

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

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In the Matter of :
 :
THE TRUSTEES OF :
COLUMBIA UNIVERSITY :
IN THE CITY OF NEW YORK :
 :
Employer, : CASE NO. 2-RC-22358
 :
-and- :
 :
INTERNATIONAL UNION, UNITED AUTOMOBILE, :
AEROSPACE AND AGRICULTURAL IMPLEMENT :
WORKERS OF AMERICA (UAW), AFL-CIO :
 :
Petitioner. :
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**POST-HEARING BRIEF OF THE
TRUSTEES OF COLUMBIA UNIVERSITY
IN THE CITY OF NEW YORK**

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II

STUDENTS SERVING AS GRAs MUST BE CONSIDERED TO BE EMPLOYEES UNDER THE NLRA TO THE SAME EXTENT AS TAs

Graduate students who provide research services to Columbia as Graduate Research Assistants (“GRAs”) are indistinguishable from TAs who provide teaching services. If the Board determines that Columbia’s TAs are “employees”, then Columbia’s GRAs must be held to be “employees” as well.

In *New York University*, 332 N.L.R.B. No. 111 (2000), graduate students who worked as science research assistants were held not to be “employees” under the Act because they did not “perform a service for the Employer.” *See id.*, slip op. at 4 n.10.³⁶ The *NYU* decision relied upon the Board’s 1974 decision in *Leland Stanford Junior University*, 214 N.L.R.B. 621 (1974), in which research assistants in physics were held not to be employees. As explained by Member John Fanning in a subsequent case, the *Stanford* decision was based on the fact that the research assistants did not perform a service for Stanford.³⁷ Fanning noted that under the NLRA, an employee is one who performs services for another, from whom he or she receives compensation. Fanning explained that:

³⁶ At the same time, the Board determined that Research Assistants in NYU’s Departments of Psychology, Economics, and the Business School did provide a service to the University and were, therefore, “employees” included in the unit. *See NYU*, 332 N.L.R.B. No. 111, slip op. at 4 (2000).

³⁷ Fanning’s analysis was cited favorably by the Board in *Boston Medical Center* and by the Regional Director in *NYU*. *See Boston Medical Center Corp.*, 330 N.L.R.B. No. 30, slip op. at 9 (1999); *NYU*, slip op. at 12, 16 (2000).

[I]n terms of the actual research conducted, Stanford was, essentially, a disinterested party. Stanford did not control the research, did not request the research, and, most significantly, did not receive remuneration from a third party for the particular research.

Cedars-Sinai Med. Center, 223 N.L.R.B. 251, 255 n.14 (1976) (Fanning, M., dissenting).

Here, in sharp contrast to *Stanford* and *NYU*, the record establishes overwhelmingly that Columbia's GRAs do provide a service to the University: they perform research and related work that the University is obligated to perform under the terms of its numerous externally-funded research grants. (Tr. 183-84 (Israel), 197, 205, 209-10, 226-27 (Sohn), 938-58, 961-65, 969-73 (Kahn), 1156-59 (Hood), 1303-05 (Laine), 1322-24, 1336-38, 1347-49 (McKeown), 1890-92, 1898-1901, 1905-14 (Fine), 2163-65 (Kelley), 2656-60 (Messori), 3006-08 (Bulinski), 3246-47 (Laine); EX 47 at 2) Furthermore, Columbia's GRAs are recruited to do the work, they perform the work under Columbia's control, and are compensated for the work the same as the TAs are "compensated."³⁸ And "most significantly," Columbia "receive[s] remuneration from a third party [usually a government agency] for the particular research." *Id.*

Indeed, Columbia, unlike *Stanford* and *NYU*, is anything but a "disinterested party" with respect to the GRAs' work. As Dr. Michael Crow, the University's chief research officer, testified, Columbia's nearly 600 GRAs play an "essential" role in performing the research and related work required by the \$300 million in faculty research grants (comprising some 15%

³⁸ EX 47, entitled "Regulations Governing Awards in the Graduate School of Arts and Sciences," states that in the Natural Sciences, "the stipend received by the Faculty Fellows is paid to them not only to support their studies but also for services rendered, *i.e.* for teaching/research assistance, and income taxes must be withheld from such payments"

of the University's annual budget) that Columbia is awarded annually. (Tr. 3384-85) "They are in many ways the key research performers to implement those grants." (Tr. 3385) Therefore, under the standard established by *NYU* and *Stanford*, Columbia's GRAs are "employees" within the meaning of the Act.

