

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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NEW YORK UNIVERSITY, :
Employer, :
-and- : Case No. 2-RC-23481
GSOC/UAW, :
Petitioner. :
: :
----- X

NEW YORK UNIVERSITY'S CONDITIONAL REQUEST FOR REVIEW

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New York University (“NYU” or “the University”), pursuant to Section 102.67 of the Rules and Regulations of the National Labor Relations Board, submits this Conditional Request for Review of the Decision and Order Dismissing Petition (“Decision”) issued by the Acting Regional Director, Region 2, on June 16, 2011. NYU does not request review of the Decision insofar as it dismisses the petition filed by GSOC/UAW (“GSOC” or “Petitioner”) in accordance with *Brown University*, 342 NLRB 483 (2004) (“*Brown*”). In the event that the Board grants review of the Decision in order to reconsider *Brown*, however, NYU requests that the Board also review the Decision to the extent that it identifies a bargaining unit of graduate students that Petitioner could seek to represent if the employee status of graduate students is reconsidered, and finds Petitioner to be a labor organization within the meaning of Section 2(5) of the Act.

There are compelling reasons for the Board to review these aspects of the Decision on the grounds that:

- (1) Substantial questions of law and policy are raised because of (i) the absence of or (ii) departure from, officially reported Board precedent;
- (2) The Acting Regional Director’s decision on substantial factual issues are clearly erroneous on the record and such error prejudicially affects the rights of NYU; and
- (3) The Acting Regional Director’s ruling to revoke a subpoena issued by NYU resulted in prejudicial error.

NLRB Rules and Regulations, Sections 102.67 (1), (2) and (3).

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

1. Overview

NYU has approximately 40,000 students, half of whom are pursuing graduate degrees. NYU consists of some 12 different schools, colleges and institutes, including, most relevant to these proceedings, the College of Arts & Science (“CAS”), which together with the Graduate School of Arts & Science (“GSAS”) comprise the Faculty of Arts & Science (“FAS”); the Courant Institute of Mathematical Sciences (“Courant”); and the Steinhardt School of Culture, Education and Human Development (“Steinhardt”). In addition to its 2,000 full-time faculty, NYU employs over 4,300 part-time faculty, whom it refers to as adjunct faculty, throughout its various schools and departments. (Tr. 361-63 (Benhabib); Tr. 811 (Halkitis); EX 56, EX 58)¹

In 1999, the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO (the “UAW”) filed a petition to represent a bargaining unit consisting of NYU graduate students appointed as Teaching Assistants (TAs), Research Assistants (RAs) and Graduate Assistants (GAs). The Board found that most of the students in those positions were employees under the Act, but excluded GAs in the Sackler Institute of Graduate Biomedical Sciences and RAs in science departments on the ground that they perform research on their dissertation topics rather than provide specific services for the University. *New York University*, 332 NLRB 1205 (2000) (“*NYU I*”). Following an election, the UAW was certified as representative of the graduate

¹ Employer Exhibits are referred to herein as “EX”, Petitioner Exhibits as “PX” and Board Exhibits as “BX”. Transcript references are indicated as “Tr.” followed by the page number and the witness’s name where not evident from the text.

assistant bargaining unit, and in January 2002, NYU entered into a collective bargaining agreement with the UAW and Local 2110 effective through August 31, 2005 (the “Graduate Assistant CBA”). (Tr. 681 (Nolan); PX 6)

On July 13, 2004, the Board issued its decision in *Brown University*, 342 NLRB 483 (2004), overruling *NYU I* and returning to the Board’s long-held position that graduate student assistants, such as those then represented at NYU by the UAW, are not employees under the Act. In light of this decision and after careful consideration of its experience under the Graduate Assistant CBA, the University withdrew its recognition of the UAW and Local 2110 after the expiration of the agreement in August 2005. (Tr. 748-50 (Nolan); EX 4)

2. The Current Proceedings

On May 3, 2010, Petitioner, an organizing committee of the UAW, filed a Petition with the Regional Director seeking to represent “all individuals enrolled in graduate level programs at NYU, who are employed to perform the functions of teaching assistants, research assistants, and graduate assistants (regardless of job title).” (BX 1) NYU moved to dismiss the Petition, and the Regional Director dismissed the Petition on June 7, 2010, concluding “that it seeks an election among graduate assistants that are clearly not employees under *Brown*.” (BX 1, June 7, 2010 Order at 4).

The Board, by a 2-1 vote, granted Petitioner’s Request for Review. The majority stated its belief that “there are compelling reasons for reconsideration” of *Brown*, and also indicated that without a hearing it could not assess the accuracy of NYU’s factual representations and contentions regarding the treatment of graduate student teachers as adjunct faculty included in the adjunct faculty bargaining unit, and the exclusion of externally-funded research assistants regardless of the validity of the *Brown* decision. It

therefore remanded the case to the Regional Director for a hearing so that the case could be decided on a “full evidentiary record”. *New York University*, 356 NLRB No. 7 at 1-2 (October 25, 2010).

The hearing directed by the Board commenced on November 18, 2010. The evidence presented at the hearing demonstrated that the financial aid structure existing at NYU has undergone a significant change since 1999. Prior to 2009, students receiving internal fellowship support were required to provide at least two years of teaching or other service to the University as either TAs or GAs. (Tr. 385 (Benhabib); Tr. 815, 819 (Halkitis); Tr. 1196 (Grier); Tr. 1260 (Dunphy); Tr. 1561-1562, 1568 (Popik)) Among other changes, as a result of financial aid reforms (referred to as FAR4 at GSAS and Courant, and FAR3 in Steinhardt), the requirement that students supported by fellowships provide service to the University in connection with their financial aid was eliminated. (Tr. 372 (Benhabib); Tr. 817, 831, 838-39 (Halkitis); Tr. 1196 (Grier); Tr. 1584 (Popik); EX 11; EX 46)

Accordingly, TA and GA positions were eliminated. (Tr. 397 (Benhabib); Tr. 712 (Nolan); Tr. 817, 831, 838-39 (Halkitis); Tr. 1481, 1483-84 (Ferraro); Tr. 1569 (Popik); Tr. 1651, 1659 (Ho); EX 11, EX 46) The duties and responsibilities of TAs had been substantially the same as those of graduate students appointed as adjunct faculty prior to financial aid reform; the distinction in those classifications was based only on the nature of the funding. As a result, all graduate students who choose to teach now do so as adjunct instructors and are automatically included in the adjunct bargaining unit represented by UAW Local 7902, if they meet the minimum “contact hours” specified in the contract. (Tr. 372, 376, 386 (Benhabib); Tr. 713-15, 716, 718 (Nolan); Tr. 818, 830, 839, 885 (Halkitis); Tr. 1215 (Grier); EX 11; EX 46) They are paid for their teaching in accordance

with the adjunct contract over and above the uniform stipend provided to all doctoral students. (Tr. 714-15 (Nolan); EX 11) The duties performed by former GAs, which involved primarily clerical and administrative tasks, were mostly reassigned to graduate students (and undergraduates) who fill many thousands of hourly-paid part-time jobs classified by the University as Code 118 and Code 119 appointments. (Tr. 1231 (Dunphy); 1484-85 (Ferraro); Tr. 1571-74, 1624 (Popik); Tr. 1671-73 (Steinfeld)) As most RAs were externally funded, these financial aid reforms had had no impact on RAs. (Tr. 397-98, 402 (Benhabib); Tr. 831 (Halkitis)).

Petitioner amended the Petition on January 31, 2011 to include “all graduate student employees of New York University who are receiving stipends from the University and who perform work for the University, including those classified as research assistants, graduate assistants and those performing teaching, administrative and other duties.”² The stated purpose of the amendment was an effort to define the current unit to recreate the previously certified graduate assistant unit that, according to Petitioner, was distinguished from the adjunct unit based on its members’ receipt of stipends. (Tr. 1226)

3. The Acting Regional Director’s Decision

On June 16, 2011, the Acting Regional Director issued a decision dismissing the Petition in accordance with the holding in *Brown*. He went on to find, however, that in the event the Board reconsiders the employee status of graduate students, “a unit including all graduate students would be appropriate.” (Decision at 26). Notwithstanding that broad description, the decision defines the unit as including: graduate student adjuncts teaching non-credit courses, RAs in all disciplines, and hourly graduate students with the job title

² Petitioner is not seeking to represent, and has expressly excluded from its petition, the GAs at the Sackler Institute and all graders and tutors. (Tr. 143-44, 1224)

“research assistant” and hourly employees whose job title indicates that they are providing assistance to a specific faculty member.³ (Decision at 26-27, n.23). In doing so, the Acting Regional Director committed legal and factual errors by:

- finding that GSOC/UAW is a labor organization under the Act;
- including graduate students teaching non-credit courses as adjunct faculty in a separate graduate student bargaining unit;
- finding NYU’s research assistants to be employees under the Act;
- including in the graduate student bargaining unit part-time hourly student workers who have the job title of “research assistant” or a job title that indicates that they work for an individual faculty member;
- combining individuals who lack a community of interest in a single bargaining unit based solely on their status as students; and
- rejecting NYU’s special appeal of the Hearing Officer’s decision to revoke NYU’s subpoena, seeking documents relevant to the adjunct union’s treatment of graduate students as members of the adjunct bargaining unit.

