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

COLUMBIA UNIVERSITY

Employer

And **Case No. 02-RC-143012**

GRADUATE WORKERS OF COLUMBIA-GWC, UAW

Petitioner **January 20, 2015**

PETITIONER'S RESPONSE TO ORDER TO SHOW CAUSE

I. INTRODUCTION

Graduate Workers of Columbia-GWC, UAW ("the Petitioner") filed this petition on December 17, 2014, claiming to represent a unit of student employees employed by Columbia University ("the Employer"). This unit includes employees who provide instructional services and employees who work as research assistants. These employees are enrolled as students at Columbia and are paid to perform services that generate income for the University.

On January 12, 2015, the Regional Director issued an Order to Show Cause why this petition should not be administratively dismissed. The Order asks whether the petition should be dismissed on the authority of Brown University, 342 N.L.R.B. 483 (2004), without a hearing, on the ground that the petition seeks a unit of graduate student assistants who are not employees covered by the Act. Specifically, the Regional Director ordered:

> that the Petitioner provide written cause as to why this petition should not be dismissed based on the decision in *Brown University, supra.* The Petitioner should identify facts that it intends to present during a hearing

that support its position and would distinguish this case from *Brown University, supra.*

This memorandum is submitted in response to that order.

II. THE REGIONAL DIRECTOR SHOULD NOT DISMISS THIS PETITION BASED UPON BROWN

In Brown, the Board declared "Federal law to be that graduate student assistants are not employees within the meaning of Section 2(3) of the Act." 342 N.L.R.B. at 493. That decision overruled the decision in New York University, 332 N.L.R.B. 1205 (2000) ("NYU I"), holding that graduate student assistants have the right to organize under the NLRA. In reaching its holding, the Board in Brown relied heavily upon St. Clare's Hospital, 229 N.L.R.B. 1000 (1977) for the proposition that "students 'who perform services at their educational institutions which are directly related to their educational program'" do not have the right to organize. 342 N.L.R.B. at 487, quoting St. Clare's at 1002. St. Clare's, however, was expressly overruled in Boston Medical Center, 330 N.L.R.B. 152 at 152 (2000). There, the Board held that medical interns, residents and fellows are "employees," despite the fact that they were also students at the institution that employed them, performing services related to their medical education. After the Brown decision, the Board reaffirmed the holding of Boston Medical. St. Barnabas Hospital, 355 N.L.R.B. No. 39 (2010). Thus, there exists an inconsistency in the Board precedent regarding whether employees are excluded from the coverage of the Act merely because they are also students at the institution that employs them.[1]

[1] The Board in Brown also made that claim that the decision in NYU I had "reversed more than 25 years of precedent." 342 N.L.R.B. at 483, citing Leland Stanford Junior University, 214 N.L.R.B. 621 (1974). In fact, the Board in Leland Stanford did **not** hold that graduate student assistants could not be employees if they provided services for their university in exchange for compensation. Rather, the Board in Leland Stanford found that particular students were not employees on the facts of that case because they did not perform services that benefitted the university in exchange for compensation. The student employees in NYU I did perform services that benefitted the university.

The Board has made it clear that it wishes to address this inconsistency on the basis of a full evidentiary record. In 2010, the Acting Regional Director dismissed the petition in *NYU*, Case No. 2-RC-23481, without a hearing. The Board granted review of that decision, finding "compelling reasons for reconsideration of the decision in Brown University." New York University, 356 N.L.R.B. No. 7 (2010) ("NYU II"). The Board reinstated the petition, holding that the validity of Brown should be "considered based upon a full evidentiary record...." sl. op. at 2).

The following year, the UAW filed the petition in *Polytechnic Institute of New York University* ("*NYU Poly")*, Case No. 29-RC-12054. The petitioner sought a unit of student employees who fit the definition of graduate student assistants under Brown. The Regional Director for Region 29, recognizing the significance of the Board's holding in NYU II, conducted a hearing on the petition, rather than dismiss the case without a hearing on the authority of Brown. The Regional Director should do the same in this case.

