin,
2014 WL 838080 (N.D.N.Y. March 4, 2014)..... 6

Trump Taj Mahal Casino,
306 NLRB 294 (1992) 13

Trumpower v. Colvin,
2015 WL 162991 (W.D.N.Y. Jan. 13, 2015)..... 6

United States v. Janati,
374 F.3d 263 (4th Cir. 2004) 7

Verizon Directories Corp. v. Yellow Book USA, Inc.,
331 F.Supp.2d 136 (E.D.N.Y. 2004) 7

Williamson Mem'l Hosp.,
284 NLRB 37 (1987) 5

RULES

Federal R. Evid. 611(a)(1) 7

PRELIMINARY STATEMENT

This brief is submitted by The New School (“The New School” or “University” or “Employer”) to the National Labor Relations Board (“NLRB” or “Board”) in support of The New School’s Request for Review. The Second Supplemental Decision and Direction of Election, dated April 7, 2017, of Regional Director Karen P. Fernbach should be overturned upon the basis that her Decision on a “substantial factual issue is clearly erroneous,” and that such error prejudicially affects the rights of The New School. In her Decision, the Regional Director, at page 2, noted that the Petitioner had argued that, among other things, “pursuant to *Columbia University* ... the employees in the petitioned-for unit should not be excluded from the unit as temporary employees.” Despite an overwhelming amount of record evidence confirming that many of The New School’s Graduate Assistants, as well as other categories of employment, are temporary or casual, the Regional Director only addressed, in a very minimal manner, the evidence adduced before her and, rather, based her Decision upon, in the main: (a) summaries submitted to by The New School during the hearings for the benefit of both the parties and Regional Director; and (b) the service history of six (6) Graduate Assistants in the putative categories, out of a total of 2,322 Graduate Assistant positions served in those categories during the period from Summer, 2013 through Fall, 2016 (a total of eleven (11) semesters and Summer sessions in the aggregate).

Leading up to, as well as during the hearing, Petitioner had adopted the position that the holding in *Columbia University* must simply be applied to this matter without deviation. The Regional Director did just that. But doing so required ignoring the vast legal, factual and policy differences between Columbia University and The New School which relate to their respective Student Assistant programs – and those differences, as proven during the hearings in this matter, necessarily require different results relating to “*temporary or casual*” employees, particularly with respect to *undergraduate* Student Assistants, and the scope of the putative unit. At a minimum, the

Regional Director should have recognized that more than 1,000 of the petitioned-for Student Assistants worked in only one (1) semester during the eleven (11) sessions and summers at issue and, as a result, were temporary or casual employees with no expectation of recurrent employment in any petitioned-for category. As more fully described below, it was also clearly erroneous for the Regional Director not to limit voter eligibility to those Student Assistants who worked in any petitioned-for title in two consecutive semesters; it was only these Student Assistants that had any expectation of recurring employment.

POINT I **PROCEDURAL HISTORY**

In this proceeding Petitioner seeks to represent various categories of both graduate students and undergraduate students who either served, or are serving, as Teaching Assistants, Teaching Fellows, Course Assistants, Tutors, Research Assistants and Research Associates at The New School. (Petition, December 17, 2014, Board Exhibit No. 1(a)).

On December 17, 2014 Student Employees at The New School – SENS, UAW (“Petitioner”) filed a petition seeking to represent a unit of both graduate students and undergraduate students. On February 6, 2015, the Regional Director dismissed the petition pursuant to *Brown University*, 342 NLRB 483 (2004). Following the Regional Director’s administrative dismissal, Petitioner sought review by the Board, and on March 13, 2015 the Board granted the Petitioner’s Request for Review, reversed the Regional Director’s dismissal, and remanded the matter for a hearing and decision. On July 30, 2015, after a hearing, the Regional Director issued a Supplemental Decision and Order Dismissing Petition, and found that the Board’s decision in *Brown University* required the dismissal of the petition. Petitioner filed a Request for Review of the Supplemental Decision, and on October 21, 2015 the Board issued an Order granting the Petitioner’s request.

On August 23, 2016, the Board issued its decision in *Columbia University*. By reason of the Board's reversal of *Brown University* in *Columbia University*, on December 23, 2016 the Board issued an Order remanding this proceeding to the "Regional Director for further appropriate action consistent with *Columbia University*, including reopening the record, if necessary." Petitioner thereafter submitted position and supplemental briefs on February 10 and 13, 2017, arguing that the existing record was sufficient to address any outstanding issues raised by *Columbia University* and that reopening of the record was not necessary. On February 21, 2017, The New School submitted its position statement arguing that the existing record was insufficient to establish that the Graduate Students in the petitioned-for unit constitute statutory employees and, even if they were deemed statutory employees, they should be excluded from the unit because, among other reasons, many of those Student Assistants (and certain categories) were temporary or casual. After consideration of the parties' submissions, the Regional Director issued a Notice of Hearing which directed a hearing on March 2, 2017. A hearing was thereafter held before the Regional Director on March 9, 2017, and post-hearing briefs were submitted by both the Petitioner and The New School.

On April 7, 2017, the Regional Director issued a Second Supplemental Decision and Direction of Election, review of which is now sought by The New School. The Regional Director found that "the petitioned-for employees are in a common-law employment relationship with the Employer and are, thus, employees within the meaning of Section 2(3) of the National Labor Relations Act." Further, the Regional Director found "that the petitioned-for classifications share a sufficient community of interest to constitute an appropriate unit." The Regional Director ordered an election in the following unit of employees:

"All student employees who provide teaching, instructionally-related or research services, including Teaching Assistants (Course

Assistants, Teaching Assistants, Teaching Fellows, Student Assistants 3 at the Parsons School, and Tutors) and Research Assistants (Research Assistants and Research Associates).”

The Regional Director also found the following employees eligible to vote:

- (1) all currently enrolled Course Assistants, Teaching Assistants, Teaching Fellows, Student Assistants 3 at the Parsons School, Research Assistants, Research Associates, compensated through a stipend, that received an assignment in any of the following semesters: Spring 2016, Summer 2016, Fall 2016, or Spring 2017; and
- (2) all currently enrolled Tutors, and any other unit employees compensated only on an hourly basis, that have received an assignment for which at least 60 hours was worked in any of the following semesters: Spring 2016, Summer 2016, Fall 2016, or Spring 2017.

The New School now seeks review of that Supplemental Decision and Direction of Election.

