

COMMENTARY

GRADUATE ASSISTANTS AT THE BARGAINING TABLE, BUT FOR HOW LONG?

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[W]e agree with the Regional Director's finding that most of the graduate assistants are statutory employees, notwithstanding that they simultaneously are enrolled as students. Stripped to its essence, the argument of [New York University] and others is that graduate assistants who work for a college or university are not entitled to the protections of the [National Labor Relations Act] because they are students.¹

I. INTRODUCTION

The above passage represents the current policy towards graduate assistants and medical interns, residents, and fellows ("House Staff").² The National Labor Relations Board's ("NLRB" or "Board") acquiescence to these student groups, after twenty-five years of denying similar union organizing efforts, stems from longstanding and well-respected former Board Member Fanning's dissent in *Cedars-Sinai Medical Center*.³ In *Cedars-Sinai Medical Center*, Member Fanning argued that

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1. New York Univ., 332 N.L.R.B. 1205, 1209 (2000).

2. Because the National Labor Relations Act is applicable only to private institutions, this Commentary addresses the graduate assistants and House Staff attending private universities and colleges. 29 U.S.C. § 152(2) (2000). In the public sector, graduate students have routinely been afforded collective bargaining rights.

3. 223 N.L.R.B. 251, 254–59 (1976).

“student” and “employee” are not mutually exclusive categories⁴ and, therefore, absent an express statutory provision to the contrary, House Staff are entitled to employee rights under section 7 of the National Labor Relations Act (“NLRA” or “the Act”).⁵

From 1974 to 1999, the Board maintained, with limited exceptions, that graduate students and House Staff “working” for private academic institutions in positions related to their academic curriculum are not employees under section 2(3) of the Act because they are “primarily students.”⁶ The Board reasoned that the foundation of the working relationship with the university was educational in nature, thereby distinguishing the student-university relationship from the employer-employee relationship.⁷

The Board’s recognition of House Staff took hold in 1999 when it reversed *Cedars-Sinai Medical Center*⁸ and *St. Clare’s Hospital*.⁹ In both of those cases, bargaining units comprised of House Staff were denied statutory employee rights. In *Boston Medical Center*,¹⁰ the Board rejected the “primarily student” mantra that had been the basis for denying students union representation and ruled that House Staff are employees under section 2(3) of the Act.¹¹ The following year, collective bargaining rights were extended to the graduate assistants at New York University.¹²

This Commentary examines the Board’s policies with respect to the unionizing efforts of medical House Staff and graduate assistants¹³ and explains why the *Boston Medical Center* and *New York University* cases were decided incorrectly, even though the ultimate result in *Boston Medical Center*—the recognition of House Staff as statutory employees—was proper.¹⁴ This Commentary further examines the political composition of the Board and explains why the Board may be primed to

4. *Id.* at 254 (Fanning, Member, dissenting).

5. National Labor Relations Act, 29 U.S.C. §§ 151–169 (2000).

6. *Cedars-Sinai Med. Ctr.*, 223 N.L.R.B. at 253.

7. *See id.*

8. 223 N.L.R.B. 251 (1976).

9. 229 N.L.R.B. 1000 (1977).

10. 330 N.L.R.B. 152 (1999).

11. *Id.* at 159.

12. *New York Univ.*, 332 N.L.R.B. at 1205.

13. The purpose of this Commentary is to illicit discussion concerning the Board’s recognition of students working for their universities in a capacity related to their courses of study. This Commentary neither addresses nor expresses an opinion regarding the recognition of students working for their universities in capacities unrelated to their courses of study or students working for outside employers.

14. *Boston Med. Ctr.*, 330 N.L.R.B. at 159.

reinstate a stricter policy with regard to the recognition of student groups.

II. COLLECTIVE BARGAINING IS NOT FOR EVERYONE

The NLRA was enacted by Congress in 1935 to counter a series of violent strikes between outraged workers and their employers.¹⁵ The restoration of civility and the imposition of a workplace free from unwarranted interrogation, harassment, and discipline was the intended purpose of the Act.¹⁶ The importance of collective bargaining to labor-management relations is undisputed. However, not every group—student or otherwise—was intended to be included within the breadth of the NLRA.¹⁷ It is contrary to the spirit of the Act and disrespectful to those who sacrificed for the right to engage in collective bargaining to bestow its benefits on those groups deemed unqualified or undeserving.

For more than twenty-six years, the Board has toiled with the issue of recognizing student groups. Other than the Board's extremely broad interpretation of the Act's inadequate definition of the term "employee," there is no basis to recognize graduate assistants. The Board's explanation for reversing *Cedars-Sinai Medical Center*¹⁸ and *St. Clare's Hospital*¹⁹ is devoid of merit as it cited the opaque definition of the term "employees" set forth at section 152(3), which merely indicates that the Act applies to all "employees" not otherwise excluded.²⁰

If the Act was intended to apply to all "employees," then every worker other than those specifically excluded in the statute, such as, agricultural laborers, domestic servants, persons employed by his or her parent or spouse, independent contractors, supervisors, and employees subject to the Railway Labor Act,²¹ would be entitled to collective bargaining rights.²² To illustrate the baselessness of this position, consider the following: Does Congress's omission of *dog walkers* on the list of excluded employees require their recognition as employees under the Act? Of course not. Such recognition would depend on the nature and

15. AMERICAN BAR ASSOCIATION, THE FIRST SIXTY YEARS: THE STORY OF THE NATIONAL LABOR RELATIONS BOARD 1935–1995, 8, 10 (1995).

16. 29 U.S.C. § 151 (2000).

17. *Id.* § 152(3) (limiting the definition of employee under the FLRA).

18. 223 N.L.R.B. 251 (1976).

19. 229 N.L.R.B. 1000 (1977).

