

BEFORE THE  
NATIONAL LABOR RELATIONS BOARD

In the Matter of:	:	
	:	
THE NEW SCHOOL,	:	
	:	
Employer,	:	
	:	Case No. 02-RC-143009
and	:	
	:	
STUDENT EMPLOYEES AT THE NEW	:	
SCHOOL-SENS, UAW,	:	
	:	
Petitioner.	:	

**PETITIONER’S OPPOSITION TO EMPLOYER’S  
REQUEST FOR REVIEW OF THE REGIONAL DIRECTOR’S  
SECOND SUPPLEMENTAL DECISION AND DIRECTION OF ELECTION**

**I. INTRODUCTION**

Two and one-half years after filing this petition, student employees at The New School are finally scheduled to vote next week on whether to be represented by the union that they formed. The New School has filed this Request for Review of the Regional Director’s Second Supplemental Decision and Direction of Election in an apparent attempt to prevent the Regional Director from counting the ballots in this long-delayed election. The Employer contends that review should be granted on the ground that the Regional Director’s “decision on a ‘substantial factual issue is clearly erroneous’...”<sup>1</sup> (Er. Req. for Rev. at 1). After a careful study of the Employer’s Request, it is difficult to identify exactly what finding(s) of fact the Employer believes to be erroneous. The Employer seems to argue that the Regional Director erred by finding

---

<sup>1</sup> As this Petition was filed December 16, 2014, it is governed by the Rules and Regulations that were in effect prior to the amendments to the rules effective April 14, 2015. The criteria for granting review were set out in §107.67(c) of the “old rules.”

that employees in the unit are not temporary employees. But the Regional Director made no factual findings regarding the temporary status of any employees. Rather, she followed the precedent of *Columbia University*, 364 NLRB No. 90 (2016), to hold that the unit sought in the petition is appropriate, regardless of the temporary status of some or all of the employees. The findings of fact discussed in the Employer's Request for Review relate, not to the temporary status of any employees, but to the eligibility formula that she devised to determine which employees not employed at the time of the election should nevertheless be permitted to vote. The Employer has not requested review of that formula, and it never proposed any appropriate formula of its own. On the contrary, the purported "eligibility" formula proffered by the Employer would exclude employees actually on the payroll at the time of the election.

In short, the Employer has failed to come forward with even a colorable basis for requesting review. The Employer's argument is dense and confusing, but a consideration of its claims in the context of the Regional Director's Supplemental Decision reveals a complete lack of substance. Employees who have been waiting for two and one-half years should not be deprived of the opportunity to have their votes counted while they remain employed. This Request for Review should be denied forthwith.

## **II. PROCEDURAL HISTORY**

On December 17, 2014, Student Employees at the New School - SENS, UAW ("the Petitioner" or "the Union"), filed this petition seeking to represent a unit of student employees who provide instructionally-related services and research services for the

New School (“the Employer” or “the University”) (Bd. Ex. 1(a)).<sup>2</sup> The Regional Director dismissed the petition for the first time on February 6, 2015, holding that she was “constrained” to follow *Brown University*, 342 N.L.R.B. 483 (2004) (Bd. Ex. 1(i)). Just five weeks later, on March 13, the Board unanimously reversed the Regional Director’s Order, citing *New York University*, 356 N.L.R.B. No. 7 (2010) (“*NYU II*”), in which the Board had held that there were “compelling reasons for reconsideration of the decision in *Brown University*.” (Bd. Ex. 1(k)). More than two additional years passed before an election was finally scheduled in this case.

Following seven days of hearing, the Regional Director issued a decision in which she found that the petitioned-for unit is composed of individuals who provide services to the University that further the mission of the University and generate income for the University. Second, she found that these individuals receive financial compensation from the University for performing these services. Finally, it was undisputed that these individuals provide these services under the direction and supervision of the Employer. Thus, they fit the common law definition of “employee.” The Regional Director nevertheless concluded that she was compelled to again dismiss this petition because these individuals also happen to be students at the institution that employs them. Her decision again stated that she was “constrained” by the precedent of *Brown* to reach this conclusion (Dec. Dismissing Pet. 3, 19).