If the Board accepts review of the Acting Regional Director’s decision in order to reconsider *Brown*, NYU requests that the Board also review and reverse these determinations of the Acting Regional Director for the reasons explained below.⁴

³ Although the Decision identifies the graduate students included in “the petitioned-for unit”, NYU understands this to refer to the unit found appropriate by the Acting Regional Director. (Decision at 26, n.23)

⁴ NYU does not dispute that graduate student adjuncts are “employees” under the Act and disagrees with the Acting Regional Director’s findings and conclusion that *Brown* is controlling and requires dismissal of the Petition as to the student adjuncts. These issues are not addressed in NYU’s Conditional Request for Review, however, as they will appropriately be raised in opposition to the Petitioner’s Request for Review.

ARGUMENT

I. THE REGIONAL DIRECTOR ERRONEOUSLY FOUND PETITIONER TO BE A LABOR ORGANIZATION

In order to be a “labor organization” under Section 2(5) of the Act an organization must satisfy two distinct elements of the statutory definition: it must be one (i) in which employees participate and (ii) that exists for the purpose of “dealing with” employers. NYU does not dispute that the Petitioner satisfies the first element of the definition, as employees participate in GSOC/UAW. Petitioner does not satisfy the second element, however, as it is a committee that was established for the sole purpose of organizing graduate students at NYU. (Tr. 146 (Kushner)) It does not -- and has no intention to -- deal with NYU or any other employer. The Regional Director conflated these two separate criteria in finding that petitioner is a labor organization because “the employees who participate in the GSOC potentially will also serve as the members of the negotiating committee” (Decision at 3, 4) and that a mere affiliation with a labor organization is sufficient for an entity to be deemed a labor organization. (*Id.* at 3) The record evidence, however, is clear that the Petitioner does not deal with, and has no intention of dealing with, NYU. Indeed, the undisputed evidence demonstrates that, if certified, another undetermined entity will be assigned by the UAW to deal with NYU -- (Tr. 148, 150-51 (Kushner)), Petitioner therefore cannot be deemed a labor organization under §2(5) of the Act.

An organization cannot be found to satisfy the “dealing with” requirement solely because some of its members may, through the auspices of another organization, “deal with” an employer. *Center for United Labor Action*, 219 NLRB 873, 873-74 (1975) Similarly, the fact that an organizing committee such as GSOC is affiliated with a labor organization cannot cause the organizing committee to be a labor organization absent evidence that committee

itself satisfies the two criteria of §2(5). *Glove Workers' Union*, 116 NLRB 681, 688-89 (1956).

In an unsuccessful effort to distinguish *Sterling Processing Corp.*, 119 NLRB 1783 (1958), the Acting Regional Director stated that the “*affiliated* petitioning committee *existed solely for organizational purposes* and was explicitly not empowered to deal with employers concerning labor disputes, wages, hours, grievances or conditions of employment.” (Decision at 3-4 (emphasis added)) The evidence in this case clearly demonstrates that GSOC, although affiliated with a labor organization, similarly exists solely for organizational purposes. Accordingly, just like the organizing committee in *Sterling Processing Corp.*, GSOC is not a labor organization under the Act and the Board should review and reverse the Acting Regional Director’s departure from established Board precedent.

II. THE DECISION INCORRECTLY FOUND THAT GRADUATE STUDENT
ADJUNCTS TEACHING NON-CREDIT COURSES SHOULD BE INCLUDED
IN A SEPARATE GRADUATE STUDENT BARGAINING UNIT

The Acting Regional Director’s conclusion that an appropriate bargaining unit, in the event that *Brown* is reversed, would include graduate student adjuncts teaching non-credit courses, is founded on a number of clearly erroneous factual findings and misapplications of Board law.

A. The Decision Erroneously Describes The Historical Adjunct Bargaining
Unit As Only Including Graduate Students Who Were Appointed As
“Instructors Of Record”

Much of the Acting Regional Director’s analysis proceeds from a fundamental, and clearly erroneous, finding that “prior to 2009 [when FAR4 became effective] graduate students were classified as adjuncts and placed in the adjunct unit only if they were appointed as the course ‘instructors of record,’ and were responsible for the course, just like an outside adjunct.” (Decision at 13). This finding is wrong in every respect. Prior to the

implementation of FAR4 in 2009, graduate students who were appointed as adjuncts served as both instructors of record and as recitation and lab section leaders in non-credit courses. Similarly, outside adjuncts served in both roles, then as now.

Indeed, there never was even a contention at the hearing that any such distinction existed in the role of graduate students in the “historical adjunct unit”. To the contrary, the Petitioner contended that the distinction between graduate students who were appointed as adjuncts and those who had been TAs was based on whether they received a stipend. Thus, in amending its petition during the hearing, counsel for Petitioner stated that the amendment was “intended to track closely the bargaining history and draw the line based upon the evidence and consistent with the evidence developed by the Employer, which we believe shows that historically the distinction between adjuncts who are included in the Local 7902 bargaining unit and those who, prior to 2006, were represented in the GSOC bargaining unit, is the distinction between those who were on the stipend and those who were not.” (Tr. 1226). In rejecting the Petitioner’s suggested unit definition, the Acting Regional Director correctly found that the receipt of a stipend was not a meaningful way to define the bargaining unit. (Decision at 27, n. 23).

Contrary to the Acting Regional Director’s finding, however, the record plainly shows that the distinction between appointment of graduate students as adjunct faculty and TAs, prior to the implementation of FAR4, was based solely on the nature of their financial support, and not on the nature of their duties.

As Roberta Popik, Associate Dean for Graduate Enrollment Services and Graduate School Administration, explained, any student who was asked to teach and who was not

eligible for MacCracken funding⁵ was hired as an adjunct faculty member. (Tr. 634-35)

Popik explained that there were various reasons for a student not to have MacCracken funding and, thus, hired be as an adjunct, rather than appointed as a TA:

[T]he various reasons would have been a student who was beyond the term of their McCracken and their financial aid eligibility as a McCracken.... We had master students in GSAS who were teaching. They were hired as adjuncts. We occasionally in arts and science had students from other NYU schools teach in arts and science. Someone from the Law School, someone from Gallatin, they would have been hired as adjuncts.

This testimony was not disputed.

The scant evidence relied on by the Acting Regional Director simply does not support his conclusion. (Decision at 13) Acting Dean of the Faculty of Arts and Sciences Jess Benhabib testified that prior to FAR4 graduate students performed a wide variety of roles as TAs, including instructors of record, section leaders and course assistants. (Tr. 380-81) Consistent with Popik's testimony, Benhabib confirmed that prior to FAR4 graduate students would have been appointed as adjunct faculty rather than TAs when they did not have MacCracken funding -- such as after their sixth or seventh year of study when they would no longer be eligible for MacCracken funding. (Benhabib Tr. 382) He did not testify that graduate students appointed as adjuncts served only as instructors of record in credit courses.