POINT II
THE STANDARD UPON THIS REQUEST FOR REVIEW

There are four bases for the Board to grant a Request for Review. Pursuant to Section 102.67 of the Board’s Rules and Regulations, the Board will grant a Request for Review upon one or more of the following grounds:

1. That a substantial question of law or policy is raised because of (i) the absence of, or (ii) a departure from, officially reported Board precedent;
2. *That the Regional Director’s decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party;*
3. That the conduct of the hearing or any ruling made in connection with the proceeding has resulted in prejudicial error; or

4. That there are compelling reasons for reconsideration of an important Board rule or policy. (emphasis supplied)

The Second Supplemental Decision and Direction of Election should be overturned on the basis that the Regional Director's Decision on a "substantial factual issue is clearly erroneous," and that such error prejudicially affects the rights of The New School. *See In re Video Tape Enters., Inc.*, 214 NLRB 1037 (1974)(Board granted employer's request for review brought pursuant to "clearly erroneous" standard and overturned the Regional Director's decision, including three challenged voters in unit as regular part-time employees, as Board determined it was an error); *In re Kamehameha Sch. Bernice P. Bishop Estate*, 213 NLRB 52 (1974)(Board granted employer's request for review brought pursuant to "clearly erroneous" standard and reversed the Regional Director's determination as the unit did not include all "service and maintenance" employees); *In re Walker-Roemer Dairies, Inc.*, 196 NLRB 20 (1972)(Board granted employer's request for review brought pursuant to "clearly erroneous" standard and reversed Regional Director's determination as the unit should have excluded the wholesale route salesmen).

Moreover, the Board reviews *de novo* a Hearing Officer's decision and its underpinnings. *See Standard Dry Wall Products, Inc.*, 91 NLRB 544, 545 (1950) ("[W]e base our findings as to the facts upon a *de novo* review of the entire record, and do not deem ourselves bound by the Trial Examiner's findings."); *Sands Bethworks Gaming, LLC*, 361 NLRB No. 102 (Nov. 12, 2014) ("The Board then stated that it had considered *de novo* the representation issues and the hearing officer's report recommending disposition of them."). Where the Hearing Officer's legal conclusions are not based on a resolution of all the relevant facts, the Board should make its own factual findings. *See Williamson Mem'l Hosp.*, 284 NLRB 37, 37 (1987) ("Inasmuch as the judge

has failed to perceive and resolve on two occasions the factual and legal issues before him, the Board is certainly free to view the record de novo and make appropriate findings of fact and conclusions of law.”).

As will be set forth, *infra*, the Regional Director’s apparent selection of some “evidence,” and concomitant failure to refer to the overwhelming body of record evidence, is clearly improper. Indeed, while suggesting that certain of the Employer’s summaries (never intended to be dispositive) are somehow “flawed,” the Regional Director did *not refer at all* to the specific underlying data set forth in Employer Exhibit 90, which is a record of the actual service performed by all Student Assistants in the putative categories from Summer, 2013 through Fall, 2016. That data, which is sorted by term and name and then by name and term (Employer Exhibit 90), reflect the actual services performed by the students and frequency of that service in each of the six (6) categories – in short, referring to the summaries provided by the Employer does not, by any means, excuse the failure of the Regional Director to review the data, and had she thoroughly reviewed that data, it is respectfully submitted that her conclusion would have necessarily differed. *Trumpower v. Colvin*, 2015 WL 162991, *17 (W.D.N.Y. Jan. 13, 2015)(citing *Correale-Englehart v. Astrue*, 687 F.Supp.2d 396, 439 (S.D.N.Y. 2009)); *see Tim v. Colvin*, 2014 WL 838080, *7 (N.D.N.Y. March 4, 2014)(citations omitted) (citing the general proposition that a fact-finder must consider all evidence, not just selective evidence).

POINT III
THE REGIONAL DIRECTOR’S DECISION RELATING TO
SUBSTANTIAL FACTUAL ISSUES IS CLEARLY ERRONEOUS

A. THE REGIONAL DIRECTOR’S FINDINGS

A cursory review of the Regional Director’s Second Supplemental Decision and Direction of Election, dated April 7, 2017, confirms that the findings of the Regional Director are clearly erroneous in any number of respects, with prejudicial effect to the Employer, thereby necessarily

warranting Review. In that regard, interspersed throughout the Decision the Regional Director made several references to “summaries” introduced by The New School during the hearings as an aid in reviewing the overwhelming evidence pertaining to Graduate Student service in the putative categories. It is respectfully submitted that in reaching her Decision the Regional Director chose to merely rely upon a portion of these summaries, rather than to all the summaries and, more importantly, the underlying factual evidence in the record upon which the summaries were based. It is clear that the summaries introduced as an aid, by themselves, are not evidence where the underlying documentation has been introduced into evidence. *See United States v. Janati*, 374 F.3d 263, 273 (4th Cir. 2004). Federal R. Evid. 611(a)(1) has been interpreted to permit the use of pedagogical charts as an aid to assist fact-finder in assessing data. *Verizon Directories Corp. v. Yellow Book USA, Inc.*, 331 F.Supp.2d 136 (E.D.N.Y. 2004). The chart is not a replacement for the data. The chart is subject to Rule 403 analysis of relevance. *Id.* Even if the Regional Director was correct in finding the charts not to be of assistance in her fact-finding, the underlying data is still part of the record and the Regional Director had an obligation to review it. That record evidence, upon which the summaries were premised, confirm that the Regional Director’s Second Supplemental Decision was clearly erroneous in holding that the Graduate Assistants sought to be organized by the Petitioner were not temporary or casual.

As articulated in the Board’s *St. Thomas* decision, set forth below, many of the students, or categories of Graduate Student Assistants at The New School, are clearly temporary or casual employees. The Board held in that case, as follows:

“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.” (emphasis supplied)

St. Thomas-St. John Cable TV, 309 NLRB 712, 713 (1992). As an example, the proffer made by The New School during the hearings concerning the testimony of Valerie Feuer, Employer Exhibit 67, confirms the casual nature of the positions inasmuch as at Mannes, which offers various programs in music, faculty members choose the tutors and, because they are hourly appointments, there necessarily cannot be any expectation of the duration of the appointment, as there can be no guarantee that the appointment will 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. That fact, consistent with the testimony of the other academics and administrators of The New School during the hearings, debunks any claim that there could be a recurring “employment” of tutors.

Moreover, the evidence adduced during the hearings *proved*, let alone merely inferred, that the Graduate Assistants’ service in a continuing role in the putative category was definitely not assured. In that regard, Dr. Sanger testified as follows:

“These tend to be courses that have technical components where we need to help students progress through the courses. And so, generally 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 also testified that there would be no expectation of continuing service as follows:

“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.