---

<sup>2</sup> References to the record in this proceeding shall be indicated as follows:  
 Second Supplemental Decision and Direction of Election ..... Dec. Dismissing Pet. (followed by page number)  
 Board Exhibits ..... Bd. Ex. (followed by Exhibit number)  
 Request for Review of the Second Supplemental Decision and Direction of Election ..... Req. for Rev. (followed by page number)  
 Supplemental Decision and Order Dismissing Petition ..... Dec. (followed by page number)

On August 23, 2016, more than a year after the Petitioner requested review of the Regional Director's second dismissal of the petition in this case, the Board issued the decision in *Columbia*, overruling *Brown*. The Board held that students at a university who provide services to that university in exchange for compensation are statutory employees if they have a common law employment relationship. Despite the clear relevance of this holding to the instant case, four months passed before the Board remanded this case to Region Two "for further appropriate action consistent with *Columbia*...." (Board Order dated December 23, 2016). More than three additional months passed before the Regional Director issued the Second Supplemental Decision, directing that this election be held May 3 and 4, 2017.

Because this case is governed by the rules in effect before April 14, 2015, any request for review is due before the election is held. However, even under the "old rules," the filing of a request for review does not stay the Regional Director's decision. Sec. 102.67. As the Employer's Request for Review is so devoid of substance, the Board should permit the election to proceed and the ballots to be counted, so that employees working this semester may learn the results of the election while still employed.

### **III. THE EMPLOYER'S REQUEST FOR REVIEW IS DEVOID OF SUBSTANCE**

#### **A. The Temporary Employee Issue**

The Employer argues that employees should be excluded from the unit on the ground that they are temporary employees, taking a variety of positions regarding which employees should be excluded. In taking these positions, the Employer disagrees, not with the Regional Director's findings of fact, but with her legal conclusions. The findings

of fact that the Employer discusses in the Request for Review relate to the eligibility formula ordered by the Regional Director. The central thesis of the Employer's argument is that "many of the students ... are clearly temporary or casual employees." (Req. for Rev. at 7). The Employer asserts that "the evidence adduced during the hearings *proved*, let alone merely inferred, that the Graduate Assistants' service in a continuing role ... was definitely not assured." (Ibid at 8; emphasis in original). The Employer cites at length to testimony that student employees are not assured employment of more than a semester at a time (Ibid at 8-10). This is not a controversial point and was recognized by the Regional Director. It is tautological that the status of an individual as a student employee has a limited duration destined to come to an end when the individual graduates or otherwise leaves school. The Board recognized this in *Columbia*, holding that students whose employment is of a short duration should not be excluded from the unit on the ground that their employment is temporary. The Employer willfully disregards this holding.

It is, of course, the Board's practice to exclude temporary employees from bargaining units otherwise composed of employees whose employment is of an indefinite duration.<sup>3</sup> *Columbia* argued that, because of the relatively short duration of their employment, masters' and undergraduate students should be excluded as temporary employees from a unit with doctoral students who generally worked several semesters over the course of five or more years. The Board rejected that argument in *Columbia*. The New School makes that same argument in its request for review. The Board in *Columbia* discussed at some length the practice of excluding temporary

---

<sup>3</sup> At one time, such employees were referred to as "permanent" employees. As most employees not represented by a union are regarded as "employees at will" with no job security, the phrase "permanent employee" is something of a misnomer.

employees from bargaining units. *Columbia* at 20. The Employer, in the Request for Review, quotes this discussion at length (Req. for Rev. at 13-14). The Employer ignores the following several paragraphs of the *Columbia* decision, in which the Board holds that the policy of excluding temporary employees from units of full-time and regular part-time employees does **not** apply to units of student employees. *Columbia* at 20-21. This holding is fatal to the Employer's entire argument, and affords a basis to deny review forthwith.

