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

THE NEW SCHOOL

Employer

and **Case 02-RC-143009**

STUDENT EMPLOYEES AT THE NEW SCHOOL-SENS UAW

Petitioner

SECOND SUPPLEMENTAL DECISION AND DIRECTION OF ELECTION

I. PROCEDURAL HISTORY

The New School ("the Employer") is a New York not-for-profit corporation which operates an institution for higher education in New York, New York. On December 17, 2014, Student Employees at the New School, SENS/UAW ("the Petitioner") filed the petition in this matter seeking the following unit:[1]

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

On February 6, 2015, I issued an Order Dismissing Petition pursuant to the then-valid Board decision in *Brown University*, 342 NLRB 483 (2004). On March 13, 2015, the Board granted the Petitioner's Request for Review, reversed the dismissal, and remanded the matter for a hearing and issuance of a decision.

On July 30, 2015, I issued a Supplemental Decision and Order Dismissing Petition ("Supplemental Decision"), in which I again found that the Board's decision in *Brown University* required the petition be dismissed. On October 21, 2015, the Board issued an Order granting the Petitioner's Request for Review of my Supplemental Decision.

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[1] The unit set forth below is the most recent articulation of the petitioned-for unit. The Petitioner will to proceed to an election in any unit found appropriate.

On August 23, 2016, the Board issued its decision in *Columbia University*, 364 NLRB No. 90 (2016).[2] On December 23, 2016, the Board issued an Order remanding the instant petition for further appropriate action consistent with *Columbia University*, including reopening the record, if necessary.

II. REOPENING THE RECORD:

On February 10 and 13, 2017, the Petitioner submitted its position and a supplemental brief. The Petitioner argued that the existing record in this matter was sufficient to address any outstanding issues raised by *Columbia University* and that reopening the record was not necessary. The Petitioner argued that the record to that point, pursuant to *Columbia University,* established that: (1) the petitioned-for employees are statutory employees; (2) the petitioned-for unit is appropriate; and, (3) the employees in the petitioned-for unit should not be excluded from the unit as temporary employees.

On February 21, 2017, the Employer submitted its position statement and argued that the existing record was insufficient to establish that the graduate assistants in the petitioned-for unit constitute statutory employees and, even if they were deemed statutory employees, they should be excluded from the unit because they constitute temporary or casual employees. Further, the Employer contended that the existing record was not sufficient to establish that the unit was appropriate.

In response, on February 24, 2017, the Petitioner in its supplemental submission, argued that employees employed for a finite period cannot be excluded from the unit on that basis alone. Further, the Petitioner noted that the Employer's assertions regarding the insufficiency of the record with respect to an appropriate unit and employee status were unaccompanied by any explanation as to why the record should be supplemented. Thus, the Petitioner argued, the only possible issue for a hearing on remand was the eligibility formula.

After considering the parties' positions and relevant portions of the record, on March 2, 2017, I issued a Notice of Hearing that set mutually agreeable dates for the hearing and afforded the Employer an opportunity to submit offers of proof with respect to: (1) whether the petitioned-for unit comprises statutory employees; (2) the differences between the classifications in the petitioned-for unit regarding level of duties, level of responsibility, remuneration, and expected length of service; and, (3) the pattern of employment of the petitioned-for unit. I indicated that I would, upon a review of the offers of proof, determine whether to permit additional evidence to supplement the record on these points.

On March 6, 2017, the Employer submitted a supplemental letter, stating that it would proffer at the hearing evidence that Student Assistants do not perform research and/or instructional functions and thus are not statutory employees. With respect to the issue of an appropriate unit, the Employer argued that individuals who do not perform instructional and/or research services should not be included. With respect to the issue of temporary or casual

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[2] See Board Order dated December 23, 2016, remanding Case 02-RC-143009, discussed *infra*.

employment, the Employer argues that there is no basis to conclude that a prior work assignment suggests an expectation of future employment.

On March 8, 2017, the Petitioner submitted an additional letter brief reiterating positions it made in prior submissions and arguing that Employer's offers of proof were insufficient to warrant permission of additional evidence on any issue other than the eligibility formula.

III. PARTIES' POSITIONS ON ELIGIBILITY FORMULA:

The Petitioner's proposed eligibility formula is:

(1) Teaching Assistants, Teaching Fellows, Research Assistants, Research Associates, Course Assistants and any other unit employees compensated through a stipend who hold an appointment in the Spring semester 2017, and

(2) Hourly paid Tutors who are working 5 hours per week or more in a unit position in the Spring semester 2017, and

(3) Unit employees who met either of these eligibility criteria for either the Fall, Spring or Summer of 2016.