Q. What’s the ordinary length of time based on your experience that one serves as a teaching assistant or a teaching fellow?

A. Well, each teaching assistantship and fellowship lasts for an academic semester, so that’s usually 15 weeks.”

(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.

A. Yes, that program is used to identify and award teaching fellows.

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).

Against that uncontradicted evidence that there could be no finding that there is an expectation of recurring employment of Graduate Assistants at The New School, except for the few fully-funded students noted hereafter, and the Regional Director, rather than referring to this evidence, merely suggested that the:

“Employer’s *summary* is flawed in that it is incomplete and suggests that some of the students, who were granted only a single, semester-long assignment did no other work for the Employer in a different petitioned-for classification during the relevant period.”
(emphasis added)

See the Second Supplemental Decision and Direction of Election, page 5.

In short, the Regional Director referred to only “some” students, and ignored the evidence and data as to whether there was an *expectation* of “continued employment” or, in fact, whether there was a recurrence of positions to be served in by the Student Assistants by the overwhelming majority of the Student Assistants. Had the Regional Director referred to that data, the only finding that could have been made is that there was no expectation of continued employment by The New School Graduate Assistants. To merely advert to a summary, rather than to the record evidence is, by itself, necessarily erroneous. Moreover, the fact that a Graduate Assistant *might* serve in a different category during his or her enrollment at The New School, as noted by the Regional Director, begs the question as to whether there was *recurring* employment by Graduate Assistants at The New School, or whether there was an expectation of recurring employment in either one, or more than one, putative categories. *Columbia University*, upon which this proceeding was remanded, in addressing temporary or casual employment of its Graduate Assistants, held as follows:

“... [Columbia University] will continuously employ groups of Master’s and undergraduate student assistants to perform research and instructional duties across semesters ... because the

University's employment of Master's and undergraduate student assistants is *regularly recurring* ... and their individual tenures are neither negligible nor ad hoc ... we believe that as a group they ... form a stable unit capable of engaging in meaningful collective bargaining."

362 NLRB No. 90, at page 21. That finding is completely at odds with the Graduate Student employment at The New School.

As set forth, *infra*, not only were certain positions not offered by The New School during certain of the eleven (11) semesters/sessions between Summer, 2013 and Fall, 2016, but the employment of discrete Student Assistants was definitively not "regularly recurring." Indeed, the six (6) students to whom the Regional Director referred to in her Supplemental Decision should not, by themselves, have been relied upon as a basis to hold that the remaining "thousands" of Graduate Assistants, and categories of employees (such as undergraduate Teaching Fellows), are not temporary and casual under Board law. One need only refer to undergraduate Course Assistant Allison P.____, who received \$100.00 as a Course Assistant in Spring, 2014, but who was not employed in any of the succeeding eight (8) Summer sessions or semesters concluding in Fall, 2016. (See Affidavit of Shaw Ogiba, Er. Exh. 95, ¶2; Er. Exh. 96, 97). As a result, the necessary, and erroneous, outgrowth of the Regional Director's Decision is that Allison P.____ is an "employee" by reason of having received \$100.00, *once*, during course of nine (9) successive semesters or Summer sessions, and that she is eligible to be included within the putative unit.

What facts, then, was the Regional Director's Decision premised upon? As noted above, at pages 4 and 5 of her Second Supplemental Decision and Direction of Election the Regional Director merely referred to Johanna T.____, Fadi S.____, Lior T.____, Logan C.____, Raquel D.____ and Mingyu D.____, and stated that, as reflected in the summaries introduced into evidence by The New School, these students *may have* "received assignments in different petitioned-for classifications during a particular semester or in different semesters." (emphasis supplied). For

the Regional Director, therefore, to suggest that the summaries do not provide the complete picture as to the underlying data does not, and cannot possibly, provide a basis for finding that *all* Graduate Assistants at The New School, irrespective of their length of service and number of occasions upon which had served, are regular employees and not to be excluded from the putative bargaining unit.

In addition to her reliance upon the employment history of six (6) Graduate Assistants, the Regional Director also stated, at page 5 of her Second Supplemental Decision and Direction of Election, that:

“*[b]ased on the Employer’s raw data, and the exemplars cited above, I find that the Employer’s summary is flawed and of limited probative value with respect to the frequency with which students work in consecutive or non-consecutive semesters. It is also of limited probative value with respect to the number of student services in only one semester.*” (emphasis supplied)

Yet it may be asked what “raw data” is the Regional Director referring to? In fact, the raw data actually confirms the temporary and casual employment of the overwhelming number of Graduate Assistants in the putative class.

B. TEMPORARY OR CASUAL EMPLOYEES

Temporary employees are those without a sufficient community of interest to be included in the putative unit of regular full-time employees. The test for determining the eligibility of individuals designated as temporary employees is whether they have an uncertain tenure, e.g., the “date certain” test. If the tenure of the disputed individuals is indefinite but they are otherwise eligible, they are permitted to vote. *MGM Studios of New York Inc.*, 336 NLRB No. 129 (2001). On the other hand, if employees are employed for one job only, or for a set duration, or *have no substantial expectancy of continued employment* and have been notified of this fact, then such employees are excluded as temporaries. *EF Drew*, 133 NLRB No. 155 (1961). The practice of

excluding temporary employees from a unit recognizes that, “as a general rule,” employees of a defined, short tenure are “likely” to have divergent interests from the rest of the unit.

Additional Board guidance is consistent. 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 NLRB 127, 128 (2003). As the Board has noted, the goal in crafting an appropriate voting formula in this case is to “strike a balance between the need for an ongoing connection with a unit and concern over disenfranchising voters who have a continuing interest notwithstanding their short-term, sporadic, or intermittent employment.” *Id.*, at 22, citing *Steiny & Co.*, 308 NLRB 1323, 1325 (1992) and *Trump Taj Mahal Casino*, 306 NLRB 294 (1992).

“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.”

St. Thomas-St. John Cable TV, 309 NLRB 712, 713 (1992).

Indeed, in *Columbia University*, upon which remand was directed by the Board, and as noted above, the Board stated as follows:

“In its analysis of 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 whether he shares a community of interest with the unit employees. 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 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.

However, the determination is not based on the nature of an employee's tenure in a vacuum; rather, the nature of the alleged temporary employees' employment must be considered relative to the interests of the unit as a whole. The practice of excluding temporary employees from a unit merely recognizes that, as a general rule, employees of a defined, short tenure are likely to have divergent interests from the rest of the unit."