20. *See Boston Med. Ctr.*, 330 N.L.R.B. at 160.

21. 29 U.S.C. § 152(3).

22. *Id.* § 157.

scope of the employment.²³ It follows then that section 7 rights should only be available to “employees” as that term was intended to be applied by Congress, and in the spirit of the Act.²⁴ While there is no express restriction on student unions, those students primarily focused on fulfilling degree requirements and completing course work in an area related to their studies should *not* be permitted to organize.

The Board’s current approach has opened the door to countless petitions and the recognition of an unlimited number of student unions. The Board’s position is further conspicuous by the absence of an objective standard upon which it may base its determination whether a particular student group ought to be recognized. Although *Cedars-Sinai Medical Center* and *St. Clare’s Hospital* failed to set a clear policy, collectively, these decisions provided solid fact-based guidelines for analyzing student petitions based upon the type of work performed. For instance, in *St. Clare’s Hospital*, the Board established a four-tiered system for analyzing student petitions.²⁵ While these standards need not be fully re-implemented, they offer a framework for the establishment of a new set of guidelines. In essence, the St. Claire’s Hospital fact-based standards created an appearance, if nothing else, of order and consistency within the Board’s decisions. The Board should return to an objective criteria with a fact-based analysis, and in the process restore the Board’s credibility as an impartial and reliable federal agency.

III. CRITICAL BOARD NOMINATION

The ability of graduate students to continue to collectively bargain in the near future *may* hinge on the President’s recent appointment of a fifth member to the Board. On December 26, 2003 President Bush announced the appointment of Ronald E. Meisburg, a Republican, to fill

23. *Id.* § 152(3).

24. Section 152(3) of the Act defines an “employee” as:

[A]ny employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any person who is not an employer as herein defined.

Id.

25. *St. Clare’s Hosp.*, 229 N.L.R.B. at 1000–02.

the fifth and final vacancy on the Board. Member Meisburg replaced former Board Member Alex Acosta who left the Board on August 21, 2003.²⁶ Member Meisburg joins Chairman Robert J. Battista,²⁷ and Members Wilma B. Liebman,²⁸ Peter C. Schaumber,²⁹ and Dennis P. Walsh.³⁰

Board members are appointed by the President and confirmed by the Senate³¹ and serve a five-year term, with one member's term expiring each year.³² Members may be re-appointed at the end of their term.³³

The appointment of Member Meisburg shifts the balance of the Board to the right as the Board is now comprised of three Republicans.³⁴ Chairman Battista³⁵ and Members Schaumber³⁶ and Meisburg comprise the Board's pro-management conservative sector. Members Liebman³⁷

26. Press Release, N.L.R.B., Ronald Meisburg Receives Recess Appointment from President Bush to be NLRB Member (December 29, 2003), at http://www.nlr.gov/nlr/press/releases/bul_meisburg_dec2003.pdf. At full strength, the Board consists of five members. 29 U.S.C. § 153(a).

27. National Labor Relations Board, *Factsheet on the NLRB*, at <http://www.nlr.gov/nlr/press/facts.asp> (last visited Feb. 27, 2004).

28. *Id.*

29. *Id.*

30. *Id.*; National Labor Relations Board, *NLRB Members*, at www.nlr.gov/nlr/about/structure/fb_members.asp (last visited Feb. 27, 2004).

31. 29 U.S.C. § 153(a) (2000).

32. *Factsheet on the NLRB*, *supra* note 27, at <http://www.nlr.gov/nlr/press/facts.asp> (last visited Feb. 27, 2004).

33. 29 U.S.C. § 154(a). The Board also has a General Counsel who acts independent from the Board but is the chief investigator and prosecutor of unfair labor cases. *Id.* The General Counsel is appointed by the President, upon confirmation by the Senate, to a four year term. *Id.* The current General Counsel is Arthur F. Rosenfeld. *Id.* The duties and responsibilities of the position are set forth in section 3(d) of the Act:

There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than administrative law judges and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 160 of this title, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law.

Id. § 153(d).

34. The Board may not have of more than three Members from the same political party. See Ross Runkel, *NLRB Reversals During the Bush Administration*, Jan. 18, 2004, at <http://www.lawmemo.com>.

35. *Factsheet on the NLRB*, *supra* note 27; *NLRB Members*, *supra*, note 30. Chairman Battista was appointed by President Bush. His term expires on December 16, 2007. *Id.*

36. *Factsheet on the NLRB*, *supra* note 27; *NLRB Members*, *supra* note 30. Member Schaumber's term expires on August 27, 2005. *Id.*

37. *Factsheet on the NLRB*, *supra* note 27; *NLRB Members*, *supra* note 30. Member Liebman

and Walsh,³⁸ both of whom are Democrats appointed by former President Clinton and subsequently re-appointed by President Bush, are more inclined to support labor. Member Liebman is the only Board Member to have participated in the *Boston Medical Center* and *New York University* decisions, and in both cases she found in favor of the petitioning students.³⁹

IV. THE SHIFT IN LABOR POLICY

The timing of the Board's shift in labor policy is telling. Under former President Clinton, the Board broadened the Act's scope as evidenced by the recognition of House Staff and graduate assistants as statutory employees.⁴⁰ It remains to be seen whether the Board under the present administration will maintain the status quo, reinstate the *Cedars-Sinai Medical Center* and *St. Clare's Hospital* approaches, or create an altogether new standard for evaluating student-based petitions.⁴¹

A revised approach would have been proper in deciding the petitioning efforts of the graduate assistants in *New York University*. Graduate assistants, whether teaching a course related to their academic curriculum or performing research, are first and foremost students with the goal of completing academic and/or university requirements.⁴² Graduate students are decisively more similar to students than to employees and the "work" they perform is designed to be an educational experience whereby practical training and experience is gained under the supervision of faculty or staff.⁴³ Clearly, these circumstances are more indica-

is serving her second term and is the longest tenured Board Member, having been a Member since 1997. *Id.* Her term expires on August 27, 2006. *Id.*

38. *Factsheet on the NLRB*, *supra* note 27; *NLRB Members*, *supra* note 30. Member Walsh was a recess appointment by President Clinton and served on the Board from December 2000 to December 2001. *Id.* He was then nominated by President Bush and confirmed by the Senate. Member Walsh's term expires on December 16, 2004. *Id.* Prior to his appointment, Member Walsh served as Member Liebman's Chief Counsel. *Id.*

39. *Boston Med. Ctr.*, 330 N.L.R.B. 152, 152 (1999); *New York Univ.*, 332 N.L.R.B. 1205, 1205 (2000).