The only other witness cited for this proposition is Vincent Renzi, Associate Director of the Morse Academic Plan (MAP), the core curriculum for undergraduates in CAS and certain other schools. But Renzi's testimony does not show that the graduate students were appointed as instructors of record in MAP. To the contrary, "The MAP was designed

⁵ The MacCracken program provided five years of full funding, including a stipend, tuition and health benefits, to doctoral students in GSAS. (Tr. 369, 372 (g), 438-40 (Benhabib); Tr. 511 (Kohn); EX 17) Prior to FAR4, students were eligible for additional support through TA appointments for one or two additional years. (Tr. 452, 468 (Benhabib); Tr. 1342, 1351 (O'Connell); Tr. 1538 (Popik))

specifically with the intent of putting only regular members of the faculty in charge of the lectures and the teaching teams.” (Tr. 1074 (Renzi)) Thus, graduate students were appointed as instructors in MAP courses only as leaders of recitation sections.⁶ (Tr. 1083 (Renzi), Decision at 13) Whether graduate students serving as MAP recitation instructors were supported by their departments as TAs or appointed as adjunct faculty made no difference in their responsibilities.⁷ (See Tr. 1101 (Renzi) Renzi testified, consistent with Popik, only that graduate students were appointed as adjuncts on MAP prior to FAR4 if they were Master’s degree students, doctoral students beyond seven years in the program or if they were graduate students in “quasi-GSAS” purposes, such as Cinema Studies, Performance Studies or the Institute of Fine Arts. (Tr. 1083)

In the same way, the Decision finds -- without citation to any evidence or any support in the record -- that “[a]s a corollary, the historical graduate unit was mostly comprised of graduate students teaching non-credit courses.” (Decision at 14, n. 14) In fact, the Regional Director’s decision in *NYU I* discusses numerous TAs included in that bargaining unit who served as instructors of record in credit courses -- for example in the Expository Writing Program and language instruction. See 332 NLRB at 1211-12. The evidence in this case also demonstrated that TAs were instructors of record pre-FAR4. (Tr. 380-81 (Benhabib))

The Acting Regional Director’s effort to bolster his erroneous conclusion with mathematical computations involving the numbers of graduate student adjuncts is so confused as to be worthless. For example, he postulated that the number of graduate student

⁶ This was equally true at the time of the hearing in *NYU I*. See 332 NLRB at 1212, n.12.

⁷ The only other evidence relied on by the Acting Regional Director “as an example” involves English Department graduate students who “could possibly be appointed to teach a course for which they are fully responsible”, during the summer session (Decision at 13). NYU cannot locate any support in the record for this unattributed finding. Even if correct, however, this single example of summer teaching in one department cannot possibly support the finding of a supposed uniform practice of appointing graduate student adjuncts only to teach as instructors of record.

adjuncts teaching credit courses in the College of Arts and Sciences for current academic year would be double the 134 who taught such courses in the Fall 2010, and that 268 is approximately the same as the average number of graduate students in the historical adjunct bargaining unit. (Decision at 13) Even assuming that all graduate student adjuncts in FAS were teaching as instructors of record in credit courses prior to 2009 -- which was plainly not the case -- graduate students in FAS constituted only about one-third of the graduate students in the adjunct bargaining unit prior to 2009, so that his false equation proves nothing as to what most graduate student adjuncts were doing. (EX 56). Similarly, there is no basis in the record for the assertion that the 734 graduate student adjuncts and 66 outside adjuncts appointed in the Fall 2010 was “consistent with the typical number of TAs responsible for recitation and laboratory sections in the past.” (Decision at 13)⁸

B. The Decision Improperly Removes a Group of Graduate Students from the Adjunct Bargaining Unit

Although the Acting Regional Director offers no explanation for his decision that only graduate student adjuncts teaching non-credit courses would be included in the bargaining unit, it appears that he based this decision solely on his erroneous finding, discussed above, that graduate student adjuncts in the bargaining unit prior to financial aid reform in 2009 had only taught as instructors of record in credit courses. The Acting Regional Director thus implicitly recognized the need to maintain the integrity of the adjunct

⁸ The Decision contains numerous other errors in its findings with respect to the number of students and non-students in various positions and efforts to analyze that data. By way of example only, the Decision states that the population of hourly workers in Fall 2010 included 1560 undergraduates, 207 graduate students, and 6233 others. (Chart H) In fact, there were 1560 graduate students in hourly positions, *including* 207 who received stipends. (EX 81, EX 85, EX 116) The balance of the estimated total of over 8,000 student hourly workers were undergraduates. (Tr. 1672 (Steinfeld)) The number 6233 represents the difference between the Acting Regional Director’s erroneous assumption that there were *exactly* 8,000 hourly-paid workers, and 1767, which he mistakenly believed was the total number of students (1560 + 207) in these positions. (*See also* p. 32, below).

bargaining unit, which has included graduate students from its inception, but mistakenly failed to do so by drawing a distinction that has no basis in the factual record.

There is no dispute that graduate students have been included in the adjunct bargaining unit since that unit was certified in 2002. They were included on the list of eligible voters, and comprised approximately 10-12 per cent of the bargaining unit consistently through 2008. (Tr. 1000 (Dunphy); EX 56, EX 58, EX 59) All individuals hired as adjuncts who satisfy the minimum contact hours requirement of the certification and the collective bargaining agreement are automatically included in the bargaining unit. There is no exclusion for students. (EX 43 at 1-2) As of Fall 2010, there were 937 graduate students appointed as adjuncts, of whom 705 (or 75 per cent) met the criteria for inclusion in the adjunct bargaining unit. (EX 56)⁹

The Acting Regional Director stated that it is unclear whether the Adjunct CBA is applied to what he termed “former teaching assistants.” The record evidence, however, plainly demonstrates that the Adjunct CBA is applied by NYU to all student adjuncts. No distinction is made in the CBA or by NYU in terms and conditions of adjuncts, whether based on student status or other outside interests. Furthermore, there is no distinction made by NYU -- and none is possible -- based on whether adjuncts are considered “former teaching assistants.” Graduate students who teach are all appointed as adjuncts and treated the same under the Adjunct CBA.

⁹ With respect to the graduate student adjuncts who did not meet the eligibility requirements for inclusion in the adjunct bargaining unit, they are in the same position as other adjunct instructors who do not meet the same eligibility requirements. In the Fall 2010 semester, 1,752 of the 3,367 non-student adjunct instructors (52%) were bargaining unit eligible. (Tr. 988-89 (Dunphy); EX 58) The minimum hour eligibility requirements contained in the Adjunct CBA represent a consensus of the University and the union regarding the minimum level of annual service appropriate for inclusion in a bargaining unit, agreeing that any less was too casual. (Tr. 763 (Nolan)) To the extent that this small sub-group of student adjuncts is considered to be entitled to representation under the Act, they share a community of interest with the non-student adjuncts who similarly do not meet the bargaining unit eligibility requirements.

In particular:

- The compensation provisions of the Adjunct CBA apply equally to student and non-student adjuncts. (Tr. 376 (Benhabib); Tr. 728 (Nolan); Tr. 1133 (Reiss); Tr. 1164, 1191, 1220 (Grier))
- As per the terms of the Adjunct CBA all adjunct instructors receive an appointment letter setting forth the rates of compensation. The letters are identical for all instructors in the same role. (Tr. 563-72 (Kohn); Tr. 619 (Amico); Tr. 1086-87 (Renzi); Tr. 1133 (Reiss); Tr. 1188-91 (Grier); Tr. 1470, 1473 (Ferraro); EX 13, EX 24 -- EX 31, EX 63, EX 64, EX 69, EX 70, EX 77A, EX 77B, EX 93A, EX 93B, EX 94A, EX 94B)
- Student and non-student bargaining unit members are equally eligible to participate in the University's 403B benefit plan (both the main and supplemental annuity plans) offered under the Adjunct CBA. (Tr. 730 (Nolan))
- Student adjunct faculty are eligible to participate in the health insurance plan and other benefit plans under the Adjunct CBA on the same basis as all other adjuncts. (Tr. 730 (Nolan); PX 34; PX 77; EX 119)

Indeed, the President of Local 7902, Joel Schlemowitz, could not identify a single distinction between student adjuncts and non-student adjuncts at NYU.¹⁰ (Tr. 1301-03)

Although recognizing that all adjuncts are paid in accordance with the CBA -- whether or not they meet the minimum contact hours requirement -- and are eligible for

¹⁰ Schlemowitz admitted that the one distinction between student and non-student adjuncts he attempted to identify -- that non-student adjunct instructors are really pursuing careers as adjunct faculty members -- was not a real distinction as there were many outside adjuncts who did not pursue careers as faculty members. (Tr. 1301-03)

benefit plans and health insurance under the CBA,¹¹ the Acting Regional Director found significant that “[a]lthough appointment letters reference the adjunct agreement and inform students of the obligation to pay union dues, it does not appear that the union-security clause has been enforced.” (Decision at 14). Whether the union chose to enforce the union security clause with respect to graduate students, however, is an internal union matter that cannot detract from the undisputed evidence that the Adjunct CBA is applied to graduate students in all substantive respects. Furthermore, as discussed below, the Regional Director erroneously denied NYU’s request to appeal the Hearing Officer’s ruling which revoked a subpoena served by NYU seeking documents, including dues check-off authorization cards, relevant to the very issue of whether graduate students had been considered as members of the adjunct unit, before and after the adoption of FAR4. (*See* Point V, below).