The Employer's proposed eligibility formula is:

(1) Teaching Assistants, Teaching Fellows, Research Assistants, Research Associates, Course Assistants 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 and

(2) Currently matriculated 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, consecutively.

IV. FACTS:

The relevant facts regarding the Employer's operations, including the descriptions of the petitioned-for job classifications, are found in my Supplemental Decision, which is hereby incorporated by reference into this Decision.

At the March 9 hearing, the Employer limited its presentation of evidence to two witnesses. Dean Robert Kostrzewa briefly testified as to funding of the petitioned-for classifications. The Employer also elicited testimony from Sean Ogiba, who is an employee familiar with the Employer's payroll process. Ogiba explained a number of payroll-related exhibits proffered by the Employer including, chiefly, a summary of payments (along with its

underlying data) made to students who held assignments in the petitioned-for classifications from the Summer semester of 2013 through the Fall semester of 2016 (hereinafter the "relevant period").[3]

The Employer's chart (Exhibit 79) includes, for the relevant period, a summary of, *inter alia*, the total number of assignments made for each of the petitioned-for classifications and a breakdown of the total number of students for which those assignments were made and, with respect to the latter, how many of those students received that assignment in one semester only.

The Employer submits that the above-referenced summary shows: (1) the distinction between students who served in a given petitioned-for classification in one semester only and students who served in a given classification in more than one semester; and, (2) the percentages of how often students received those assignments in consecutive semesters, versus how often they received assignments non-consecutively.

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.

An analysis of the Employer's underlying data (Exhibit 90) demonstrates that students who received assignments in any one of the petitioned-for classifications, during the relevant period, may have also received assignments in different petitioned-for classifications during a particular semester or in different semesters. For instance, PhD student, Johanna Taylor, received the following assignments: Student Assistant 3 at the Parsons School, Teaching Assistant, Teaching Fellow, and Research Assistant in Fall 2013; Student Assistant 3 at the Parsons School, Teaching Fellow, and Research Assistant in Spring 2014; Teaching Fellow in Fall 2014; Teaching Assistant and Teaching Fellow in Spring 2015; and Teaching Fellow and Research Assistant in Fall 2015. Similar examples appear with respect to students in other registration levels, as well. For instance, Master's student, Fadi Shayya, received the following assignments: Student Assistant 3 in the Parsons School in Fall 2014, Student Assistant 3 in the Parsons School, Teaching Fellow, and Research Assistant in Spring 2015, Teaching Fellow and Research Assistant in Fall 2015 and Spring 2016. Similarly, undergraduate student, Lior Tamim, received the following assignments: Student Assistant 3 at the Parsons School in Spring and Fall 2014; Student Assistant 3 at the Parsons School and Research Assistant in Spring 2015. Accordingly, by tracking assignments made within a specific classification, rather than all of the assignments granted to a particular student over the course of the relevant period, the Employer's data inflates the number of students that purportedly received only a single assignment and creates the appearance that fewer students worked in non-consecutive semesters.

The Employer's underlying data shows that some students worked in non-consecutive semesters, excluding assignments granted during summer. For example, Master's student,

[3] See also Section I(G) of the Supplemental Decision at pp. 15-16 regarding the frequency and duration of student appointments to the petitioned for classification.

Logan Chappe, received assignments in Fall 2013, but not Spring 2014, and then worked again in Fall 2014 and Spring 2015. Similarly, Master's student, Raquel DeAnda received assignments in Fall 2013, but not Spring 2014, and then did not work Fall 2014, but she did work again Spring 2015. Likewise, Master's student, Mingyu Dong, received assignments in Fall 2013 and Spring 2016, but did not receive assignments during Fall 2014, Spring 2015, and Fall 2015. See also Pet. Ex. 44 (showing the existence of students receiving multiple assignments in non-consecutive semesters).

Thus, 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. Again, consider undergraduate student, Lior Tamim. Tamim received assignments as a Student Assistant 3 at the Parsons School in Spring and Fall 2014 and Spring 2015, and as a Research Assistant in Spring 2015. The Employer's summary considers Tamim as having served as a Research Assistant for one semester only. While this is technically true, the Employer's summary based on the specific Research Assistant classification does not reveal that Tamim was also assigned to a petitioned-for classification in three separate semesters.

That flaw also distorts the Employer's data regarding the frequency of students that received assignments in consecutive semesters or non-consecutively. Again, consider Master's student, Logan Chappe. Chappe received Course Assistant assignments in Fall 2013 and Fall 2014, and Research Assistant assignments in Fall 2014 and Spring 2015. As a result, Chappe would have been counted in the Employer's Course Assistant summary as a student who served in two non-consecutive semesters. He would have been counted in the Employer's Research Assistant summary as having served in two consecutive semesters. In reality, according to the raw data provided by the Employer, Chappe is a student who received eight separate assignments in two classifications in three separate semesters with a year-long gap between the first and second semesters in which he performed work.