Research grants usually originate with an application submitted by a faculty principal investigator to a federal agency proposing to conduct certain research within a specific time frame. (Tr. 163-64 (Israel)) The application includes a request for funding for personnel who will be performing the work — such as GRAs, post-docs, and technicians — in the form of an itemized budget, and frequently identifies the responsibilities that will be performed by the individuals to be supported under the grant. (Tr. 164 (Israel); EX 6 at 5-6, EX 12 at § 2) In the case of a GRA, the grant typically pays the GRA's stipend and tuition.³⁹ (Tr. 178-81 (Israel), 1335-36 (McKeown)) Primary responsibility for supervision of all personnel conducting the proposed research rests with the faculty principal investigator. (Tr. 164-165 (Israel))

It is readily apparent upon even a cursory review of the grant proposals included in the record that GRAs play an essential role in Columbia's ability to secure research grants and provide the services required under those grants. For example, EX 7 is a grant application (that was funded) for research on "Mechanisms governing polarity in *Drosophila* oogenesis." (Tr. 168-72 (Israel)) The grant is requested by Columbia University, not an individual faculty

³⁹ The National Institutes of Health ("NIH"), which is part of the Department of Health and Human Services which funds most faculty grants in the Natural and Basic Sciences at Columbia, caps the total amount of stipend and tuition "compensation" that the University can charge an NIH research grant for a GRA at \$26,000 per year. NIH's December 2, 1998 announcement of the cap referred to the GRAs as "employees of the grantee institution." (EX 10)

member, and two graduate students are specifically included in the description of the personnel working on the grant. (EX 7 at 4) The description identifies these GRAs by name, describes the precise tasks that they will be performing and even identifies their qualifications to perform those tasks. *Id.*

The record includes numerous other funded grant proposals that commit Columbia to perform specific research with the assistance of GRAs. (EXs 8, 9, 13, 76, 88, 150, 156, 163, 180, 202) Payments to GRAs are incorporated in the itemized budgets of these grant proposals. GRA stipends are included under the "salary" heading and a separate reference to reimbursement for tuition expenses is incorporated under the "other" expenses heading. (EXs 8, 9, 13, 76, 88, 150, 156 at 22-26, 163, 202 at 28-33; Tr. 178-81 (Israel), 1335-36 (McKeown))

The grant applications also frequently make reference to specific graduate students and the specific tasks that they will perform. Graduate students are identified by name among the personnel to be supported by the grant or in the budget justification for personnel costs. (EXs 8 at 4, 9, 13 at 4, 76 at 4, 150 at 4, 22, 163 at 4, 6, 180 at 13, 202 at 34) The specific tasks to be performed by the named GRAs are summarized in the budget justification or project description sections of the grant proposals. (*Id.*; EXs 88, 156 at 22-26; Tr. 178-81 (Israel), 1335-36 (McKeown)) Where a GRA has special training or skills, or prior experience, those qualifications are highlighted in the grant application and in some cases copies of the student's curriculum vitae or detailed biographical sketches are included with the grant application. (Tr. 174 (Israel), 2873-75 (Krantz), 3245-47 (Laine); EXs 13 at 8-10, 156 at 11, 21, 163 at 27, 180 at 13, 44-45) This detailed information is included in grant applications because it strengthens the

application and increases the likelihood that the grant proposal will be accepted for funding. (Tr. 3246-47 (Laine))

Funded grants impose specific contractual obligations on Columbia University. (Tr. 3385 (Crow)) The University simply cannot charge a research grant for the salary or tuition of a graduate student who is not providing services in support of that grant. (Tr. 183-84 (Israel), 205 (Sohn)) To do so would violate "one of the basic tenets of grantsmanship and one of the basic principles" under which grants are administered. (Tr. 184 (Israel); EX 11 at 4) Not only must a GRA perform services that support a grant, those services must be *necessary* to the grant. (Tr. 184 (Israel), 205, 226 (Sohn), 3903-04, 3912-15 (Ruttenberg); EXs 11 at 4, 12 at § 2.1.1.1) The NIH Grants Policy Statement, which governs most faculty research grants in the Natural and Health Sciences at Columbia (Tr. 3400-01 (Crow), 3901-02 (Ruttenberg); EX 185 at 16), requires that a GRA perform "activities necessary to the grant". (NIH Grants Policy Statement, Part II: Terms and Conditions of NIH Grant Awards; Tr. 3913-15 (Ruttenberg)) This provision is derived from Office of Management and Budget ("OMB") Circular A-21 which applies to all federal research grants awarded to Columbia. (Tr. 3915 (Ruttenberg))⁴⁰ Cost Principles for Educational Institutions, 65 Fed. Reg. 48566-01 (Aug. 8, 2000).