Columbia University, at page 20. Those facts are presented in this proceeding and, as a result, the dictates of Columbia University actually support The New School's position concerning the temporary or casual nature of the Graduate Assistants *and* their putative roles.

At The New School (apart from the few fully-funded students whose status will be noted *infra*), the role of Graduate Assistants is dramatically different from the recurring employment at the large research institutions – as an example, Duke receives approximately one billion dollars from governmental sources and there will necessarily be more of an opportunity for its Graduate Assistants to serve as Research Assistants. *Duke University, Decision and Direction of Election*, Case 10-RC-187957 (Jan. 18, 2017). The present record before the Regional Director makes clear that certain, and significant, sectors of The New School Student Assistants, irrespective of statutory employment, are casual or temporary employees and are not entitled to be included in the collective bargaining unit.

The New School compiled and introduced data before the Hearing Officer which shows the distribution of assignments and hours worked by individuals in the various categories from Summer, 2013 through Fall, 2016. The underlying data was initially introduced as Employer Exhibit 79, and a summary of the data was thereafter introduced in connection with the March 9, 2017 hearing as Employer Exhibits 95 through 98. That data confirms the overwhelming sporadic

and intermittent nature of Student Assistant work, a detailed analysis of which follows. When analyzing the evidence, it should also be noted that some single appointments may be for a duration of two consecutive semesters, so the stated number of students who were paid in multiple semesters might actually reflect an *even lower* number of actual appointments.

1. THE TEMPORARY AND CASUAL NATURE OF THE POSITIONS AND STUDENT EMPLOYMENT

The Regional Director's determination in her Second Supplemental Decision that the categories of "employment" in the petitioned-for unit had a community of interest is contrary to that substantial evidence that several positions and a significant number of Student Assistants were temporary and casual and therefore did not have a community of interest with the rest of the petitioned-for unit. In reaching her conclusion, the Regional Director found that The New School's summary chart, Employer Exhibit 79, incompletely analyzed the data contained electronically in Employer's Exhibit 90:

"The Employer's summary, however, is limited by classification. It does not account for individual students that are granted assignments in different petitioned-for classifications. Thus, while the Employer's summary may show that a given student only received a single assignment in a given petitioned-for classification during the relevant period, the summary does not indicate whether that student also worked in a different classification during that period. (Supplemental Decision p. 5)."

Notwithstanding the Regional Director's reference to Exhibit 79, any information that was not to be found in Exhibit 79 (a mere summary of certain information) was available in the underlying data found in Employer's Exhibit 90. Employer's Exhibit 90 shows all of the appointments of students in the various categories of the petitioned-for unit at The New School during the course of the eleven (11) semester session period between Summer 2013 and Fall 2016. The Regional Director concluded that Exhibit 79 incompletely summarized that data based on the service history of six (6) Student Assistants, which allegedly demonstrated that Exhibit 79 underreported

instances in which Student Assistants worked multiple semesters and in multiple titles. (Supplemental Decision, p. 4-5).

The Supplemental Decision and Direction of Election is, however, devoid of any substantial analysis of Exhibit 90, which the Regional Director colloquially refers to as “raw data.” Further, the Supplemental Decision contains no analysis of Exhibits 91, or Exhibits 95 through 97, each of which is based on the data contained in Exhibit 90. Regardless of whether the Regional Director found The New School’s data summary in Exhibit 79 helpful, an obligation to conduct a thorough review of the data of Exhibit 90 remained — and that review, if it had been conducted, would confirm the temporary and casual nature of the various appointments.

A review of Exhibit 90 reveals that there were 2,316 discrete students in positions during the 11-semester/session period. Of those students, 1,046, or 45.16% of the total number of students, had only one (1) semester during which they were paid in any of the petitioned-for titles. (Er. Exh. 90). This confirms the ultimate conclusion of Exhibit 79 and The New School’s position in this case — nearly half of the petitioned-for employees had no expectation of continued employment. By analyzing only six (6) of the 2,316 students the Regional Director reached a conclusion that ignored the more than 1,000 temporary and casual Student Assistants who only worked one semester in any category.

The New School never argued that there were not some Student Assistants who worked in multiple titles in a number of semesters. This is revealed in Employer Exhibit 91, introduced by The New School, which showed that there was either a range of recurrence, or a complete lack thereof, that would be indicated in the data contained in Exhibit 90. Exhibit 91 is an extract from Exhibit 90, and shows that although some students, Barbara A.____, for example, worked in each of the seven (7) semesters during which she was enrolled at The New School, many more students

worked in only a fraction of the semesters in which they were enrolled at The New School. (Er. Exh. 91, p. 1). Tamara A.____, for example, worked in only one (1) of the eight (8) semesters in which she was enrolled, and Azin K.____ only worked one (1) of the three (3) semesters in which he was enrolled.

As such, the record evidence clearly showed that the Regional Director’s conclusion was clearly erroneous. The fact that six (6) employees out of thousands worked more than one semester or received multiple assignments, cannot, on its own, support the Regional Director’s conclusion that “the majority of students received multiple assignments and a substantial cohort of the students received assignments in multiple semesters.” (Supplemental Decision, p. 7). The Regional Director concluded that the “the fact that a student is granted an assignment in one semester and not the next does not definitively establish that that student has no chance of receiving another assignment.” (emphasis supplied). *Id.* While that inapt conclusion may be true, in so stating the Regional Director is creating a new and incorrect legal standard, and imposing a higher burden on The New School than is appropriate. A position is temporary and casual when there is no substantial expectancy of continued employment. *EF Drew*, 133 NLRB No. 155 (1961). The Regional Director’s claim that the data “definitively establish that that student has no chance of receiving another assignment” standard is significantly higher than the applicable, and correct, standard. And just as significantly, short of ceasing to operate, no employer might ever “definitively establish” that an employee has “no chance” of receiving another assignment. As such, the Regional Director’s conclusion is clearly erroneous.

2. THE COURSE ASSISTANT POSITION IS TEMPORARY AND CASUAL AND SHOULD BE EXCLUDED FROM THE BARGAINING UNIT

There can be no question that there are a significant number of Student Assistants who should not have been included in the bargaining unit or eligible to vote because of the infrequent

nature of their work and the limited hours that they had worked. For example, as noted above, Allison P.____, an undergraduate Course Assistant, received just \$100.00 in the Spring of 2014 and never worked for The New School again. (See Affidavit of Shawn Ogiba, Er. Exh. 95, ¶ 2; Er. Exhs. 96, 97). Similarly, undergraduate Course Assistant Samuel N.____ received \$156.00 as a Course Assistant in Spring, 2014 and did not serve again as a Student Assistant. (Er. Exh. 96, 97).