40. *Boston Med. Ctr.*, 330 N.L.R.B. at 152.

41. Currently, there are NLRB appeals pending at a number of private universities. These include the University of Pennsylvania, Brown University, Columbia University, and Tufts University. See Sarah LaBrie, *URI Graduate Student Union Supported by School, State*, THE BROWN DAILY HERALD, (October 7, 2003) vol. CXXXIX, no. 87, available at <http://www.browndailyherald.com/stories.asp?storyID=1518> (last visited April 20, 2004).

42. *But see New York Univ.* 332 N.L.R.B. at 1207 (rejecting the argument that graduate assistants' work is primarily educational).

43. *St. Clare's Hosp.*, 229 N.L.R.B. 1000, 1002 (1977) *overruled by Boston Med. Ctr.*, 330 N.L.R.B. 152 (1999).

tive of the teacher-student relationship than the relationship between an employer and employee, and graduate assistants should be treated accordingly.⁴⁴

V. POST-1974 HEALTH CARE AMENDMENTS – MEMBER FANNING’S DISSENT

Following the NLRA’s Health Care Amendments of 1974,⁴⁵ three prominent Board decisions set the tone for its policy against the recognition of graduate students and medical House Staff – *Leland Stanford Junior University*,⁴⁶ *St. Clare’s Hospital*,⁴⁷ and *Cedars-Sinai Medical Center*.⁴⁸ In each of those cases, collectively referred to as the *Trifecta Decisions*,⁴⁹ the Board denied student-based union petitions concluding that the petitioners were “primarily students” engaged in educational training and were therefore *not* entitled to collective bargaining rights under the Act.⁵⁰ The Board reasoned that recognition was inappropriate where students performed work on behalf of their academic institution and in conjunction with their educational development.⁵¹

In *Cedars-Sinai Medical Center*, Member Fanning relentlessly opposed the majority’s position with respect to House Staff.⁵² He opined that House Staff were employees because 1) they received compensation in the form of stipends for the services rendered, 2) students and em-

44. *Id.*

45. See 29 U.S.C. §§ 152(14), 158(d) (2000) (codifying the 1974 Health Care Amendments). 29 U.S.C. § 152(14) defines a “health care institution” as “any hospital, convalescent hospital, health maintenance organization, health clinic, nursing home, extended care facility, or other institution devoted to the care of sick, infirm, or aged person.” *Id.*

46. 214 N.L.R.B. 621 (1974).

47. 229 N.L.R.B. 1000 (1977).

48. 223 N.L.R.B. 251 (1976).

49. See Stephen L. Ukeiley, *Confusion at the National Labor Relations Board: The Misapplication of Board Precedent to Resolve the Yale University Grade-Strike*, 14 HOFSTRA LAB. & EMP. L.J. 527, 530 n.10 (1996) (coining the term *Trifecta Decisions* in reference to *St. Clare’s Hosp. & Health Ctr.*, *Cedars-Sinai Med. Ctr.*, and *Leland Stanford Junior Univ.*).

50. See *id.* at 545; *St. Clare’s Hosp.*, 229 N.L.R.B. at 1004; *Cedars-Sinai Med. Ctr.*, 223 N.L.R.B. at 253; *Leland Stanford Junior Univ.*, 214 N.L.R.B. at 623.

51. See *St. Clare’s Hosp. & Health Ctr.*, 229 N.L.R.B. at 1003 (denying petition for employment status concluding that the student unit is providing “services at the educational institution itself as part and parcel of his or her educational development [and] the individual’s interest in rendering such services is more academic than economic”); *Cedars-Sinai Med. Ctr.*, 223 N.L.R.B. at 253 (stating medical interns, residents, and clinical fellows are “primarily students” and therefore not employees under the Act); *Leland Stanford Junior Univ.*, 214 N.L.R.B. at 623 (denying research assistants the right to collectively bargain because they were not employees within the meaning of the Act).

52. See *Cedars-Sinai Med. Ctr.*, 223 N.L.R.B. at 254–59 (Fanning, Member, dissenting).

ployees are *not* “mutually exclusive” categories, and 3) the overall lack of a federal labor policy excluding students from the provisions of the Act.⁵³ Nearly twenty-six years following his dissent, the Board adopted Member Fanning’s views in *Boston Medical Center*.⁵⁴

The compensation provided to House Staff in *Cedars-Sinai Medical Center* was a topic of significant debate among the Board Members. The House Staff’s compensation was described as a scholarship in the Essentials of Approved Residencies and Internships (“Essentials Manual”),⁵⁵ a manual prepared by the Council on Medical Education and approved by the American Medical Association.⁵⁶ The Essentials Manual further provided guidelines for the operations of the House Staff program.⁵⁷ Interestingly, the Essentials Manual described the House Staff program as an employment agreement.⁵⁸

Based upon these factors, Member Fanning wrote a scathing dissent criticizing his fellow Board Members:

[T]here is a pathetic irony in what my colleagues do today. The onset of organization of housestaff officers is among us. Fewer cases may come to this Agency, but as many will come to training hospitals. The one group so singularly involved in the [1974] congressional issues, both in terms of its immediate relationship with the delivery of medical services and in terms of its recognitional interests, is, today, by fiat, read out of the [National Labor Relations] Act. This decision is not grounded in the statute, the law, or reason.⁵⁹

53. *See id.* at 254–58.