Nor does the testimony of Local 7902’s President, Joel Schlemowitz, support the Acting Regional Director’s decision. Schlemowitz did not dispute that the adjunct union had historically respected graduate students. (Tr. 1304) Schlemowitz’s testimony served only to parrot Petitioner’s position, first asserting that Local 7902 did not presently claim to represent any graduate student adjuncts, and then modifying his position -- to fit Petitioner’s amended Petition -- that it did not represent graduate students receiving stipends. (Tr. 1298, 1307-08) Schlemowitz, however, was at a total loss to explain Local 7902’s position that its unit did not include graduate students on stipends. (Tr. 1326) Notably, neither Schlemowitz

¹¹ The Decision seeks to minimize the significance of the students’ eligibility to participate in the adjunct benefit plans in the same manner as other adjuncts, by pointing out that approximately 40 students (out of about 270) participated each year in the supplemental annuity plan and there is no evidence as to student participation in the adjunct health insurance plan. (Decision at 14-15) There is also no evidence, however, that students’ level of participation significantly differs from that of non-student adjuncts -- who often have insurance and other benefit plans with their primary employers outside NYU. In any event, receipt of benefits is not a significant factor in determining community of interest. *See Tri-State Transp. Co.*, 289 NLRB 356, 357 (1988) (difference in fringe benefits alone does not destroy community of interest).

nor Petitioner ever attempted to draw the unsupportable distinction between graduate students teaching credit and non-credit courses made by the Acting Regional Director.

Furthermore, to the extent that the Decision relies on the purported policy of Local 7902 to disclaim representation of some or all graduate student adjuncts, Local 7902 cannot unilaterally modify the certified unit of *all* adjuncts. See *United Steel Workers of America*, 345 NLRB 754 (2005). Where a bargaining unit has been established by clear language in a collective bargaining agreement, as is the case with respect to the adjunct unit, “the statutory goal of ‘encouraging the practice and procedure of collective bargaining’ (sec. 1 of the Act) requires adherence to that unit, absent mutual agreement by the parties to change it. ‘Adherence to a bargaining unit, once it is fixed, is central to Congress’ purpose of stabilizing labor-management relations in interstate commerce.’” *The Sun*, 329 NLRB 854, 860 (1999) (citations omitted)

C. The Decision Relies on Erroneous Factual Findings and Fails to Follow Board Precedent in Finding that Graduate Student Adjuncts Do Not Share a Community of Interest with Other Adjuncts

The Acting Regional Director’s finding that graduate student adjuncts do not share a community of interest with other adjuncts rests on clearly erroneous factual findings and fails to apply Board precedent. The Decision relies on a few purported community of interest factors, ignoring undisputed evidence showing that student and non-student adjuncts satisfy almost every relevant factor identified in Board precedent for determining community of interest. By failing to weigh *all* the relevant factors in determining community of interest, the Acting Regional Director failed to follow Board precedent. See, e.g., *Publix Super Markets*, 343 NLRB 1023 (2004); *Bradley Steel, Inc.*, 342 NLRB 215 (2004); *Trumbull Mem’l Hosp.*, 338 NLRB 900 (2003); *United Operations, Inc.*, 338 NLRB 123 (2002); and

Hotel Servs. Group, 328 NLRB 116 (1999). Furthermore, the few factors discussed by the Acting Regional Director are based on clear factual errors or are not significant.

To begin with, the Regional Director completely ignored undisputed evidence as to the following lengthy list of community of interest factors shared by all NYU adjuncts -- students and non-students alike:

- All adjuncts share the same wage structure (Tr. 786 (Nolan); *see also* Tr. 376 (Benhabib); Tr. 564-65 (Kohn); Tr. 622 (Amico); Tr. 823 (Halkitis); Tr. 1085-1086 (Renzi); Tr. 1133 (Reiss); Tr. 1164, 1220 (Grier); Tr. 1473 (Ferraro) (EX 77A, EX 77B, EX 93A, EX 93B, EX 94A, EX 94B)
- Within their departments, adjunct instructors perform the same duties, including serving as instructors of record and recitation section leaders. (Tr. 626-27 (Amico); Tr. 823, 879 (Halkitis); Tr. 954 (Sonntag); Tr. 1083-85 (Renzi); Tr. 1163-63, 1178-78, 1184-87; 1213 (Grier); Tr. 1280-81 (Schwartz); Tr. 1459, 1468, 1475 (Ferraro); EX 35; EX 54; EX 76C; EX 76D)
- Student and non-student adjuncts perform the same functions in those roles. (Tr. 386-87 (Benhabib); Tr. 954 (Sonntag); EX 54) (Tr. 823, 879 (Halkitis); Tr. 1280-1281 (Schwartz); Tr. 1459, 1468, 1475 (Ferraro)) (Tr. 1177-78, 1184-87 (Grier); EX 76C, 76D).
- All adjuncts have the same underlying skills (Tr. 461-62, 486 (Benhabib); Tr. 1128-29, 1145 (Reiss); Tr. 1164-65, 1188 (Grier))
- There is a high degree of interchange among student and non-student adjuncts (Tr. 1177-78, 1184-87 (Grier); EX 76C, EX 76D) (Tr. 396-97)

- Student adjunct instructors often continue to teach in that capacity after they graduate, and non-student adjunct instructors often become students who are then appointed to adjunct faculty positions. Thus, a student adjunct instructor can become a non-student adjunct instructor and *vice versa*. (Tr. 1093, 1110 (Renzi); EX 120)
- Within each course, all adjuncts have frequent interaction with one another, including meetings with full-time faculty. (Tr. 1089-90 (Renzi) (Tr. 1182-83, 1187 (Grier); Tr. 1280-81 (Schwartz))
- Within each department, all adjuncts are subject to the same terms and conditions of employment. (Tr. 563-572 (Kohn); Tr. 619, 623-24 (Amico); Tr. 1086-88 (Renzi); Tr. 1133 (Reiss); Tr. 1188-91, 1210-11 (Grier); Tr. 1281-82 (Schwartz); Tr. 1470, 1473 (Ferraro); EX 13; EX 24-EX 31; EX 63, EX 64; EX 69; EX 70; EX 77A; EX 77B; EX 93A, EX 93B, EX 94A, EX 94B)
- Within their departments all adjuncts are supervised in the same way (Tr. 1084-85 (Renzi)) (Tr. 1469-70 (Ferraro))
- Within their departments all adjuncts receive the same training (Tr. 1084, 1090-91 (Renzi); Tr. 1136-37 (Reiss); EX 62, EX 72) (Tr. 1132-33, 1143 (Reiss))
- Within their departments all adjuncts are subject to the same policies and procedures, and expectations (Tr. 573, 575-76 (Kohn); Tr. 622 (Amico); Tr. 1084, 1091 (Renzi); EX 32, EX 33, EX 34, EX 62, EX 68) (Tr. 1186 (Grier) (Tr. 1090 (Renzi))

- Within their departments all adjuncts are subject to the same evaluation process (Tr. 1192-93 (Grier); Tr. 1093-95 (Renzi); EX 78) (Tr. 880 (Halkitis) EX 53, EX 66, EX 67) (Tr. 1138-41 (Reiss); EX 73A, 73B, 74)
- All adjunct appointments are for the same duration and subject to the same reappointment process (Tr. 719-20 (Nolan); Tr. 1091 (Renzi); Tr. 1134-35 (Reiss)) (Tr. 1091-92, 1110 (Renzi); Tr. 1134-35 (Reiss)) (Tr. 1091-93 (Renzi)) (Tr. 1108-11 (Renzi))
- All adjunct instructors have similar working hours (Tr. 560 (Kohn); Tr. 1175-77, 1184 (Grier); EX 76C, EX 76D) (Tr. 395 (Benhabib); Tr. 1085-86 (Renzi); EX 63, EX 64)
- All adjuncts are eligible for the same adjunct benefits, including annuity and health plans (Tr. 728, 730-31 (Nolan)) (Tr. 655-56 (Popik); Tr. 780-81 (Nolan); EX 43)

Ignoring this evidence of a close and inseparable community of interest among all adjuncts, the Acting Regional Director found that

“graduate students share a separate community of interest based on the nature of the work and the level of responsibility that they have for the course. Further, the students share educational goals and concerns. Adjuncts work on a distinct and different track, as evidenced by the selection and hiring process, course autonomy, and minimal departmental participation.”

(Decision at 18).

Each of these factors relied on by the Acting Regional Director is either factually incorrect or legally insignificant.