Reviewing the data for all undergraduate Course Assistants by assignments and hours of service confirms that these students are not at all outliers. Undergraduate Course Assistants were rare and worked few hours when they did have assignments. In the eleven-semester/session period payments were made to just seventeen (17) differently named undergraduate Course Assistants. Those seventeen (17) undergraduates served in just twenty-two (22) Course Assistant assignments during the three and one-half year period (Tr. 628) (Er. Exhs. 79, 96, 97), and only four (4) students served in two (2) consecutive semesters while none served more than two (2) consecutive semesters. (See Employer Exhibit 96, 97 and 98).

The limited number of assignments only tell part of the story. The undergraduate Course Assistants worked very few hours when they did work. Nine (9) of the assignments were for less than one (1) hour per week, on average. (Er. Exh. 98). Eleven (11) assignments averaged fewer than five (5) hours of weekly service per semester. (Er. Exh. 98). Only three (3) assignments averaged more than five (5) hours per week of service, and of those three, none averaged greater than ten (10) hours per week. (Er. Exh. 98). Taking all this evidence together, no undergraduate Course Assistant could have any reasonable expectation of continued employment — in short, the undergraduate Course Assistant work is, and was, temporary and casual.

In the Second Supplemental Decision, the Regional Director states that there was insufficient evidence as to the hours worked by the Student Assistants (Dec. at p. 7):

“... there otherwise is insufficient evidence in the record regarding how many hours were performed by an employee in connection with a given stipend” (Dec. at p. 7).

But information necessary to calculate the hours worked is contained in the record in Employer Exhibits 84 to 86, which include the hourly rate for each position and also the hourly rate for the stipend positions. The Regional Director’s conclusion that this information was not contained in the record is therefore clearly erroneous.

By expanding the analysis to non-undergraduate level Course Assistants, the same picture emerges – Course Assistants at all levels of matriculation work infrequently and perform few hours of service when they do:

<i>Course Assistants – Weekly Hours of Service as a Percentage of All Service</i>				
	Less Than 1 Hour	1 to 5 Hours	5 to 10 Hours	More Than 10 Hours
Undergraduate	39.1%	47.8%	13.0%	0%
Graduate Other	28.6%	71.4%	0%	0%
Masters	.4%	69.3%	27.9%	2.4%
Ph.D.	1.2%	18.1%	49.4%	31.3%

<i>Course Assistants – by Assignments</i>				
	Less Than 1 Hour	1 to 5 Hours	5 to 10 Hours	More Than 10 Hours
Undergraduate	9	11	3	0
Graduate Other	2	5	0	0
Masters	2	316	127	11
Ph.D.	1	15	41	26

(Employer Ex. 98). This data reveals that only a small percentage of the Masters and Ph.D. Course Assistants meet a ten-hour threshold. In *Columbia*, the threshold for Course Assistants was 15 hours per week, on average. Applying that standard reveals that only 25 Ph.D. candidates and 9 Masters candidates would be eligible to vote. Again, though, the frequency of reassignment must also be considered, which further confirms the temporary or casual scope of their employment. Thus, once a Course Assistant served, there was little likelihood that he or she would serve again. Of the 207 discrete named Masters students who served as Course Assistants, 150, or nearly three quarters, served only one semester. Of the 59 Ph.D. Course Assistant students, 44, or nearly 74% of the students, served for only one semester. Since between 75 and 80% of the named Course Assistants (at all levels) serve for only one semester, the only conclusion that can be reached is that if a student becomes a Course Assistant it is unlikely that he or she will serve in that position again.

Based on the foregoing, there can be no question that Course Assistants' employment is temporary and casual. It is so sporadic that there can be no expectation of recall or recurring employment for any employee who is assigned to the position. Further, the students that do work in this category perform so few hours of service that they would not have any community of interest with those Student Assistants who work in the other categories.

3. ALL UNDERGRADUATE STUDENT ASSISTANTS ARE TEMPORARY AND CASUAL AND SHOULD BE EXCLUDED FROM THE BARGAINING UNIT

In fact, the data for *all undergraduate* Student Assistants in all of the six (6) putative categories reveals a similar pattern. That is, there is an extremely limited number of undergraduates serving in those positions, those who do serve do so infrequently and without repetition, and they work very few hours in the putative categories. As such, all undergraduate Student Assistants are temporary and casual and should be excluded from the bargaining unit.

In addition to Course Assistants, as noted above, during the eleven (11) semester/session period undergraduates served in limited numbers in the remaining positions: Research Associate, Research Assistants, Student Assistant 3 (Parsons Research Assistants), Teaching Assistant, Teaching Fellow, and Tutor positions. The limited number of assignments and students serving in those positions is striking for the Research Associate, Teaching Assistant, and Teaching Fellow designations. Thus, there were fewer than five (5) students serving in each category in the three and one-half (3 ½) year period, and there were fewer than ten (10) assignments in each category. Indeed, there were only three (3) Teaching Assistant *assignments*, and just one (1) Teaching Fellow assignment in that Summer, 2013 through Fall, 2016 period.

The following summary highlights the striking reason why undergraduates should not be included within the unit:

Position	No. of Students	No. of Assignments
Research Associate (Summer 2013-Fall 2016)	4	9
Teaching Assistant (Summer 2013-Fall 2016)	2	3
Teaching Fellow (Summer 2013-Fall 2016)	1	1

(Er. Exh. 96); see also (Er. Exh. 90). Of these seven (7) discrete, named students, only one, a Research Associate, served more than one (1) semester. (Er. Exh. 96); see also (Er. Exh. 90). The assignments in those categories were not only less than sporadic, indeed, they were virtually non-existent.

Reviewing the hours served for the Teaching Assistants and Teaching Fellow confirms the limited nature of the assignments. Both undergraduate named Teaching Assistants worked on average fewer than five (5) hours per week in each of the three (3) assignments that they worked. (Er. Exh. 98). The single Teaching Fellow worked fewer than 15 hours per week. (Er. Exh. 96); see also (Er. Exh. 90). There is no hours-based data for the Research Associates, as Research Associates are paid on a stipend basis, and hours are not tracked. But that does not change the

conclusion. Even without the benefit of the hours worked, there is nothing to suggest that these assignments are recurring.