54. *See generally* Boston Med. Ctr., 330 N.L.R.B. 152 (1999).

55. *See Cedars-Sinai Med. Ctr.*, 223 N.L.R.B. at 252.

56. *Id.*

57. *See id.* at 252, 256.

58. *Id.* at 256. Shortly following the passage of the 1974 Health Care Amendments, on January 13, 1975, the American Medical Association reported that it had approved the “Guidelines for House Staff Contracts or Agreements,” which further referred to the *employment* relationship between the House Staff and University. The Guidelines stated, in pertinent part:

[T]he agreement should provide fair and equitable conditions of employment for all those performing the duties of interns residents and fellows . . . *The institution and the individual members of the housestaff must accept and recognize the right of the housestaff to determine the means by which the housestaff may organize its affairs*, and both parties should abide by that determination; provided that the *inherent right* of a member of the housestaff to contract and *negotiate freely with the institution*, individually or *collectively*, for terms and conditions of employment and training should not be denied or infringed. No contract should require or proscribe that members of the housestaff shall or shall not be members of an *association or union*.

Id. at 256 (Fanning, Member, dissenting) (emphasis added).

59. *Id.* at 259 (Fanning, Member, dissenting).

Member Fanning's words triggered a harsh response from the majority, which wrote:

Our dissenting colleague has misconstrued the basis for our decision. We are aware that the Board has included students in bargaining units and, in a few instances, has authorized elections in units composed exclusively of students. However, contrary to our dissenting colleague, we do not find here that students and employees are antithetical entities or mutually exclusive categories under the Act. . . . Thus far from "exploiting semantic distinctions," our decision rests on the fundamental difference between an educational and an employment relationship.⁶⁰

The following year, in *St. Clare's Hospital*,⁶¹ the Board again denied the petition of medical interns and residents.⁶² In *St. Clare's Hospital*, the Board made a concerted effort to clarify the *Cedars-Sinai Medical Center* decision, and in the process created a four-category system for the review of student-employee organizing petitions.⁶³ The critical factors to be considered were the nature of the work provided, the type of compensation, and for whom the services were provided.⁶⁴

The Board concluded that medical interns and residents, as Category 4 students employed by their university in a capacity related to their course of study, were "primarily students" and not entitled to collective bargaining rights. The Board reasoned that the medical interns and residents were students providing services at the educational institution in conjunction with their "educational development" and their participation in these academic endeavors warranted denial of their petition.⁶⁵

60. *Id.* at 253.

61. 229 N.L.R.B. 1000 (1977), *overruled by* Boston Med. Ctr., 330 N.L.R.B. 152 (1999).

62. *Id.* at 1004.

63. *Id.* at 1000. The four-tier category system included the following groups: Category 1, students employed outside the university in a capacity unrelated to their course of study; Category 2, students employed by the university in a capacity unrelated to their course of study; Category 3, students employed outside the university in a capacity related to their course of study; and Category 4, students employed by the university in a capacity related to their course of study. *Id.*

64. *Id.* at 1000-03.

65. *Id.* at 1002-03. The Board held:

[T]he student-teacher relationship is not at all analogous to the employee-employer relationship. The former is predicated upon a mutual interest in the advancement of the student's education and is thus academic in nature. The latter is largely predicated upon conflicting interests of the employer to minimize costs and the employees to maximize wages, and is thus economic in nature.

Id. at 1002.

VI. BOARD REVERSAL

A. Boston Medical Center

By a 3-2 vote, the Board overruled *Cedars-Sinai Medical Center* and *St. Clare's Hospital* and determined that the House Staff of the Boston Medical Center ("BMC") are employees under the Act.⁶⁶ BMC, the primary teaching facility for the Boston University School of Medicine, offered approximately thirty-seven residency programs.⁶⁷ During the fourth year of medical school, students applied for a residency program comprised primarily of lectures and clinical training.⁶⁸ Successful completion of the residency program was a prerequisite for students becoming certified in their chosen medical specialty.⁶⁹

During the residency program, house officers performed rotations within their specialty under the supervision of attending physicians or faculty.⁷⁰ Residents typically provided patient care in teams with third- and fourth-year medical students, interns, junior and senior residents, and attending physicians.⁷¹

The majority of the residents' efforts and time was devoted to supervised patient care.⁷² According to the "Essentials of Accredited Residencies in Graduate Medical Education; Institution and Program Requirements,"⁷³ the "training of residents relie[d] primarily on learning acquired through the process of their providing patient care under supervision . . ."⁷⁴ Residents received an annual, taxable income ranging

66. *Boston Medical Ctr.*, 330 N.L.R.B. 152, 152 (1999). Chairman John C. Truesdale and Members Sarah M. Fox and Wilma B. Liebman voiced the majority opinion. Members Peter J. Hurtgen and J. Robert Brame III dissented.

67. *Id.*

68. *Id.* at 153.

69. *Id.*

70. *Id.*

71. *Id.* Each intern was assigned approximately twelve to fifteen patients. The responsibilities of interns expanded as they progressed through the program. These responsibilities included performing patient rounds, intravenous lines, responding to "codes" (life threatening emergencies), consulting with the family members of patients, preparing "do not resuscitate" orders, hospital admissions, preparing discharge summaries, filling prescription orders, and writing daily patient progress notes. *Id.* at 154.

72. *Id.* at 154 n.7. In fact, in order to remain "[c]onsistent with the mandatory requirements of the Essentials . . . all patient care provided by residents . . . must be supervised by an attending physician." *Id.* at 174 (Brame, Member, dissenting).