(i) *There is no evidence that students and non-student adjuncts perform different work or have different levels of responsibility for courses.* To the contrary, there is extensive evidence that students and non-student adjuncts serve in the same roles -- for both credit and non-credit courses -- and perform exactly the same duties in those roles. Indeed, they very often work side-by-side in a course. (Tr. 387-88, 426 (Benhabib); Tr. 626-27 (Amico); Tr. 1083-85 (Renzi); Tr. 1163-64, 1213 (Grier); EX 35) For instance, both students and non-students served as instructors of record in numerous departments, including Anthropology, Art History, Creative Writing, East Asian Studies, Economics, English, French, Hebrew & Judaic, Italian, Irish Studies, Music and Spanish & Portuguese departments. (Tr. 387 (Benhabib); Tr. 954 (Sonntag); EX 54) In these positions, student and non-student adjuncts have the same duties and responsibilities. (Tr. 387 (Benhabib)) Further, a student adjunct could serve as the instructor of record for a class one semester and a non-student adjunct could teach the same class the next semester. (Tr. 396-97 (Benhabib)) In fact, in the Fall 2010 semester, students comprised half of 268 the adjunct instructors who taught credit courses in the FAS. (Tr. 946-47 (Sonntag); EX 54)

As in the FAS, student and non-student adjuncts in Gallatin and Steinhardt also serve as instructors of record and perform the same duties in that each department. (Tr. 823, 879 (Halkitis); Tr. 1130-31 (Reiss)) For instance, in MPAP both students and non-students teach private music or voice lessons to undergraduates. (Tr. 1473-74 (Ferraro); EX 93B, EX 94B)

In addition, both student and non-student adjunct instructors serve as recitation and laboratory leaders for many large lecture classes throughout the University. For instance, in the Fall 2010 semester, adjunct instructors taught 809 non-credit recitation and laboratory sections in the FAS. Students taught 743 of these non-credit sections, and non-students

taught 66. Student and non-student adjuncts both taught non-credit sections in a number of departments, including Chemistry, Physics, and Environmental Studies, as well as in MAP.

In their roles as recitation and laboratory leaders, student and non-student adjuncts perform the same duties. In MAP, all recitation instructors, student and non-student, are required to attend the two weekly lectures associated with the course for which they are responsible, lead two weekly recitation sections, grade under faculty supervision and perform various other tasks, such as meeting with students, completing administrative queries and providing letters of recommendation. (Tr. 1084-85 (Renzi); Tr. 1187 (Grier))

Likewise, in the Physics Department there is no difference in the responsibilities of student and non-student adjuncts. (Tr. 1187 (Grier)) As recitation section leaders, both student and non-student adjuncts clarify the concepts that have been discussed in lectures, answer students' questions in a smaller setting, review over problem sets and assignments to solidify the students' understanding of the coursework, and grade problem sets and exams. (Tr. 1166, 1169, 1191 (Grier)) As laboratory section instructors, adjuncts are responsible for both teaching and maintaining the safety of the lab itself, briefing the students on the proper use of the equipment, supervising the students in their experiments, and grading. (Tr. 1167-68, 1170 (Grier)) As Dr. Grier, Chair of the Physics Department noted, student and non-student adjuncts serve interchangeably as both recitation section leaders and laboratory instructors. (Tr. 1209-10, 1213)

(ii) *The Decision erroneously finds a significant difference in the selection and hiring process for student and non-student adjuncts.* The Acting Regional Director mistakenly said that "the record is clear that graduates are recruited or referred based on their area of study or the faculty lecturer's preference to work with certain graduates. Accordingly, the selection

and purpose for hiring is different than the employer's need for adjuncts.” (Decision at 18-19) First, the Decision relies solely on evidence about MAP in support of his conclusion that selection and hiring are different for graduate student adjuncts. MAP, however, had only 107 (or less than 11 per cent) of the 987 graduate student adjuncts appointed in the Fall 2010. (Decision at 17; EX 57) Evidence about this relatively small fraction of the total graduate student adjunct population cannot be treated as representative of the process for selecting and hiring adjuncts throughout NYU. To the contrary, the Department of Music Performance and Professions (MPAP) had approximately the same number of graduate student adjuncts (104 in Fall 2010) as MAP and Lawrence Ferraro, Chair of MPAP, testified that there was no difference in that department in the selection and hiring process of graduate student adjuncts as compared to other adjuncts. (Tr. 1470, 1473, 1475 (Ferraro); EX 57, EX 93A, EX 93B) Furthermore, Acting FAS Dean Benhabib testified that, as a general matter, FAS (which had 656 total student adjuncts in Fall 2010, including 549 outside of MAP) employs the same criteria for student and non-student adjuncts seeking to fill the same positions, *i.e.*, academic merit and relevant scholarship. (Tr. 461-62) As an example, Benhabib testified that in the Economics Department, when an adjunct instructor is needed, the department will look for individuals -- students or non-students -- who are proficient in the field and whom the department believes will make good teachers. (Tr. 426) Similarly, Professor David Grier testified that in Physics (21 graduate student adjuncts in Fall 2010) the focus in hiring for adjunct positions is not on student status but on expertise and qualifications. (Tr. 1165, 1188); EX 57) In Gallatin (6 graduate student adjuncts in Fall 2010) -- dismissed by the Acting Regional Director as “an outlier” (Decision at 18) -- the student status of an adjunct is not even known to the curriculum committee making hiring decisions unless the applicant's

student status is noted on his or her CV, and, in any event, is not considered as a factor in hiring. (Tr. 1128 (Reiss); EX 57)

Finally, the Acting Regional Director misstated the testimony even as to MAP. As Vincent Renzi explained, while many recitation instructors are recruited from a faculty member's department, MAP also hires students to serve as recitation instructors from other departments in the University as well as non-students. (Decision at 17, Tr. 1080-81, 1083 (Renzi)) As to the Decision's unsupported claim that the "purpose" of hiring students in MAP differs from that of non-graduate student adjuncts, Renzi testified that the primary concerns -- hence the purpose of any hiring -- are whether the adjunct is a good teacher and whether his/her area of expertise matches the program's needs. (Tr. 1092 (Renzi)).¹²

(iii) *The Decision repeatedly refers to the graduate student adjuncts' unique connection to the school as students.* The Acting Regional Director emphasized the students' connection to the department, educational goals and institutional concerns. (Decision at 17-18, 27), which have nothing to do with the terms and conditions of their employment as adjuncts. NYU does not dispute that its graduate students have a relationship with the university and their departments that differs from that of non-student adjuncts. But this is a direct consequence of the students' status and role as students, and has nothing to do with the terms and conditions of their employment to teach at NYU -- which, as discussed above, are identical to those of all other adjuncts. These differences have no significance in determining the community of interest among student and non-student adjuncts as University employees.

¹² Without any elaboration, the Decision also refers to a difference in mentoring received by graduate student adjuncts and other adjuncts. To the contrary, the record evidence demonstrates that within the various departments, all adjuncts receive the same mentoring, supervision, training and access to resources. (Tr. 1084-85, 1090-91 (Renzi); (Tr. 1192-93 (Grier); (Tr. 573-76 (Kohn); Tr. 622 (Amico); (Tr. 879-80 (Halkitis); (Tr. 1132-322, 1136 37 (Reiss))

All graduate students -- whether appointed as an adjunct, appointed to another position at NYU, holding outside employment or simply a student without any outside endeavors -- share a connection to the school different from non-students. All students, by virtue of being students, obviously share similar academic goals. (Decision at 18, 26-7) Similarly, as noted by the Acting Regional Director, graduate students take courses for a number of years, work closely with faculty who serve on their dissertation committees, are part of the intellectual life of the department and attend departmental colloquia and workshops, often are part of faculty search committees and other departmental committees, put together special programs, conferences and events, and are expected to attend symposia and lectures. (Decision at 18) What the Regional Director completely ignored, however, is that Board precedent holds that the determination of community of interest is based on the individuals' status as employees and not factors -- such as student status -- outside the employment relationship. *See Winsett Simmonds Eng'rs., Inc.*, 164 NLRB 611, 612 (1967); *Terri Lee, Inc.*, 103 NLRB 995 (1953); *Lone Star Boat Mfg. Co.*, 94 NLRB 19 (1951); *Georgia-Pacific Corp.*, 201 NLRB 760 (1973); *Rosslyn Concrete Constr. Co.*, 261 N.L.R.B. 732 (1982), *enf'd*, 713 F.2d 61 (1983); *Speedrack Prods. Group Ltd. v. NLRB*, 114 F.3d 1276, 1280 (1997). This is all the more true in a unit of adjunct faculty, which includes several thousand individuals with disparate backgrounds and experience, including industry professionals, Wall Street professionals, distinguished artists, government officials, students (usually graduate students) from NYU and other universities as well as "career adjuncts" for whom teaching as an adjunct instructor is their principal occupation. (Tr. 361-62 (Benhabib); Tr. 563 (Kohn); Tr. 718 (Nolan), Tr. 1302 (Schlemowitz))

Even more significantly, the Regional Director ignored cases cited by NYU holding that students and non-students working for their schools who share traditional community of interest factors are properly included in the same bargaining unit. *Boston Medical Center*, 330 NLRB 152, 167-68 (1999); *Univ. of West Los Angeles*, 321 NLRB 61 (1996). The Board has also applied a similar analysis in numerous cases involving students working for an employer other than their school. *Hearst Corp.*, 221 NLRB 324, 325 (1975); *System Auto Park & Garages, Inc.*, 248 NLRB 948, 949 (1980); *Display Sign Serv., Inc.*, 180 NLRB 49, 50 (1969); *Delight Bakery, Inc.*, 145 NLRB 893, 905-06.