Both *NYU II* and *NYU Poly* were ultimately dismissed by the respective regional directors on the basis of Brown after a full record had been made. The Board reaffirmed its intention to reconsider Brown by granting review of both decision. In granting review, the Board explicitly stated that it wished to consider the validity of the decision in Brown. This past May, the Board invited briefs on review in Northeastern University, addressing, *inter alia,* whether the Board should "adhere to, modify or overrule the test of employees status" applied in Brown. Case No. 13-RC-121359, Order dated May 12, 2014.

Thus, on three occasions the Board has stated that it wishes to reconsider the holding of Brown. The Board has also held that it wishes to consider this question on the basis of a full record. The Regional Director recognized as much when he conducted the hearing in *NYU Poly.* Consistent with the most recent decisions of the Board, the Regional Director therefore should conduct a hearing to enable the Board to address this issue on the basis of a full record.

III. FACTS THAT DISTINGUISH THIS CASE FROM *BROWN*

Based upon the Board decisions cited above, the Petitioner intends to argue in this case that Brown should be overruled. This result is mandated by the fundamental policies of the Act. Brown is premised upon a perceived inconsistency between an individual's status as an employee and status as a student. Such a dichotomy cannot be justified in logic or in the policies of the Act. The Brown decision also relies upon speculation about harms that would result from collective bargaining that has no objective or empirical basis. Contrary to that speculation, the Petitioner intends to offer evidence of successful collective bargaining among graduate student employees. Brown is also inconsistent with the broad definition of employee contained in Section 2(3) of the Act and with Supreme Court and NLRB decisions broadly interpreting Section 2(3). Finally, as discussed above, the Board based the Brown decision on St. Clare's, a decision that has been overruled and that cannot be reconciled with the holdings of Boston Medical and St. Barnabas. Therefore, even if this case were on all fours with Brown, a hearing should be held.

However, as directed in the Order to Show Cause, we make an offer of proof as to the factual distinctions between this case and Brown. At a hearing, we will show that

the Employer receives nearly One Billion Dollars ($1,000,000,000.00) in annual income from research projects funded by government, foundations and businesses. This income, generally in the form of grants, is conditioned upon the University conducting particular research projects. Research assistants in the petitioned-for unit perform a substantial portion of the work necessary to fulfill the conditions of these grants and generate this income for the Employer. We will also show that much of the rest of the work to fulfill the conditions of these grants is performed by post-doctoral and other employees who are not enrolled students at Columbia, but who nevertheless provide similar services to the research assistants, working in the same locations under similar working conditions. There was no evidence in Brown that the student employees at issue in that case did work that generated comparable sums of income.

In Brown, the Board found that teaching assistants generally did not "teach independently" and that the classes that they worked in were generally related to their education. 342 N.L.R.B. at 489. We will present evidence of teaching assistants at Columbia who do teach independently and who teach classes that bear little or no relationship to their courses of study. We will offer evidence that some of the employees in the unit sought do not even receive grades for performing their teaching functions. While teaching for many of the employees in the unit sought is offered as part of a financial aid package, we will offer evidence of employees who teach in exchange for income that is not offered as part of a financial aid package connected to their admission as students.

We will also present evidence that the Employer regards the work performed by employees in the petitioned-for unit to be part of an "apprenticeship." It is, of course,

well established that apprentices are considered to be employees within the meaning of section 2(3) of the Act. E.g., Newport News Shipbuilding & Dry Dock Co., 57 N.L.R.B. 1053, 1058-59 (1944), General Motors Corp., 133 N.L.R.B. 1063, 1064-65 (1961); Chinatown Planning Council, Inc., 290 N.L.R.B. 1091, 1095 (1988), *enfd.*, 875 F.2d 395 (2d Cir. 1989).

Therefore, while we intend to argue that Brown should be overruled, we can also present evidence that this case is distinguishable on its facts in ways that are related to the holding in Brown. Accordingly, for all the reasons stated above, this petition should not be dismissed.[2]

RESPECTFULLY SUBMITTED

By: _____

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[2] The Petitioner is prepared to proceed to an election in any unit found appropriate by the Board.