73. *Id.* at 155 n.9.

74. *Id.*

from \$34,000 to \$44,000.⁷⁵ Residents were further offered paid vacations and sick, parental and bereavement leave, health, dental and life insurance, and malpractice insurance.⁷⁶

1. Positions of the Parties

The House Staff argued that the national policy of achieving peaceful collective bargaining mandated their recognition as statutory employees.⁷⁷ They further asserted that Congress's legislative history accompanying the 1974 Health Care Amendments⁷⁸ illustrated the intention of Congress to include medical residents as employees under the Act.⁷⁹

BMC countered that the House Staff were "primarily students," and based its position on the seminal cases of *Cedars-Sinai Medical Center* and *St. Clare's Hospital*.⁸⁰ BMC further argued that the House Staff's academic pursuits and the student-teacher relationships associated with the residency program prohibited the parties from achieving a suitable economic relationship or the "equality of bargaining" intended by the Act.⁸¹ BMC also claimed that Congress excluded House Staff from the Act when it defeated a proposed amendment supporting the recognition of residents.⁸² The debate resulted in several amicus curiae weighing in on both sides of the issue.⁸³

75. *Id.* at 156.

76. *Id.* The residents' compensation was significantly lower than that of attending physicians. In addition, the residents were *unable* to participate in the BMC retirement program, and they were excluded from vision care or disability insurance. The residents could defer selected federal and medical school bank loans during a portion of their residency because "they [were] still considered to be training for a job." *Id.*

77. *Id.* The House Staff sought the inclusion of chief residents within the proposed bargaining unit consisting of interns, residents, and fellows. *Id.* at 157.

78. LEGISLATIVE HISTORY OF THE COVERAGE OF NONPROFIT HOSPITALS UNDER THE NATIONAL LABOR RELATIONS ACT, S. REP. NO. 93-766 (1974), *reprinted in* 88 Stat. 395.

79. *Boston Med. Ctr.*, 330 N.L.R.B. at 156.

80. *Id.* at 157.

81. *Id.*

82. *Id.*

83. *Id.* at 157-59. The AFL-CIO, American Medical Association, American Nurses Association, American Public Health Association, University of Michigan House Officers Association, Medical Association of New York, Ad Hoc Committee for House Staff Rights at University Hospital, Ad Hoc Committee for House Staff Rights at Prince George's Hospital Center, California Medical Association, and Massachusetts Medical Society, supported the House Staff. *Id.* at 157-58. The American Medical Association and the Massachusetts Medical Society argued that while the House Staff should have the right to collectively bargain on matters involving patient care and resident well-being, they should not be permitted to strike. *Id.* at 158. The Association of American Medical Colleges, American Hospital Association, American Council on Education, American Board of

2. The Decision – *Cedars-Sinai Medical Center* is Overturned

In deciding *Boston Medical Center* in favor of the House Staff, the Board adopted Member Fanning's dissent, relied upon Supreme Court precedent,⁸⁴ cited the Act's purpose of "protecting the rights of employees,"⁸⁵ and used the dictionary definition of the term "employee."⁸⁶ The Board reasoned that the Act's definition of the term "employee," which is derived from the common law "master-servant" relationship, applies to the House Staff because "[n]othing in the statute suggests that persons who are students but also employees should be exempted from the coverage and protection of the Act. The essential elements of the [H]ouse [S]taff's relationship with the Hospital obviously define an employer-employee relationship."⁸⁷

The Board considered the House Staff to be "employees" providing patient care on behalf of their employer,⁸⁸ and were compensated for their services with a taxable stipend.⁸⁹ The Board analogized the work-

Medical Specialties, and Council of Medical Specialty Societies supported BMC. *Id.* at 159. The amici on behalf of BMC expressed concern that were residents permitted to collectively bargain, they may seek to negotiate over typical "academic" issues, such as section hours and projects, typically reserved for the academic institution. *Id.*

The Act requires the employer to negotiate in good faith on the mandatory subjects of collective bargaining with union representatives. *See* PRIMER OF LABOR RELATIONS 59–62 (John J. Kenny & Linda G. Kahn eds., 24th ed. 1989). The "mandatory subjects" that must be negotiated include wages, hours and working conditions. *Id.* at 60. Section 8(d) of the Act requires the representatives of the employer and union to "meet at reasonable times and confer in good faith" on the mandatory subjects and other terms and conditions of employment. 29 U.S.C. § 158(d) (2000).

84. *See* NLRB v. Town & Country Elec., Inc., 516 U.S. 85, 93–94 (1995).

85. *Boston Med. Ctr.*, 330 N.L.R.B. at 160.

86. *Id.*

87. *Id.* The Board stated:

Ample evidence exists here to support our finding that interns, residents and fellows fall within the broad definition of 'employee' under Section 2(3), notwithstanding that a purpose of their being at a hospital may also be, in part, educational. That house staff may also be students does not thereby change the evidence of their 'employee' status.

88. The Act, which is applicable to only "private employers," defines an "employer" at Section 152(2). The provision states:

The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act . . . as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

29 U.S.C. § 152(2).

89. *Boston Med. Ctr.*, 330 N.L.R.B. at 160 (noting that "the Hospital withholds Federal and state income taxes, as well as social security, on their salaries").

ing environment to that of apprentices crafting their skills.⁹⁰ The Board held:

[W]e reach our decision here to overrule *Cedars-Sinai* and its progeny on the basis of our experience and understanding of developments in labor relations in the intervening years since the Board rendered those decisions. Almost without exception, every other court, agency, and legal analyst to have grappled with this issue has concluded that interns, residents, and fellows are, in large measure, employees.⁹¹

The Board overlooked the fact that House Staff were enrolled at BMC for the primary purpose of completing their state and medical specialty board requirements.⁹² The mere receipt of compensation for fulfilling educational obligations does not transform a student into an employee. If compensation was sufficient to permit student bargaining, then every student receiving a scholarship, stipend, academic credit, or anything of value in return for performing their educational obligations would be entitled to union representation.