Not only does the Decision improperly ignore Board law by defining the bargaining unit based on a supposed community of interest resting on “their identity as students” (Decision at 26), it illogically excludes from that unit student adjuncts who teach credit courses, and who share all of the same student attributes that supposedly support a graduate student bargaining unit.

Finally, the supposed divergence of interests between student and non-student adjuncts found by the Acting Regional Director is belied by seven years of bargaining history, in which Local 7902 has successfully represented both student and non-student adjuncts in a single bargaining unit. The distinctions between students and non-students emphasized by the Acting Regional Director have always existed, yet there is absolutely no evidence of any differing interests in bargaining that negatively impacted the adjunct unit. Moreover, it is one of the well-recognized functions of a bargaining representative to reconcile and balance the often-divergent interests of employees in the unit. *Int’l Assoc. of Machinists & Aero Workers*, 189 LRRM 1017 (2010); *Humphrey v. Moore*, 375 U.S. 335 (1964). NYU is not aware of any precedent -- and the Acting Regional Director certainly

cited none -- in which employees in the same job classification, performing the same duties, at the same location, under identical terms and conditions of employment, have been split into separate bargaining units.

D. Even Under an Inapplicable Accretion Analysis, Graduate Students Properly Belong in the Adjunct Bargaining Unit

The Acting Regional Director offered no explanation for his application of an accretion analysis in finding that “[t]he former teaching assistants do not share an overwhelming community of interest with the adjunct faculty” and “to the extent that the former teaching assistants can be said to have accreted into the adjuncts unit, the record demonstrates that the adjuncts unit has historically excluded them.” (Decision at 27)

Initially, the accretion doctrine has no application here. NYU simply made a bona fide change in the way in which it treats teaching by graduate students, and now appoints all graduate student teachers as adjunct faculty. The graduate students so appointed come within the adjunct faculty bargaining unit by definition. There is no existing bargaining unit of TAs, or even any way to define the so-called “former TAs” as a distinct group being consolidated with the existing adjunct unit. *See Tree of Life*, 336 NLRB 872, 873 (2001) (“It is axiomatic that when an established bargaining unit expressly encompasses employees in a specific classification, new employees hired into that classification are included in the unit.”); *Developmental Disabilities Inst.*, 334 NLRB 1166, 1168 (2001) (holding that an accretion analysis is inappropriate when the newly hired group “perform the same basic educational functions that historically have been performed by bargaining unit members.”); *Premcor, Inc.*, 333 NLRB 1365, 1366 (2001) (“Once it is established that a new classification is performing the same basic functions as a unit classification historically had performed, the

new classification is properly viewed as remaining in the unit rather than being added to the unit by accretion”).

Even if an accretion analysis could properly be applied, there can be no doubt that graduate student adjuncts and non-student adjuncts do share “an overwhelming community of interest” for all the reasons discussed above. The Regional Director’s finding that the adjunct unit historically excluded the former TAs reflects his erroneous findings that (i) “former TAs” only performed non-credit teaching; and (ii) the adjunct bargaining unit was limited to graduate students who served as instructors of record for credit courses. (*See* pp. 8-12, above) As discussed above, the distinction between graduate student adjuncts and TAs prior to financial aid reform was based on the nature of their financial support, not any difference in responsibilities. Once that distinction was eliminated, as a result of financial aid reform, the historical difference became meaningless.

Similarly, the Acting Regional Director is wrong in stating that “it does not appear that the parties mutually intended or agreed to the consolidation of the units.” (Decision at 27) In the first place, there was no separate unit of “former TAs” to be consolidated into the adjunct unit.¹³ Furthermore, notwithstanding their public statements protesting the change, neither Local 7902, the UAW, nor GSOC filed any grievance or unfair labor practice charge challenging NYU’s decision to appoint -- and separately compensate -- all graduate student teachers as adjunct faculty pursuant to FAR4 in 2009.

¹³ To the extent that there is any significance to the Regional Director’s finding that NYU did not withdraw recognition of the previous graduate assistant bargaining unit in 2005, that finding is clearly erroneous. (Tr. 758-50 (Nolan); EX 4; *see also* Tr. 138-39 (Kushner))

III. THE DECISION IGNORES BOARD PRECEDENT IN FINDING ALL RESEARCH ASSISTANTS TO BE EMPLOYEES INCLUDED IN A GRADUATE STUDENT BARGAINING UNIT

The Acting Regional Director's decision to include all research assistants in the bargaining unit inexplicably ignored his own factual findings that the RAs are engaged solely in academic pursuits by performing research for their dissertations and binding Board precedent, including the decision in *NYU I*, that externally funded RAs in science departments are not "employees" under the Act. Indeed, the Regional Director offered no rationale for his failure to follow the holding in *NYU I* at the same time that he found that the relevant facts regarding the RAs have not changed since the hearing in that case.

In *Leland Stanford*, 214 NLRB 621 (1974), the Board held that doctoral students in Physics serving as RAs on externally-funded grants were not "employees" under the NLRA. The Board reasoned that even though the students received stipends for their work as RAs, which were processed through the University's payroll system, such payments did not reflect wages as they were in the form of financial aid and were "not based on the skill or function of the particular individual or the nature of the research performed" and there was "no correlation between what [was] being done and the amount received by the student. . ." *Id.* at 621-622.

Further, although the students may have participated in research that did not always fit into their ultimate thesis, it was "clear, however, that all steps lead to the thesis and [were] toward the goal of obtaining the Ph.D. degree." *Id.* at 622. Based on these factors, the Board determined that the RAs were "primarily students" and, as such, were "not employees" within Section 2(3) of the Act. *Id.* at 623. The testimony of Petitioner's sole RA witness in this case virtually mirrors the description of RAs in *Leland Stanford*. (Tr. 180-87, 193-95 (Freudenthal))

Notwithstanding the Board's decision in *NYU I* finding a bargaining unit of graduate student assistants to be employees, it affirmed the Regional Director's decision excluding the Sackler Institute research assistants (who were appointed as GAs) and science department RAs funded by external grants because the evidence failed to demonstrate "that the research assistants perform a service for the Employer and, therefore, they are not employees as defined in Section 2(3) of the Act." *Id.* at 1209, n. 10.

Specifically, following *Leland Stanford*, the Regional Director excluded GAs in the Sackler Institute and RAs in the Biology, Physics and Chemistry Departments and the Center for Neural Science who were supported by external faculty research grants -- primarily from the NIH and NSF. The Regional Director found that "students classified as RAs in these departments are performing the research required for their dissertations, which is the same research for which the professor has obtained an outside grant." *Id.* at 1214. He stated that "[n]o specific services are required of these RAs -- the students are simply expected to progress towards their dissertations" and emphasized that "RAs in these departments do not specifically apply for these positions (these departments are fully funded); instead, the positions are awarded to them." *Id.* In concluding that these RAs were like the RAs found not to be employees in *Leland Stanford*, the Regional Director explained:

These ... RAs have no expectations placed upon them other than their academic advancement, which involves research. They receive stipends and tuition remission as do other GAs, RAs, and TAs, but are not required to commit a set number of hours performing specific tasks for NYU. The research they perform is the same research they would perform as part of their studies in order to complete their dissertation, regardless of whether they received funding. The funding for the Sackler GAs and the science RAs, therefore, is more akin to a scholarship.

Id. at 1214.

Finally, the Regional Director rejected the assertion that RAs performed services for NYU by helping the University fulfill its obligations under the research grants, or by helping to increase the University's and faculty members' stature and reputation. *Id.* at 1220 n. 50.

Throughout his decision, the Acting Regional Director emphasized that NYU's RAs are similar in all significant respects to the science RAs excluded in *NYU I* and *Stanford*.