**B. The Regional Director's Findings of Fact**

The Employer's argument seems to be that the Regional Director erred by failing to find that certain unit employees are "temporary." As noted above, the Regional Director made no finding on that question, as no such finding is necessary to her conclusion that the petitioned-for unit is appropriate. Therefore, it is unnecessary to address the Employer's meandering and confusing discussion of the Regional Director's findings.

Moreover, even a cursory examination of its argument reveals that the Employer has not demonstrated that those findings are "clearly erroneous." The Employer begins by conceding that there is evidence to support the Regional Director's findings, noting that she chose to rely upon "some 'evidence'" rather than other evidence that the Employer characterizes as "the overwhelming body of record evidence." (Req. Rev. 6). One can read the Employer's memorandum repeatedly without identifying an instance in which the Employer identifies a single finding by the Regional Director that is contradicted by any specific evidence. The Employer complains that the Regional Director erred by basing her findings on some summaries of the evidence (Req. for Rev.

7). The Employer neglects to point out that the summaries relied upon by the Regional Director were based upon evidence submitted by the Employer. Thus, the Employer concedes that there is evidence to support the Regional Director's findings. After protesting the Regional Director's reliance upon summaries rather than the underlying data, the Employer complains that, where the Regional Director did consider the underlying data, she considered the wrong data (Req. for Rev. 11). In sum, the Employer has failed to present a coherent critique of the Regional Director's findings.

While the Employer does propose an alternative to the Regional Director's eligibility formula, that formula is unrelated to its attack on her factual findings. The Employer contends that eligibility to vote should be limited to student employees who worked a minimum of two consecutive semesters (Req. for Rev. 32-33). The Employer offers no explanation as to how this formula is related to the facts that it attempts to dispute, nor does it cite any precedent for such a formula. The Employer would deny the vote to student employees who are currently working unless they also worked during the previous semester. This position is directly contrary to the purpose of an eligibility formula and flies in the face of the Board's holding in *Columbia*.

The Board held in *Columbia* that, because of the intermittent nature of student employment, some student employees who "may not be eligible to vote under the Board's traditional eligibility date approach - should nevertheless be permitted to vote because of their continuing interest in the unit." *Columbia* at 21. The Board's "traditional eligibility date approach" is that, to be eligible to vote, an employee must have been hired and be working in the payroll period immediately preceding the direction of election. *Roy Lotspeich Publishing Co.*, 204 N.L.R.B. 517 (1973). "[E]ligibility formulas

attempt to include employees who, despite not being on the payroll at the time of the election, have a past history of employment that would tend to signify a reasonable prospect of future employment.” *Columbia* at 22. The Employer’s proposed formula would have the opposite effect: it would disenfranchise voters who would be eligible under the Board’s “traditional eligibility date approach.” This position warrants no consideration.

**C. Differences Between Columbia and the New School**

As the Employer points out, there are substantial differences between the New School and Columbia. The Employer is correct that Columbia is much larger and richer than the New School. As a consequence, Columbia can hire more of its students for longer periods of time and pay them a higher salary. Unlike the New School, Columbia fully funds its Ph.D. students so that they are guaranteed an income for several years as they work toward their degrees. Thus, there is a large group of student employees at Columbia who work several semesters over the course of their studies. Masters’ and undergraduate students, on the other hand, are generally employed for only one or two semesters. Despite this contrast in the employment pattern for doctoral students as opposed to masters’ and undergraduate students, the Board rejected the argument that the latter should be excluded from the unit as temporary employees and included them in the unit with doctoral student employees.