Moreover, under the Board's rationale, summarized as *if the group is not excluded from the Act they are employees*, all of the following student groups are equally deserving of the right to organize: law review and journal members; stipend recipients in specialty fields such as drama, music, and special arts; scholarship athletes; and students participating in faculty-supervised clinics. This cannot be what Congress intended with the passage of the Act.

3. House Staff are Professional Employees – Section 152(12)

Although the correct result was reached in *Boston Medical Center*, i.e., House Staff are statutory employees, the Board's reasoning was misguided. As a consequence, the extension of collective bargaining rights to student groups will most likely continue to spiral absent the Board's reversal of its current policies.

In *Boston Medical Center*, the Board need only have examined section 152(12) of the Act for the statutory provision recognizing House Staff as professional employees under the Act.⁹³ Indeed, the Board addressed section 152(12) in its decision, but only as an afterthought and

90. *Id.* at 161. Apprentices have traditionally been considered statutory employees. *See generally*, e.g., *The Vanta Co.*, 66 N.L.R.B. 912 (1946).

91. *Boston Med. Ctr.*, 330 N.L.R.B. at 163 (citations omitted).

92. *See id.* at 161.

93. 29 U.S.C. § 152(12) (2000).

an alternative argument.⁹⁴ The provision should have formed the basis of the Board's decision.

Section 152(12) of the Act includes in the definition of the term "professional employee," a worker engaged in study and instruction at a hospital.⁹⁵ Specifically, professional employee is defined, in pertinent part, as follows:

(a) [A]ny employee engaged in work . . . (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital . . . or

(b) any employee who (i) has *completed the courses of specialized intellectual instruction and study* described in clause (iv) of paragraph (a) and (ii) is *performing related work under the supervision of a professional person to qualify himself to become a professional employee* as defined in paragraph (a).⁹⁶

House Staff clearly meet the threshold of a professional employee since they have "completed a course of specialized intellectual instruction and study 'in an institution of higher learning or a hospital'" and "perform[] related work under the supervision of a professional to qualify himself to become a professional" as defined in the Act.⁹⁷ The legislative history to the Taft-Hartley Amendments⁹⁸ further suggests that section 152(12) was intended to include "such persons as legal, engineering, scientific and *medical personnel along with their junior professional associates.*"⁹⁹ Undoubtedly, House Staff are statutory employees entitled to collective bargaining rights.¹⁰⁰

94. See *Boston Med. Ctr.*, 330 N.L.R.B. at 161–62.

95. 29 U.S.C. § 152(12).

96. 29 U.S.C. § 152(12) (emphasis added).

97. *Boston Med. Ctr.*, 330 N.L.R.B. at 161.

98. See *id.* at 161–62 (citing H.R. REP. 510, at 36 (1947), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947, at 534, 540 (1948)).

99. *Boston Med. Ctr.*, 330 N.L.R.B. at 161–162 (emphasis added). It would be interesting to observe how the Board determines a union petition from a group of law review and journal members.

100. The Board further cited the 1974 Health Care Amendments as additional evidence that House Staff are statutory employees. *Id.* at 162. The Board's argument is unpersuasive and of little benefit, since the portion of the legislative history cited by the Board merely states that the House Staff were *not* supervisors, a group generally excluded from employee status under the Act. *Id.*

The health care amendments expanded the Board's jurisdiction to encompass nonprofit healthcare facilities, thereby repealing the statutory exemption of private, nonprofit hospitals. The Amendments were enacted in response to a series of healthcare strikes to ensure continuous health services. *Id.* A proposal to exclude House Staff from the statutory section concerning "supervisors," thereby

B. New York University

The following year, the Board by a 3-0 vote adopted its ruling in *Boston Medical Center* and extended collective bargaining rights to a unit of approximately 1,700 graduate assistants.¹⁰¹ In *New York University*, the Board mistakenly applied the reasoning used to grant the House Staff's petition to the *New York University* graduate assistants without adequately considering the educational nature of the employment.¹⁰² The Board held:

ensuring that House Staff would *not* be excluded from coverage under the Act on this basis alone, was defeated. However, this does not offer any resolution to the question whether House Staff are employees. The Senate Committee report stated:

Various organizations representing health care professionals have urged an amendment to Section 2(11) of the Act so as to exclude such professionals from the definition of "supervisor." The Committee has studied this definition with particular reference to health care professionals, such as . . . interns, residents, fellows . . . and concludes that the proposed amendment is unnecessary because of existing Board decisions. The Committee notes that the Board has carefully avoided applying the definition of a "supervisor" to a health care professional who gives directions to other employees, which direction is incidental to the professional's treatment of patients and thus is not the exercise of supervisory authority in the interest of the employer.

330 N.L.R.B. at 162 (quoting S. REP. NO. 93-766, at 6 (1974), *reprinted in* LEGISLATIVE HISTORY OF THE COVERAGE OF NONPROFIT HOSPITALS UNDER THE NATIONAL LABOR RELATIONS ACT (1974).

101. See *New York Univ.*, 332 N.L.R.B. 1205, 1205 (2000). The collective bargaining unit sought by the Petitioner was:

All full-time and regular part-time teaching assistants (including teaching fellows), graduate assistants, research assistants, graduate student graders and graduate student tutors who are classified under codes 101, 111, 130, 131 (referred to collectively as graduate assistants) employed by New York University, excluding all other employees, graduate assistants at the Sackler Institute and research assistants in the Physics and Biology Departments, and guards and supervisors as defined by the Act.