Based 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 students serving in only one semester.

As described in my Supplemental Decision, most of the students working in the petitioned-for classifications receive stipends, which are disbursed in biweekly payments over the semester. However, some Teaching Assistants, Teaching Fellows, Research Assistants, Research Associates, and Course Assistants receive stipend amounts that are expressed in terms of hourly rates. However, there is no formal monitoring of a student's time in these positions.

With respect to tutors, the evidence establishes that over 99% of Tutor assignments have hours worked data and were marked as hourly assignments. When the underlying data is limited to include only assignments showing hours worked data, regardless of the petitioned-for classification, just over half of those assignments were for fewer than 60 hours in that semester. Moreover, nearly 90% of all assignments with hours worked data showed less than 225 total hours worked for that semester.

The Employer's Exhibit 98 shows a summary of the average weekly hours of service in a petitioned-for classification during the relevant period. Those summaries, however, do not distinguish between assignments paid by stipend and those paid on an hourly basis. This is problematic because actual number of hours worked is not tracked for students receiving stipends. In other words, the Employer's summary assumes that an employee compensated by a stipend worked an average amount of hours per week based solely on the dollar amount of the stipend divided by the hourly wage rate assigned to the classification. Accordingly, the Employer's summary skews the average number of hours worked per week and is of limited probative value with respect to the question of a proper formula for any of the petitioned-for classifications.

V. ANALYSIS:

I have considered all of the parties' submissions and briefs, and the entire record, and based on the evidence, I make the following findings:

A. *2(3) Status of the Employees in the Petitioned-for Classifications*:

Based on the record, I find that the petitioned-for employees are statutory employees.[4] Here, there is ample record evidence indicating that: (1) the students in the petitioned-for unit classifications receive financial compensation for their work; and, (2) the Employer has the right to control and direct their work. As a result, the students in the petitioned-for unit 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. *Columbia University*, slip op. at 15. Notably, the Employer failed to make an offer of proof on this point at hearing.

B. *The Employees in the Petitioned-for Unit Share a Community of Interest*:

The petitioned-for unit in this matter is appropriate. First, akin to the unit found appropriate in *Columbia University*, the petitioned-for unit consists of all students who provide teaching, instructionally-related or research services. Here, all of the classifications in the petitioned-for unit perform a supplemental education service, i.e., teaching, instructionally-related or research services. All of the classifications have similar methods of remuneration, i.e., payment for assignments granted on a semester-long basis. Moreover, the record reflects that individual employees regularly moved between classifications during the relevant period. Therefore, applying traditional community of interest factors to these facts, I conclude that the petitioned-for classifications share a sufficient community of interest to constitute an appropriate unit. Again, the Employer failed to make an offer of proof at the hearing. To the extent that the Employer relies on its summaries to show distinctions in the number of hours worked, as explained above, those summaries are flawed.

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[4] See December 23 Board Order at fn. 2.

C. *Pattern of Employment*:

The record establishes that the majority of students received multiple assignments and a substantial cohort of the students received assignments in multiple semesters. Although the data shows that most students who were granted assignments in more than one semester worked in consecutive semesters, there are also instances in which students have semester-long gaps between assignments. The latter point is true regardless of whether the summer semester is considered in the calculation. Thus, 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, as suggested by the Employer through its summaries. The existence of students that receive assignments in non-consecutive semesters supports a finding that a "look back" period is necessary to ensure that bargaining unit members are not improperly disenfranchised based solely on the fact that they happened to not receive an assignment in the semester in which the election takes place.[5]

I find that none of the petitioned-for employees that received assignments pursuant to a stipend warrant exclusion from the unit. Although the Employer takes the position that whole classifications should be excluded on the basis of summary data purportedly showing that many assignments in that classification were for fewer than five hours on average per week over the course of a semester, that position is flawed. First, the summary used by the Employer does not distinguish between assignments paid pursuant to a stipend and those paid based on the number of hours worked. Second, there otherwise is insufficient evidence in the record regarding how many hours were performed by an employee in connection with a given stipend. As such, I cannot find that whole classifications should be categorically excluded based on assumptions regarding hours worked in the absence of actual data on that point.