Undergraduates served in slightly higher numbers in the Research Assistant, Student Assistant 3 (Parsons Research Assistant), and Tutor positions. Again, though, the data reveals that these assignments are sporadic, for limited hours, and not recurring. As an example, 79 students served in the Student Assistant 3 title but 53 of them served in only one (1) semester, 251 of the 361 named students who served as Research Assistants served in only one (1) semester, and 52 of the Tutors (out of 114), again only served one (1) semester. (Er. Exh. 96); see also (Er. Exh. 90).

It is self-evident that the data described above verifies that all of these undergraduate positions are not recurring, and that any student who had served in one (1) semester should not have an expectation that he or she would receive another assignment. A deeper analysis of the data has confirmed this. In that regard, only a very small percentage of the limited number of undergraduates who served in these positions served more than one semester and fewer still served in consecutive semesters.¹ The following chart is illustrative:

<i>Undergraduates in Multiple Assignments (Summers Included)</i>				
	Named Students in Title	1 Semester Only	2 Semesters or More	2 Consecutive Semesters
Course Assistant	17	13	4	4
Research Assistant	364	252	142	86
Research Associate	4	2	2	2
Teaching Assistant	2	2	0	0
Teaching Fellow	1	1	0	0
Tutor	114	52	46	41

¹ It is important to note that a designation that a Student Assistant worked in two consecutive semesters overstates the number of Student Assistants who actually provided services in two consecutive semesters. The data is based on payroll data, so it is possible that a student was paid in two semesters while providing service in only one semester. This could be because of the terms of the stipend, the timing of the payment, or when a Student Assistant actually provided timesheets or evidence of the work performed.

<i>Undergraduates in Multiple Assignments (Summers Included)</i>				
	Named Students in Title	1 Semester Only	2 Semesters or More	2 Consecutive Semesters
Student Assistant 3	79	53	31	25

(Er. Exh. 96); see also (Er. Exh. 90). As noted above, therefore, a vast majority of the undergraduate assignments are for a single semester. As such, there cannot be any expectation of recurring employment, and the data is similar whether Summers are included or excluded (Contrast Er. Exh. 96 with Er. Exh. 97), and given this data, undergraduates serving in the putative categories can have no substantial expectancy of continued employment and should be excluded from the bargaining unit.

4. OTHER CATEGORIES OF MASTERS AND PHD STUDENT ASSISTANTS ARE TEMPORARY OR CASUAL AND SHOULD BE EXCLUDED FROM THE UNIT

At the Masters and Ph.D. levels, Student Assistants worked more hours than the undergraduates, but there was still a pattern of limited recurrence and limited weekly hours. Accordingly, there are, once again, other Student Assistant categories that should be excluded because they are temporary or causal and with no expectation of recurrence. From Summer, 2013 through Fall, 2016:

- 1,157 of 1,886 (61%) Masters students served in only one semester; and
- 329 of 872 (38%) Ph.D. students served in one semester only. (Er. Exh. 96); see also (Er. Exh. 90).

Though the numbers are higher than for the undergraduates, there is still a significant pattern of non-recurrence for Masters Students as the data below demonstrates.

<i>Masters Students in Multiple Assignments (Summers Included)²</i>				
	Discrete Students in Title	1 Semester Only	2 Semesters (Not Consec.)	2 Consecutive Semesters
Research Assistant (Including Work Study)	783	426	150	295
Research Associate	72	53	7	15
Teaching Assistant	514	328	29	172
Teaching Fellow	70	61	3	7
Tutor	82	46	22	30
Student Assistant 3	158	93	17	57

(Er. Exh. 96); see also (Er. Exh. 90). The Teaching Fellow (87% single semester assignments) and Research Associate (74% single semester) titles particularly stand out as being non-recurring.

But the casual nature of these Masters appointments becomes even more clear when the hours worked are analyzed. As with the undergraduates, a significant percentage of Masters Student Assistants worked fewer than five (5) hours on a weekly average during the semester or Summer session:

<i>Masters Students – Hours by Student and Percentage</i>				
	Less Than 1 Hour	1 to 5 Hours	5 to 10 Hours	More Than 10 Hours
Research Assistant	157 (9%)	710 (40.5%)	510 (29.1%)	376 (21.5%)
Student Assistant 3	16 (5.2%)	152 (49.2%)	107 (34.6%)	34 (11%)
Teaching Assistant	22 (2.6%)	320 (37.8%)	377 (44.6%)	127 (15%)
Teaching Fellow	4 (4.4%)	29 (32.2%)	42 (46.7%)	15 (16.6%)
Tutor	20 (13.2%)	72 (59.5%)	38 (31.4%)	21 (17.3%)

(Er. Exh. 98).

² Graduate level Course Assistants have been previously addressed and are not included in the analysis here.

Thus, at the Masters level in almost all instances fewer than 20% of the Student Assistants worked more than ten (10) hours per week on average. Just as significantly, at least nearly half, if not significantly more in the case of Tutors, worked on average in each of these categories for fewer than five (5) hours in a week. These are assignments where, once employed, only a slim minority of student assignments could possibly have any expectation of recurring employment.

At the Ph.D. level the number of Student Assistants in recurring positions and working more than ten (10) hours on average in a week increases, but the data still reveals a significant number of Student Assistants who work minimal weekly hours, and are appointed for only one semester, or both.

<i>PhD Students in Multiple Assignments (Summers Included)³</i>				
	Students in Title	1 Semester Only	2 Semesters (Not Consec.)	2 Consecutive Semesters
Research Assistant	274	52	84	205
Research Associate	58	26	15	29
Teaching Assistant	258	101	72	116
Teaching Fellow	162	78	41	51
Tutor	44	48	18	14
Student Assistant 3	10	3	4	5

(Er. Exh. 96); see also (Er. Exh. 90). The Teaching Fellow (48% single semester assignments) and Research Associate (44% single semester appointments) titles again stand out.

As with undergraduate and Masters students, the casual nature of many of these appointments becomes evident after analyzing the hours worked. Thus, there is still a significant percentage of Student Assistants even at the Ph.D. level working fewer than five (5) hours per week, on average, across all categories:

³ PhD Course Assistants were also addressed and are not included in this analysis here.