Id. at 1210. The graders and tutors were excluded from the unit by the Regional Director. *Id.* at 1221. The majority of the graduate students were doctoral students with the balance seeking Masters degrees. *Id.* at 1210.

102. *Id.* at 1209. Former Chairman Truesdale and Member Liebman voted in favor of recognition with Member Hurtgen concurring. *Id.* Member Sarah Fox did not participate in the decision.

In *Boston Medical Ctr.*, Chairman Truesdale and Members Fox and Liebman voted in favor of recognizing the medical House Staff, and Members Hurtgen and Brame dissented. *Boston Med. Ctr.*, 330 N.L.R.B. at 152, 168, 170. Member Hurtgen, a Republican, wrote his concurring opinion in the *New York University* decision that the graduate assistants are employees, unlike the medical House Staff in *Boston Medical Ctr.*, because the majority of New York University graduate assistants had completed their course work and "working" as a graduate student was *not* a requirement for graduating from the program. *New York Univ.*, 332 N.L.R.B. at 1209. Member Hurtgen further distinguished the graduate assistants from the medical House Staff by noting that since House Staff were required to perform their duties to obtain the proper licensing to care for patients, they were *not* employees because their services are a "fundamental part of their medical education." *Id.* (Hurtgen, Member, concurring).

[W]e reach the same conclusion with respect to graduate assistants. It is undisputed that graduate assistants are not within any category of workers that is excluded from the definition of “employee” in Section 2(3). Like the house staff in *Boston Medical Center*, ample evidence exists to find that graduate assistants plainly and literally fall within the meaning of “employee” as defined in Section 2(3).¹⁰³

The Board explained that recognition was proper because the graduate assistants worked under the “*control and direction*” of the university, were compensated for their services,¹⁰⁴ and the programs involved were not included within the majority of graduate student programs offered by New York University.¹⁰⁵

The Board rejected New York University’s efforts to distinguish the graduate assistants from the House Staff in *Boston Medical Center*.¹⁰⁶ The Board was wrong on this point.

The most persuasive of the arguments asserted by the University was that the graduate assistants, unlike the House Staff who had completed their formal education and were enrolled in the program to fulfill state medical requirements, were working to earn their degrees.¹⁰⁷ The university further cited evidence demonstrating differing compensation levels between the groups. For instance, graduate assistants receive financial aid as opposed to the stipends received by House Staff. Graduate assistants further devoted a significantly smaller percentage of their time to the program. Graduate students spent approximately 15% of their time on their duties compared to 80% of the time devoted by the House Staff.¹⁰⁸ The Board should have given more credence to these points.

The University’s public policy arguments that the graduate assistants do not have a “traditional economic relationship” with the University and the potential infringement on academic freedom¹⁰⁹ were summa-

103. *New York Univ.*, 332 N.L.R.B. at 1206.

104. *Id.*

105. *Id.* at 1206.

106. *Id.*

107. *Id.*

108. *Id.*

109. Universities have long subscribed to the notion that it shall be for the university to “determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.” *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring). Academic freedom also encompasses the right to speak freely in the classroom and to determine such fundamental matters as the right to set “course length and content, to establish standards for advancement and graduation, to administer examinations, and to resolve a multitude of other administrative and educational concerns.” *St. Clare’s Hosp.*, 229 N.L.R.B. 1000, 1003 (1977).

rily (and correctly) dismissed by the Board.¹¹⁰ Notwithstanding that recognition should have been denied because the purpose of the graduate assistants' "employment" is educational, there is no public policy in favor of or against the recognition of students. The Act is not only silent on this point, but the purpose of the Act is to protect the rights of all "employees"—student or otherwise. Similarly, the University's arguments regarding financial aid and percentage of time devoted to their duties are nonsensical because compensation may be provided by means other than a salary,¹¹¹ and the number of hours worked does not determine employment status under the Act.¹¹²

The result of the *New York University* decision is that graduate assistants may unionize, enter into contract negotiations, and strike.¹¹³ While a strike by graduate assistants performing teaching duties would undoubtedly be disruptive to the University, the Board has previously held that the withholding of grades by graduate students in conjunction with a "partial grade strike" is unlawful.¹¹⁴

The breadth of the Act should *not* have been expanded to include graduate assistants. In this vain, I thought it would be interesting to query my colleagues on their thoughts regarding the recognition of graduate assistants via an anonymous poll.

110. *New York Univ.*, 332 N.L.R.B. at 1207–08. The negotiation of "educational issues" may be precluded by the Board. *Id.* at 1207. In the public sector, where various student and graduate student unions are prevalent pursuant to several State laws, there is precedent for barring educational issues from collective bargaining as they have been deemed not part of the wages, hours, or terms of working conditions. *See, e.g., Regents of the Univ. of Michigan v. Michigan Employment Relations Comm'n*, 204 N.W.2d 218, 224 (Mich. 1973) (finding that "the scope of bargaining by the Association may be limited if the subject matter falls within the educational sphere"). The Board could simply adopt this position should changes to the academic curriculum become a contested issue.

111. *See Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 303–04 (1985) (finding that the Act "does not require the payment of cash wages"). *See generally* Fair Labor Standards Act, 29 U.S.C. §§ 201–219 (2000). Section 203(m) states: "[W]age' paid to any employee includes the reasonable cost, as determined by the Administrator, to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodging or other facilities are customarily furnished by such employer to his employees . . ." Fair Labor Standards Act, 29 U.S.C. § 203(m) (2000).

112. *See Univ. of San Francisco*, 265 N.L.R.B. 1221, 1223 (1982) (finding that part-time faculty are protected under the Act and constitute an appropriate bargaining unit).