Thus, he found:

- “consistent with *Brown* and *NYU* [the RAs on external grants] are not performing work for the Employer and, therefore, are not employees within the meaning of the Act” (Decision at 6)
- The benefits of research to NYU are the same now as in 1999-2000, when *NYUI* was decided (*Id.* at 20)
- there have been no significant changes in the past 12 years with respect to NYU's process for applying for and administering research grants, including the guidelines and policies for experiments and patent rights (*Id.* at 21)
- the responsibilities of RAs under externally funded grants are the same as those of students performing research funded by the school -- students pursue research in consultation with their thesis adviser/professor (*Id.*)
- because the research is intertwined with the subject matter of the student's dissertation, it is difficult to “tease apart the hours spent as an RA from the hours spent advancing the dissertation” (*Id.*)
- once students in the Courant Institute have selected a research topic for their dissertations and are appointed as research assistants, “there is no distinction

between the activities that the students undertake as RAs and the activities undertaken as students.” (*Id.* at 23)

- students in Courant register for credits while conducting research as if they were taking a course, in which case their adviser is the instructor of record (*Id.*)

Notwithstanding these factual findings, the Acting Regional Director concluded that the RAs are providing “services for pay which are also in furtherance of their studies.” (Decision at 27) Remarkably, however, he did not find that the RAs now are doing anything different from the RAs who were excluded in *NYU I* as not providing services to the University. Furthermore, it makes no sense to describe the stipends provided to RAs as pay for their services, when their stipends are the same as those provided to all students, including those on fellowship who perform no services, and those who are appointed as adjuncts, and who receive actual pay for their work as adjuncts over and above the uniform stipend.

To the extent that the Acting Regional Director relied on documents stating that RAs are required to work for “a maximum of 20 hours per week,” the consistent evidence -- including the testimony of Petitioner’s sole RA witness -- was that the stated 20-hour requirement had no effect on actual practice, that RAs work for many more hours on their research, and that it is not possible to distinguish between work done as an RA and work done as a student. (Tr. 181, 195-96 (Freudenthal); Tr. 391-92, 401-02, 405, 478 (Benhabib); Tr. 532, 534 (Kohn); Tr. 867-68 (Halkitis)) Moreover, the same 20-hour requirement existed at the time of the hearing in *NYU I*. See 332 NLRB at 1213.

Finally, the Acting Regional Director is clearly wrong in stating that only one half of NYU’s 300 RAs in Fall 2010 were externally supported (Decision at 21). The evidence

shows that substantially all of the 114 RAs in the GSAS science departments, the 92 RAs in the Courant Institute, and the 52 RAs in the Steinhardt School are supported on external grants. (Tr. 232-33, 272 (Dunne); Tr. 513 (Kohn); Tr. 860-61(Halkitis); EX 15; EX 55)

There is no evidence as to the exact number of the remaining social science/humanities RAs who were on external grants, although Acting Dean Benhabib testified that about one-half of the 21 RAs in the Economics Department were on external grants. (Tr. 419)

The Acting Regional Director correctly found that “the research assistants in the hard sciences are indistinguishable from RAs in the social sciences and humanities” in that both are working on projects “closely related to their thesis and they work under the mentorship of their faculty advisor.” (Decision at 27) His conclusion that all RAs should be included in the bargaining unit because they are providing services, however, fails to explain how or why he now considers the performance of thesis-related research to be a service to NYU.

IV. THE DECISION IMPROPERLY INCLUDES GRADUATE STUDENTS WORKING IN CERTAIN HOURLY-PAID POSITIONS IN THE BARGAINING UNIT

Without explanation or any evident rationale, the Decision includes in the bargaining unit “hourly graduate students with the job title ‘research assistants,’ and, hourly employees whose job title demonstrate that they are providing assistance to a particular faculty member” (Decision at 26-27, n.23). The Acting Regional Director stated that “the graduate assistants are distinct from the pool of hourly employees dispersed throughout the Employer’s expansive facilities, due to the vastly different skill set and qualifications the graduates bring to the departmental work” (Decision at 27)¹⁴ but offered no basis for singling out graduate students in these hourly-paid job titles from the 1560 graduate students in hourly positions in

¹⁴ Here and in other parts of the Decision, the Acting Regional Director referred to “graduate assistants.” He acknowledged, however, that Graduate Assistants no longer exist at NYU (Decision at 19) and it is unclear which individuals he is referring to.

Fall 2010. (EX 81) Moreover, the Decision ignored the cases cited by NYU that the hourly-paid graduate students are casual or temporary employees who should be excluded from the bargaining unit.

There was no evidence at the hearing as to the duties of graduate students in specific hourly-paid jobs. While witnesses described the duties of the hourly-paid student workers generally as including a wide variety of clerical and administrative duties, they explained that it was not possible to identify the duties of any specific students based on their job titles. (Tr. 1261 (Duphy); Tr. 1656, 1658 (Ho)) Indeed, the list of graduate students in hourly positions in Fall semester 2010 contains numerous closely-related titles, including Assistant, Office Assistant, Research Assistant, Project Assistant, Assistant to Prof., Program Assistant, Student Assistant, Production Assistant, Lab. Assistant, Library Assistant and Technical Assistant, among many others. (EX 80) The Acting Regional Director's inclusion of certain graduate students based on their job titles alone departs from Board precedent that bargaining unit determination must be based on evidence of employees' actual working conditions and duties, and not simply on job titles. *See Radio Broadcasting Co.*, 277 NLRB 1112, 1126 (1985); *Saddleback Comm. Hosp.*, 223 NLRB 247, 249 (1976).

The only evidence offered regarding the job duties of specific hourly student workers was Roberta Popik's testimony that as part of the FAR4 implementation, the job duties of all GA positions were closely reviewed and "an evaluation was made of whether that really was RA work, research assistant work, for the doctoral student or whether it was more administrative." (Tr. 1573) The positions that involved research assistant work were converted to RAs and those that were administrative were converted to hourly positions.

(*Id.*) The fact that a position was converted to an hourly position, regardless of job title, means that it was not considered similar to an RA position.

The Acting Regional Director recognized that, despite the similarity in titles, “students appointed to do research for a professor on an hourly basis are performing a different level of work than students appointed as research assistants.” (Decision at 19)¹⁵ Thus, their inclusion in the unit cannot be justified on any theory that their work is similar to that of the RAs. Nor is there any basis to find that graduate students in the specified hourly job titles represent a continuation of the Graduate Assistants (GAs) who were included in the former bargaining unit. As the Acting Regional Director found, the GA classification essentially no longer exists, and the work formerly done by GAs is mostly performed by hourly-paid student workers. (Decision at 19). The record showed, however, that there is no way to identify any particular hourly-paid positions that constitute the former GA positions -- and certainly not those in the job titles identified by the Acting Regional Director. (Tr. 1484-85 (Ferraro); Tr. 1580, 1601-02, 1604 (Popik); Tr. 1657, 1659, 1660 (Ho)) Indeed, graduate students have served in hourly-paid positions as research assistants and assistants to faculty members for many years during the same time that other students were performing similar functions as GAs. (Tr. 1562-63, 1572-73, 1576-77 (Popik); EX 100; EX 100I)

Although the Decision states that the record “did not fully explore the typical duration or expectation to an hourly position for doctoral students”¹⁶ there was testimony that the typical duration for such an assignment was either a single semester or an academic year,

¹⁵ The Decision incorrectly states that RA positions in the social sciences were reviewed as part of the GSAS financial aid reform, and that two-thirds of the work was determined to be administrative. (Decision at 19). It was not RA positions in social science, but all GA positions in the FAS, that were re-examined, and no change was made to RA positions at that time. (Tr. 1569-70 (Popik))

¹⁶ NYU assumes that the reference to doctoral students in this context is inadvertent, as many graduate students in hourly positions are Masters’ students. (*See* EX 80)

although they are often short-term assignments, such as one month or even one weekend. Appointments rarely exceed one academic year. (Tr. 1551-52 (Popik)). Moreover, the evidence showed that even when an appointment may last for an entire semester or academic year, the position may only require sporadic work during that period. (Tr. 1712 (Dunply)). Some students worked as few as 5 or 6 hours in a total semester. (EX. 116).

For this reason, graduate students in hourly-paid positions are like temporary or “casual” employees who do not have a sufficient interest in the nature of collective bargaining to participate in the process. *See Columbia Symphony Orchestra, Inc.*, 350 NLRB 523, 524 (2007).