<i>PhD – Hours by Student and Percentage</i>				
	Less Than 1 Hour	1 to 5 Hours	5 to10 Hours	More Than 10 Hours
Research Assistant	47 (3.7%)	337 (26.5%)	456 (35.9%)	431 (33.9%)
Student Assistant 3	1 (4.5%)	152 (36.4%)	107 (45.5%)	34 (13.6%)
Teaching Assistant	22 (2.6%)	320 (21.7%)	377 (59.1%)	127 (16.6%)
Teaching Fellow	17 (4.2%)	29 (10.3%)	42 (65.4%)	15 (20.1%)
Tutor	12 (11.5%)	72 (70.6%)	38 (37.25%)	21 (20.6%)

(Er. Exh. 98). While the Ph.D. Student Assistants are working greater hours than in any other category, there are still a significant number of Student Assistants working fewer than five (5) hours per week on average. In the Tutor position, as an example, more than 80% of the Tutors work fewer than five (5) hours per week.

Looking at the limited number of repeat assignments over two (2) semesters also reveals the non-recurring nature of the positions in the petitioned-for unit. When summer sessions are excluded from service:

- approximately only 8% of undergraduates, 19% of Master’s students, and 17% of Ph.D. students in positions were paid in two (2) consecutive semesters.
- of the Masters students, only 153 served in three (3) consecutive semesters (or 279 in the case of Ph.D. students), or 4.2% and 9.7%, respectively, of the total complement of Graduate Assistant assignments; and
- only 407 out of 2,322 students were paid as Student Assistants in four (4) consecutive semesters.

(Er. Exh. 97). In sum, the data clearly confirms the overwhelming non-recurring, temporary or casual service of The New School’s Student Assistants. And for many, if not most, of the students who worked one semester, they necessarily received appointments indicating that the duration of service would be only for either a semester, *or even less*, e.g., Allison P.____’s receipt of \$100.00

in Spring, 2014 for approximately eight (8) hours of work. As such, there is no basis to claim that any course assignment gives rise to an inference that there is any expectation of continued employment. Employer Exhibits 96 and 97, prepared by Shawn Ogiba, The New School's Director of Human Resources Systems, Reporting and Analysis, starkly presented the expectation that one would not serve in putative category on a repetitive basis, and the sporadic, casual and non-recurring roles of the student roles becomes obvious.

In short, the thorough analysis of the data in Exhibit 90 can only validate that a non-temporary or non-casual Student Assistant is one who has served two or more consecutive semesters/sessions. Any other formulation would clearly ignore the sporadic and non-recurring nature of their roles in the putative categories.

POINT IV
VAST DIFFERENCES BETWEEN COLUMBIA UNIVERSITY
AND THE NEW SCHOOL, AS MANIFESTED BY THEIR STUDENT
ASSISTANT PROGRAMS, PRECLUDE THE SAME APPLICATION OF
THE COLUMBIA UNIVERSITY DECISION

The Regional Director's Second Supplemental Decision followed the rationale of the Region's earlier decision in *Columbia University*. (see Supplemental Decision, p. 6). But following, without distinguishing, that case was inappropriate given the vast differences between Columbia and The New School. Columbia and The New School are both non-profit post-secondary educational institutions located in New York City. While there are certainly some similarities between the two institutions, there are also stark differences prompted by, among other things, Columbia's receipt of annual revenue totaling billions of dollars. Columbia's major sources of revenue include tuition and government contracts and grants, with 2015 net tuition revenue of \$940 million, and grants exceeding \$750 million. *Columbia*, 364 NLRB No. 90. The New School's revenue is significantly lower, however, with the record evidence in the 2015 hearings indicating that its annual revenue approximated \$300 million in that year.

Because of its significant revenue Columbia can, and does, fully fund most of its Ph.D. student assistants. Columbia has approximately 2,600 Ph.D. students. *See* (http://www.columbia.edu/cu/opir/abstract/opir_enrollment_gender_1.htm). Generally, a “fully-funded” Ph.D. student is a student who receives tuition remission coupled with a *required* commitment from the student to render service as a Teaching Assistant, Teaching Fellow, or Research Assistant. At Columbia, in most Ph.D. students’ second through fourth year, taking on teaching or research duties is a condition for the full receipt of such funding, and it is also a requirement for their degree. Additionally, if they do not perform those services they do not get paid. *Columbia*, 364 NLRB No. 90 at 15.

For most non-fully-funded Ph.D. candidates at Columbia, the first and fifth years are funded without a condition of service. In general, Ph.D. candidates spend five to nine years of study within their discipline. In the students’ sixth year and beyond, teaching-based financial support may continue to be available. Research-based financial support, unlike teaching support, frequently is provided, in whole or in part, from sources outside the University. While grants from government or other outside entities, generally to support a specified research task, often cover Research Assistants’ financial awards, Columbia will make up any shortfall if outside grants provide a level of funding that falls below the standard graduate funding package. *Id.* Against that backdrop, therefore, for a result to be reached in this proceeding Columbia’s program must be compared to the completely different Student Assistant program at The New School.

The New School’s Deputy Provost Bryna Sanger testified during the 2015 hearings that the aggregate amount of funds expended by The New School as financial support for its student assistants is approximately \$4.9 million per year, and

“... the intention of these resources and the forms of mone[ies] is to spread it around as best we can to support our students as they go through toward completion of their degree.”

(Tr. 87, lines 5-6, 25, Tr. 85, lines 1-3). Thus, unlike Columbia, The New School fully funds very few of its Ph.D. students, and from 2010 to 2013 it only fully-funded approximately six (6) students per year, which resulted in the fully-funding of approximately fifteen (15) students at any one time. (Tr. 683, 684). Moreover, at The New School the fully-funded package includes tuition for the duration of the degree, their fees, and a stipend of between \$10,000 and \$15,000 per year. (Tr. 683). Unlike the vast majority of the other Student Assistants at The New School, the *fully-funded Ph.D.* student is required to provide instructional or research services in a position in each semester after his or her first year. (Tr. 685). Since 2013, The New School has sought to increase the number of fully-funded Ph.D. candidates, but it currently only funds approximately 52 students of its complement of approximately 560 Ph.D. candidates. (Tr. 684, 185). By itself, the scope of the fully-funded packages at Columbia, when measured against the limited ability of The New School to provide such funding, necessarily results in the Student Assistants’ (other than The New School fully-funded students) failure to have “recurring” employment while attaining their degrees. Indeed, the Board has held that the *scope* of the Columbia University program, unlike at The New School, clearly benefits that University, for the Board held, in finding that Columbia’s students played a crucial role in delivering its Core Curriculum, were statutory employees (numbering in the thousands) and emphasized the key role they played in delivering Columbia’s Core Curriculum:

“... the fact that Teaching Assistants are thrust wholesale into the many core duties of teaching ... *suggests that the purpose [of Columbia] extends beyond the mere desire to help inculcate teaching skills.*” (emphasis supplied)

In short, the great breadth of the requirements upon the Student Assistants in the Columbia fully-funded program results in “having students assist in the business of universities by providing instructional services for which undergraduate students pay tuition.” *Columbia University*, 364 NLRB No. 90, at p. 16. Columbia was like many other universities in that:

“Significant portions of the overall teaching duties conducted by universities are conducted by student assistants. The delegation of the task of instructing undergraduates, one of a university’s most important revenue-producing activities, certainly suggests that the student assistants’ relationship to the University has a salient economic character.”