113. *See New York Univ.*, 332 N.L.R.B. at 1209. Section 7 of the NLRA permits employees to self-organize, form, join and assist labor organizations, collectively bargain through representatives of their own choosing, and "to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." National Labor Relations Act, 29 U.S.C. § 157 (2000). These activities include taking part in grievances, picketing and striking.

114. *See Paul Salvatore & John F. Fullerton III, Legacy of Clinton Labor Board*, N.Y. L. J., March 12, 2001, at 11. In rendering its decision in *Yale University*, 330 N.L.R.B. 246 (1999), the Board assumed that the partially-striking graduate students were employees under the Act. *Id.*

The polling irrefutably demonstrates that an overwhelming majority of my colleagues concur with the Board that graduate assistants are employees under the Act.¹¹⁵ Approximately 75% of those responding considered graduate assistants, teaching assistants, and research assistants to be employees of their university.¹¹⁶ Based upon the response to question one, it is not surprising that 95% of those responding stated that “graduate, teaching and/or research assistants” may be *both* “students” and “employees.”¹¹⁷

Clearly, “students” and “employees” are not mutually exclusive categories. However, this notion, independent of other factors or considerations, does not mandate the recognition of graduate assistants. I believe much of the discrepancy and resulting debate on the topic may be

115. The poll, which was conducted on October 7, 2003, was distributed to fifty-one attorneys in my law firm’s office located in Garden City, New York. A limited number of attorneys in the office practice labor law, and, therefore, for the purpose of maintaining anonymity, the respondents were not asked to state their primary area of practice. Twenty-seven of the fifty-one recipients, or 53%, returned completed polls. The poll consisted of the following three (3) multiple-choice questions:

1. According to “your” views as to what constitutes “employment,” would you consider graduate students, teaching assistants and research assistants to be employees of their university?

- A. Yes
- B. No
- C. No Opinion

2. Do you believe a teaching assistant, research assistant, and/or graduate assistant, under the appropriate circumstances, may be both a “student” and an “employee” of his or her university?

- A. Yes
- B. No
- C. No Opinion

3. Do you consider the “educational training” (i.e., classroom teaching, grading of papers and exams, and/or scholarly research) associated with a teaching assistant, research assistant, or graduate assistant’s academic program to be the primary purpose of a graduate program?

- A. Yes
- B. No
- C. No Opinion

Optional:

Any comments you may have regarding the topic.

In question one, the term “graduate assistant” should have been substituted for the term “graduate student” because not all “graduate students” are entitled to collectively bargain. Two of the returned pools differentiated between “graduate students” and “graduate assistants.”

116. Twenty (74%) of the respondents indicated that the students are “employees,” while only three (11%) responded that they are not employees of their university. Four (15%) respondents expressed “no opinion” on the topic.

117. Twenty-six (96%) of the twenty-seven respondents answered “yes,” with one (4%) attorney responding “no.”

explained by examining the “*primary purpose*” of the employment. Only nineteen percent of those responding to the poll considered the “*primary purpose*” of the graduate assistants’ academic program to be “educational training.”¹¹⁸ If the primary purpose of the graduate assistant’s program is something other than educational, then I would be more inclined to accept that graduate assistants are employees under the Act. However, I do not believe this to be the case.¹¹⁹ The graduate assistants’ employment is primarily educational, as evidenced by the fact that they are working to earn their degrees under the supervision of faculty and staff.

Ultimately, the recognition of graduate assistants has not had a significant effect on the academic integrity of New York University or its management-labor relations. Nor has it resulted in an overwhelming influx of student organizing petitions. However, this does not negate the fact that the Board arrived at an improper result. At its next opportunity, the Board should either reinstate, with modifications, the “primary student” standards originating in *Cedars-Sinai Medical Center* and *St. Clare’s Hospital* (without adopting the decisions since House Staff should be recognized as employees pursuant to section 152(12)), or implement a more clearly defined set of objective guidelines for evaluating student petition cases. At a minimum, a reasonable, objective criteria must be restored to offer guidance for deciding these disputes in the future.

118. Five (18.5%) of the respondents answered “yes,” seventeen (63%) responded “no,” and five (18.5%) had no opinion.

119. Additional comments from the responding attorneys, some of which are refuted by Board precedent, are thought-provoking and give some insight into the individual’s thought processes. The comments included the following:

I remember being a graduate student/research assistant/teaching assistant in graduate school at Stony Brook [NY] in 1970. The same question lingered for 30 years! Interesting issue to consider re: health insurance coverage/workers comp.

If you get paid (in [dollars] or tuition credits) you are an employee.

If a grad. student is working as a TA/RA for course credit rather than [dollars], I consider them a student and not an employee.

Whatever the primary purpose, workers should be compensated for labor. The university charges students (through tuition) for the services being provided.

Work is employment. Employment is work.

VII. CONCLUSION

Congress's failure to exclude students from the Act is not a basis for concluding that it intended to *include* them. Unfortunately, the statute and the accompanying legislative history provide little, if any, guidance on this point.

In both *Boston Medical Center* and *New York University*, the NLRB overemphasized the compensation, control and direction characteristics of the employment relationship instead of focusing on the underlying educational purpose of the services rendered. Ironically, the *Boston Medical Center* result was proper because House Staff are statutory employees under the Act but for reasons entirely unrelated to those cited in the Board's decision. The Board compounded its error the following year by extending its decision to the graduate assistants at *New York University*. There is no legitimate basis for extending collective bargaining rights to graduate assistants.

President Bush's appointment of Ronald Meisburg to the Board, assuming the conservative Members are united on the issue of graduate assistants, will provide the opportunity and means to reverse *New York University*. The Board should further take the opportunity to revisit and re-establish, with modifications, the "primarily student" guidelines utilized in *Cedars-Sinai Medical Center* and explained in *St. Clare's Hospital*, both of which were reversed by *Boston Medical Center*.

It is only a matter of time before the Board reverses itself, yet again.