In *NYU I*, graduate students working as graders and tutors were excluded from the unit as temporary employees, where they worked for varying periods of time (from one week to one semester) and had no substantial expectancy of continued employment in those jobs. 332 NLRB at 1221. Similar to the grader and tutor positions excluded in *NYU I*, hourly-paid student jobs are typically awarded on a semester by semester basis and rarely, if ever, exceed a single academic year. As in *NYU I*, students working in hourly-paid jobs have no substantial expectancy of continued employment in these positions. Tr. 1551-52 (Popik); 1670 (Steinfeld); EX 105)

In addition, many students in these positions actually work for only a small number of hours each week or semester. One excellent example of how minimal the work in these jobs can be was provided by Petitioner’s witness, Rachel O’Connell -- the only student to testify about an hourly-paid job. She had an appointment as a Code 119 tutor in the McGhee Division of the School of Continuing and Professional Studies academic year 2008-2009, in

which she worked a total of just nine hours over the course of the year. (Tr. 1684-85 (Murray); EX 110)

The Decision ignores the Board precedent cited by NYU, holding that students who work for their universities in a variety of part-time clerical, administrative and similar jobs “are best likened to temporary or casual employees” and thus are excluded from collective bargaining under the Act. *Saga Food Serv. of Cal.*, 212 NLRB 786 (1974); *San Francisco Art Inst.*, 226 NLRB 1251, 1252 (1976).

V. STUDENT ADJUNCT INSTRUCTORS TEACHING NON-CREDIT COURSES, RAs AND PART-TIME HOURLY STUDENT WORKERS IN SELECT JOB TITLES DO NOT SHARE A COMMUNITY OF INTEREST

The Acting Regional Director compounded the errors discussed above by including graduate student adjuncts, research assistants in all disciplines, and graduate students in certain part-time hourly jobs in a single bargaining unit, in which they share no community of interest. Board precedent clearly provides that when the interests of one group of employees are dissimilar from those of another group, a single unit is not appropriate. *Swift & Co.*, 129 NLRB 1391 (1961).

The Acting Regional Director based his unit determination solely on a finding that “[t]he community of interest for those in the petitioned-for unit rests on their identity as students.” (Decision at 26) The Decision failed entirely to examine the applicable community of interest factors, which demonstrate that these groups of students do not belong in the same bargaining unit. Even assuming that student status is a relevant condition in determining a community of interest, and it is not, such a “single element of common interest [does not] supply a sufficient bond to overcome the diversity of interests among employees in this otherwise random grouping of heterogeneous classifications.” *The Grand*, 197 NLRB 1105, 1106 (1972).

When the proper factors are considered, it is clear that the members of the bargaining unit found appropriate by the Acting Regional Director do not share a community of interest: they do not share the same compensation structure; they do not perform the same duties; their positions do not require the same skills; they have practically no interchange; they are not supervised in the same manner; they are not subject to the same policies and procedures; they are not subject to the same hiring and appointment procedures; only student adjuncts can maintain their positions following graduation; and they do not perform their duties during the same hours. (*See, e.g.*, Tr. 619, 624-25 (Amico); Tr. 369, 374-75, 390-91, 400-02, 411; 420-22, 461-62, 465 (Benhabib); (Tr. 236, 243-44, 291 (Dunne); Tr. 1702, 1712 (Dunphy); Tr. 1457, 1477 (Ferraro); Tr. 167, 176, 180-81, 185-86 (Freudenthal); Tr. 1363 (Gallagher); Tr. 1164-66, 1169-70, 1188, 1191, 1195 (Grier); Tr. 834-35, 853, 855-56, 867-68, 875, 905-06, 911, 914-16 (Halkitis); Tr. 511, 526-27, 533-37, 559-61, 583-84, 590-92 (Kohn); Tr. 1681-85 (Murray); Tr. 786 (Nolan); Tr. 630-31, 1549-50, 1585 (Popik); Tr. 1145 (Reiss); Tr. 1073, 1084-86 (Renzi); Tr. 1669-70, 1672-75 (Steinfeld); EX 11, EX 19, EX 43, EX 46, EX 77A, EX 105, EX 116, PX 28).

In short, there is no justification for combining the occupants of these dissimilar positions into a single bargaining unit based solely on the irrelevant fact that they are all graduate students.

VI. THE ACTING REGIONAL DIRECTOR'S RULING AFFIRMING THE REVOCATION OF NYU'S SUBPOENA CONSTITUTED PREJUDICIAL ERROR

On February 16, 2011, NYU subpoenaed six categories documents from Petitioner relating to the testimony of Joel Schlemowitz, President of UAW, Local 7902, that Local

7902 did not represent the graduate students in the petitioned-for unit.¹⁷ (Subpoena B-624981) All of these requests, in different respects, sought to determine the extent to which Local 7902 considered graduate students to be included in the adjunct bargaining unit both before and after the graduate student financial aid reforms.

The Hearing Officer granted Petitioner's petition to revoke the subpoena and the Acting Regional Director denied NYU's request for special permission to appeal the Hearing Officer's ruling. In his Order Denying Request For Special Permission To Appeal Hearing Officer's Rulings (the "Order") the Acting Regional Director held as follows:

- With respect to NYU's requests seeking to "challenge the veracity of Mr. Schlemowitz's testimony through a review of any communications that shaped his testimony that graduate students on stipend [the petitioned-for unit] are not part of the local 7902 adjunct faculty bargaining unit," the Acting Regional Director held, "I am not persuaded that these documents are sufficiently relevant, or of probative value, in determining whether the unit sought by the Petitioner herein is appropriate." (Order at 2)
- With respect to NYU's request seeking documents reflecting the impact of FAR4 on Local 7902's view of graduate students in the Adjunct unit, the Acting Regional Director held "I fail to see how these internal and external communications could or would constitute evidence relevant to the issues herein." (Order at 3)

¹⁷ The subpoena consisted of seven requests, one of which was unrelated to Mr. Schlemowitz's testimony and was complied with by Petitioner.

- With respect to NYU’s request for the Local 7902 authorization dues check-off cards presented to Petitioner, a sample of which was submitted into evidence, the Acting Regional Director held that “at best, production of these authorization cards would reflect Local 7902’s actions with respect to check-off authorizations and, possibly, its understanding of the scope of the bargaining unit, and whether or not Local 7902 had acted in a consistent manner with regard to each of the foregoing.” Accordingly, he found it to be irrelevant to the issues presented at the hearing.” (Order at 4)

Despite these rulings finding evidence related to Local 7902’s views and actions as to the scope of the adjunct bargaining unit to be irrelevant to the hearing, the Decision relied on the absence of such evidence to support the removal of graduate student adjuncts teaching non-credit courses from the adjunct unit. (Decision at 14, 27).

Schlemowitz’s testimony made it clear that his position on the membership eligibility of graduate students changed in the short time period of the hearing -- to conform with the Petitioner’s amending of the Petition. (*See* p. 16, above) The Acting Regional Director cited Schlemowitz’s testimony that “Local 7902’s policy was not to accept fees or collect dues from any graduate students that would have been covered by the graduate assistant agreement.” (Decision at 12) But, the “sample” of dues check-off cards/authorizations cards presented by Petitioner showed that NYU’s financial aid reforms had nothing to do with Local 7902’s position with respect to graduate students as many of the sample rejected cards were from individuals previously employed as adjuncts and/or in schools unaffected by the

financial aid reforms.¹⁸ (Tr. 1311 -- 1315 (Schlemowitz))

In accepting Schlemowitz' testimony, the Acting Regional Director stated that “no documentary evidence was submitted regarding actual dues receipts.” (Decision at 12) Similarly, the Acting Regional Director found the record evidence pertaining to whether the adjunct contract currently applied to “the former teaching assistants” unclear because, in part, “[n]o evidence was adduced regarding dues receipts.” (Decision at 14) NYU's subpoena sought to explore what, according to the Decision, are relevant issues regarding: (i) Local 7902's current and prior positions on the inclusion or exclusion of graduate students in the adjunct unit; and (ii) what, if any, impact FAR4 had on those positions.

By sustaining the revocation of NYU's subpoena, the Acting Regional Director prevented NYU from obtaining evidence that he later concluded would have been relevant to his decision. The decision was plainly prejudicial to NYU and should be reviewed by the Board.

¹⁸ Apart from the plain relevancy of the request, NYU's subpoena for the dues authorization cards should have been enforced as Petitioner put a sample of the cards produced to it into evidence as PX 48. Without viewing all the cards produced to the Petitioner, NYU had no ability to assess whether the sample was representative of the entire group.

CONCLUSION

In the event that the Board grants review of the Acting Regional Director's decision in order to reconsider the holding in *Brown* that graduate assistants are not employees under the Act, NYU requests that the Board also review and reverse the decision insofar as it holds that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act, and finds an appropriate bargaining unit consisting of graduate student adjuncts teaching non-credit courses, all research assistants, and graduate students in specified hourly-paid positions. NYU also requests review and reversal of the Acting Regional Director's Decision upholding revocation of its subpoena for documents relating to the position of the adjunct union with respect to the inclusion of graduate students in the adjunct bargaining unit.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that copies of the within Conditional Request For Review in Case No. 2-RC-23481 has been served by electronic mail on this date on:

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