Columbia University at 16.

No such conclusion can be reached concerning The New School’s program. First, the 2015 record evidence during The New School hearings indicates that the teaching provided by Graduate Assistants was specifically designed to be a pedagogical technique, and might have been supplanted (if The New School chose to do so) by the services of part-time faculty, whose services might be less costly to The New School. See the testimony of Dr. Bryna Sanger and Dr. Bourgeois (Tr. 91, 553). Importantly, Dr. Sanger testified that the intent was not to provide instructional services for undergraduates but, rather, the intent of the “teaching” provided by the Student Assistants was to assist the student in attaining his or her degree.

A number of other differences between Columbia and The New School are instructive, and bear upon the issues presented in this proceeding. Columbia undergraduates serve in Teaching Assistant roles, which is a virtually non-existent phenomenon at The New School. See 364 NLRB No. 90, at p. 14. Indeed, there were only three (3) “Teaching Assistants” and one (1) Teaching Fellow position during the eleven (11) semesters/sessions between Summer, 2013 and Fall, 2016 at The New School. Moreover, Columbia Student Assistants, excluding Course Assistants, work in *semester-long increments*, which is often not the case at The New School, irrespective of the

category of employment, as students might perform services as little as only one day. 364 NLRB No. 90, at p. 20 and fn. 131. Further, the categories in the *prospective* unit relating to Columbia’s Student Assistant employment is recurring which, again, is not the case for the Student Assistants at The New School. 364 NLRB No. 90, at p. 21. Finally, as noted more fully below, “Teaching Assistants conduct lectures, grade exams, and lead discussions”, and “Course Assistants, graders or readers” who were not appointed on a semester-long basis worked, on average, 15 hours per week at Columbia, making them eligible to vote in an election. 364 NLRB No. 90, at p. 16. Contrariwise, the record evidence in this proceeding shows that there are few Teaching Assistants and those who serve work very few hours, and that The New School Tutors served, in the vast majority of instances, one (1) to four (4) hours per week over the course of a 15-week semester, with *each* of the remaining categories also providing for many fewer hours of work served than at Columbia. (Er. Exh. 98).

The Regional Director should have considered the differences between The New School and Columbia University and applied the law to The New School in a way that recognized those significant differences.

POINT V
BECAUSE THE REGIONAL DIRECTOR MISTAKENLY CONCLUDED THAT THERE WERE NO TEMPORARY AND CASUAL CATEGORIES, THE VOTING ELIGIBILITY FORMULA IN THE DIRECTION OF ELECTION IS INCORRECT

The Regional Director’s decisions to include more than 1,000 Student Assistants who could only be temporary or casual employees in the unit and that those temporary or casual employees were eligible to vote was clearly erroneous. Those Student Assistants should have been restricted from voting. Specifically, given the significant instances of sporadic or intermittent employment for Student Assistants, across all categories, only those Student Assistants who worked in any

petitioned for position in two consecutive semesters/sessions had any expectation of recurrent employment and, therefore, only those Student Assistants should be eligible to vote. Further, the undergraduates should not have been included as appropriate voters.

The Regional Director found that the following was the appropriate voter eligibility formula:

- (1) All currently enrolled Course Assistants, Teaching Assistants, Teaching Fellows, Student Assistants 3 at the Parsons School, Research Assistants, Research Associates, compensated through a stipend, that received an assignment in any of the following semesters: Spring 2016, Summer 2016, Fall 2016, or Spring 2017; and
- (2) All currently enrolled Tutors, and any other unit employees compensated only on an hourly basis, that have received an assignment for which at least 60 hours was worked in any of the following semesters: Spring 2016, Summer 2016, Fall 2016, or Spring 2017.

Since the Regional Director incorrectly included various categories of employees as noted above, the correct voter eligibility formula should have been:

Included: All currently matriculated student employees, other than undergraduates, who provide teaching, instructionally related or research services, including Teaching Assistants, Course Assistants, Teaching Assistants, Teaching Fellows, Student Assistants 3 at the Parsons School, and Tutors, and Research Assistants (Research Assistants and Research Associates), but only if any individual in any such category actually performs instructional or research services.

Excluded: All other employees, Student Assistants at schools other than Parsons, guards and supervisors as defined in the Act.

In addition, the Regional Director should further determine eligibility to vote, if an election is directed, by making those eligible to vote, as follows:

- (1) Teaching Assistants, Teaching Fellows, Research Assistants, Research Associates, Course Assistants in Master's or Ph.D programs (excluding undergraduates), and any other unit employees that are currently matriculated and

compensated through a stipend and who actually performed instructional and/or research duties and who held an appointment in both the Spring 2017 and Fall 2016 semester, or Summer 2016 and Fall 2016, consecutively.

- (2) Currently matriculated Master's or Ph.D student hourly-paid Student Assistants who actually performed instructional and/or research duties and who worked an aggregate of 150 hours or more, or at least, on average fifteen hours per week in each such semester in a unit position in each of the Spring 2017 and Fall 2016 semesters, or Summer 2016 and Fall 2016, consecutively.

CONCLUSION

For all the foregoing reasons, The New School's Request for Review should be granted.

Dated: April 21, 2017
New York, New York

Respectfully submitted,

CLIFTON BUDD & DEMARIA, LLP

By: Douglas P. Catalano

Douglas P. Catalano, Esq.
350 Fifth Avenue, 61st Floor
New York, New York 10118
Tel: (212) 687-7410
Fax: (212) 687-3285

*Attorneys for Employer
The New School*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she has served a copy of the employer The New School's Post-Hearing Brief on the following parties by electronic mail on April 21, 2017:

Thomas W. Meiklejohn, Esq.
Livingston, Adler, Pulda, Meiklejohn & Kelly
557 Prospect Avenue
Hartford, CT 06105
twmeiklejohn@lapm.org



Jennifer L. Siroti