With respect to hourly employees, the Employer argues that students must work at least 225 total hours in a semester, i.e., at least 15 hours per week on average, in order to be eligible to vote. I find, however, that excluding hourly employees that work fewer than 15 hours per week would disenfranchise too many voters that otherwise have a sufficient regularity of employment to share a community of interest with unit employees. The pattern of employment regarding hourly employees in this matter shows that there were roughly as many assignments granted for fewer than 60 hours in a semester as there were assignments granted for more than 60 hours. Thus, I find that the eligibility formula regarding hourly employees that permits optimum employee enfranchisement and free choice in this matter would include a minimum threshold of 60 hours worked in a given semester.[6]

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[5] The Employer has the right to challenge any specific voters it believes, for reasons that may include, e.g., those who have graduated or are pending graduation, definitively have no prospect of future employment. Moreover, the Employer has the right to challenge any student employees it believes have not actually performed teaching, instructionally-related or research services.

[6] Although the circumstances here – student employees in the context of higher education – are unique from other traditional situations in which the Board has developed eligibility formulas for employees that work few average hours per week, those cases may nevertheless be instructive. For instance, the Board has developed a rule allowing part time or on-call employees to be included in a bargaining unit and vote in the election if they regularly average four (4) or more hours of work per week for the last quarter prior to the eligibility date. *Davison-Paxon Co.*, 185 21, 23-24 (1970). In this matter, 60 hours over a 15 week semester is four (4) hours per week, on average. In

VI. CONCLUSION:

In conclusion, based on my analysis of the record evidence related to the Board's remand on voting eligibility and the Board's historic approach to fashioning eligibility formulas in cases such as this, I am ordering an election in the following unit of employees, found appropriate by the Board, according to the following eligibility formula.

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

I find the following employees are 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
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> (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.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those employees in the unit described above.

Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike which commenced less than twelve months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike

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the formula that follows, we have selected total hours worked, as opposed to average weekly hours, because there is no data establishing the average hours worked per week.

who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than twelve months before the election date and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining purposes by Student Employees at The New School – SENS UAW

NOTICE OF ELECTION

Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer at least three working days prior to an election. If the Employer has not received the notice of election at least five working days prior to the election date, please contact the Board Agent assigned to the case or the election clerk.

A party shall be estopped from objecting to the non-posting of notices if it is responsible for the non-posting. An Employer shall be deemed to have received copies of the election notices unless it notifies the Regional office at least five working days prior to 12:01 a.m. of the day of the election that it has not received the notices. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure of the Employer to comply with these posting rules shall be grounds for setting aside the election whenever proper objections are filed.

LIST OF VOTERS

To insure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is directed that two copies of an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the undersigned within **seven days from the date of this Decision**. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The undersigned shall make this list available to all parties to the election. In order to be timely filed, such list must be received in Region 2's office, 26 Federal Plaza, Room 3614, New York, New York, 10278, on or before **April 14, 2017**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

ELECTION DETAILS

The election, to be conducted manually,[7] will be held between the hours of 10:00 A.M. and 4:00 P.M. on Wednesday and Thursday, May 3 and 4, 2017, at the Employer's University

[7] The Employer cites the Regional Director Claude Harrell's Decision and Direction of Election in the recent representation matter concerning students at Duke University, 10-RC-187957, in support of its argument that a mail ballot election is appropriate. I find that the considerations in that case are distinct from those herein, in which – unlike those in Duke University – there is a centralized campus. As such, the issues presented by holding elections at multiple sites at the same time are not present here and a mail ballot election is therefore not appropriate.

Center, 63 Fifth Avenue, New York. Specifically, voting will occur at that address in a private room, to be determined and reserved exclusively for voting, on either the Lower Level or the Second Floor.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street NW, Washington, DC, 20570. This request must be received by the Board in Washington by **April 21, 2017**.

In the Regional Office's initial correspondence the parties were advised that the National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with its offices. If a party wishes to file one of the documents which may not be filed electronically, please refer to the Attachment supplied with the Regional Office's initial correspondence for guidance in doing so. Guidance for e-filing can also be found on the National Labor Relations Board website at www.nlrb.gov. On the home page of the website, select the E-Gov[8] tab and click on E-Filing. Then select the NLRB office for which you wish to e-file your documents. Detailed e-filing instructions explaining how to file the documents electronically will be displayed.

Dated at New York, New York, this 7th day of April 2017

Karen P. Fernbach SS 4/7/17

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[8] To file the request for review electronically, go to www.nlrb.gov and select the E-Gov tab. Then click on the E-Filing link on the menu. When the E-File page opens, go to the heading Board/Office of the Executive Secretary and click on the "File Documents" button under that heading. A page then appears describing the E-Filing terms. At the bottom of this page, check the box next to the statement indicating that the user has read and accepts the E-Filing terms and click the "Accept" button. Then complete the filing form with information such as the case name and number, attach the document containing the request for review, and click the "Submit Form" button. Guidance for e-filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under "E-Gov" on the Board's website.