In the New School, fewer employees work multiple semesters. As a result, there is no large core group of employees, like the doctoral students at Columbia, who work over several years. Therefore, the contrast in the working patterns between different categories of student employees at the New School is less than the differences between

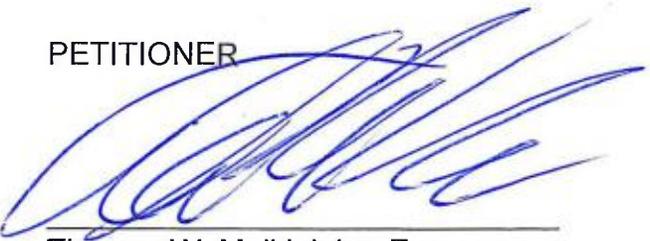
the undergraduate and masters' students and the doctoral students at Columbia. In addition, at Columbia, Ph.D. students receive a stipend in semesters when they are not working while masters' and undergraduate students receive compensation only in semesters when they are working. At the New School, all students receive compensation only in semesters when they are actively employed. It follows from these differences that the different categories of student employees at the New School share a greater community of interest than those at Columbia. Thus, the differences between Columbia and the New School support the Regional Director's conclusion that all of the petitioned-for employees share a community of interest and are properly included in the unit.

#### **IV. CONCLUSION**

The Employer's Request for Review raises no serious issues. The Employer provides no basis for finding that the Regional Director erred in her factual findings. The Employer's arguments are inconsistent with the Board's holding in *Columbia* that temporary employees are appropriately included in a unit of student employees. Accordingly, the Employer's Request for Review should be denied forthwith. The election should proceed next week and the ballots be counted upon the conclusion of the election.

PETITIONER

By:



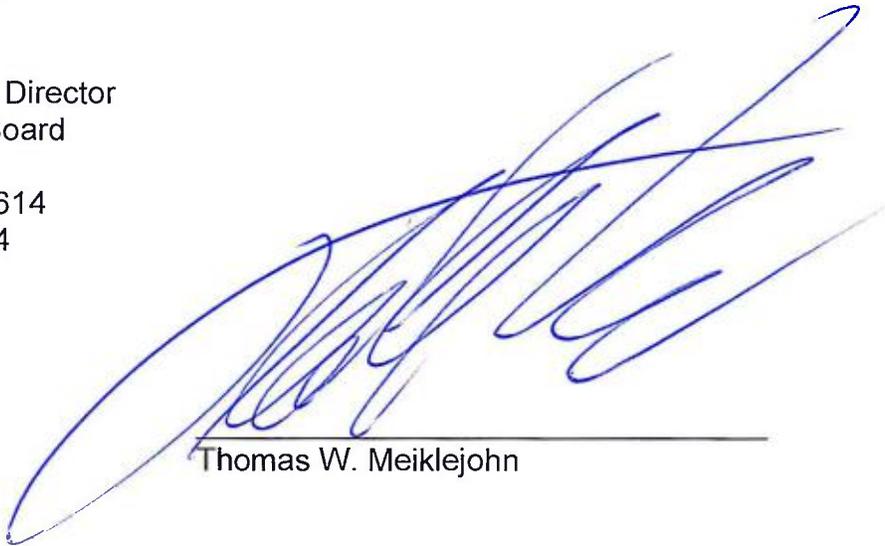
Thomas W. Meiklejohn, Esq.  
Nicole M. Rothgeb, Esq.  
Livingston, Adler, Pulda, Meiklejohn &  
Kelly, PC  
557 Prospect Avenue  
Hartford, CT 06105-2922  
(860) 570-4628  
[twmeiklejohn@lapm.org](mailto:twmeiklejohn@lapm.org)  
[nmrothgeb@lapm.org](mailto:nmrothgeb@lapm.org)

**CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing Petitioner's Opposition To Employer's Request for Review of the Regional Director's Second Supplemental Decision and Direction of Election was sent via email, on this 28<sup>th</sup> day of April, 2017, to the following:

Douglas P. Catalano  
Clifton, Budd & DeMaria, LLP  
The Empire State Building  
350 Fifth Avenue, 61st Floor  
New York, NY 10118

Karen Fernbach, Regional Director  
National Labor Relations Board  
Region Two  
26 Federal Plaza, Room 3614  
New York, NY 01278-0194



Thomas W. Meiklejohn