Numerous witnesses testified to the essential nature of the services performed by GRAs. (Tr. 100-01 (Cohen), 174 (Israel), 974 (Kahn), 1159-60 (Hood), 1306-08, 1324-25,

⁴⁰ Indeed, in order to comply with OMB and NIH regulations, graduate students at Columbia who are working on and being supported by research grants are required to be appointed as GRAs because it is an "employee classification." (Tr. 3913 (Ruttenberg); EX 12 at § 2.1.1.1) New graduate students are informed that if they are appointed GRAs, income taxes will be deducted from their "salary check" and they will receive a W-2 Earnings Summary from the University. (Tr. 3917-21 (Ruttenberg); EX 227)

1339-42, 1348-49 (McKeown), 1902, 1917 (Flynn), 2163-64 (Kelley), 2489, 2494-96 (Shortliffe), 2661 (Messeri), 3002-04, 3009-10 (Bulinski), 3250, 3260 (Laine), 3412, 3555 (Levin)) For example, Professor Barry Honig described the work being done by Cinque Soto, a Ph.D. student beginning his third year in the Biochemistry and Molecular Biophysics Program. (Tr. 3601) Mr. Soto is serving as a GRA on an NSF grant in rapid computational analysis of biological function. (Tr. 3599-3601; EX 202) The purpose of this grant is to develop software tools to study proteins and nucleic acids and to develop databases that can be used to better understand how proteins and nucleic acids function. (Tr. 3600) Mr. Soto is responsible for writing some of the software that was promised under this grant. (Tr. 3601) He works under the direction and control of Professor Honig, the PI on the grant, performing tasks assigned by Professor Honig that are necessary for the grant. (Tr. 3602-03) Mr. Soto is still in the early stages of the dissertation process and Professor Honig assigns him tasks without regard to whether they may advance Soto's dissertation research. (Tr. 3603) Rather, Professor Honig's concern is that the work promised in the grant application is being performed. (Tr. 3601, 3603) In exchange for performing these tasks, Soto receives tuition support and a "salary". (Tr. 3603)

Psychology Professor Donald Hood described the work Xian Zhang has performed for him as a GRA on an NIH grant from the Eye Institute relating to retinal disease. (EX 76) Mr. Zhang began working on this grant as a first year Ph.D. student, "running" the subjects and collecting data. (Tr. 1157-59) As he became more advanced in his studies, Mr. Zhang assumed greater responsibility designing some of the experiments, supervising undergraduates in the lab and ultimately designing very sophisticated programs for new analysis of the collected data. (*Id.*) Professor Hood has assigned Mr. Zhang specific tasks, such as

calibrations of the computer equipment used in the tests they are running, and he supervises Mr. Zhang directly, meeting with him daily and setting deadlines for the completion of assignments. (Tr. 1163-65) While some segment of the tasks that Mr. Zhang has performed may be applicable to his dissertation research, he has also performed many tasks that are necessary for the grant but “will certainly not be applicable” to his dissertation. (Tr. 1165-66)⁴¹

To secure future funding for this research, Professor Hood must publish articles relating to his research. (Tr. 1162) Mr. Zhang has assisted Professor Hood with his publications both through the services he provided in the lab and by co-authoring several articles with Professor Hood. (Tr. 1162-63; EXs 76 at 7, 72 at 10-11, 77, 78) These articles were then referenced in Professor Hood’s most recent application for renewal of the Eye Institute grant. (EX 76 at 5-7) The grant application specifically states the tasks that will be performed by Mr. Zhang and describes his training and ability to assume that responsibility. (Tr. 1160-61; EX 76 at 4) In exchange for his services, Mr. Zhang is compensated from funds provided by the grant. (Tr. 1166)

Professor Steven Kahn described the assistance he has received from five GRAs on a NASA grant for “Science and Calibration Support for the Reflecting Grade Spectrometer on the X-Ray Multi-Mirror Mission,” which involves the calibration of an instrument designed to detect and perform spectroscopic analyses on the x-ray band on stars, galaxies and the like. (Tr.

⁴¹ For example, Professor Hood assigned Mr. Zhang to calibrate a color monitor, a highly technical responsibility that required knowledge of the monitor’s physics as well as an understanding of the absorption characteristics of cells in the eye. Performing this task had nothing to do with Xiang’s doctoral research but it was essential to the successful completion of an experiment required by the grant. (Tr. 1225-26)

938-41; EX 69) The GRAs each assisted Professor Kahn in performing specific tasks required under the grant. (Tr. 952, 954-55)

Two GRAs, Jean Cottam and Joshua Spodek, worked primarily on calibration of the instruments, which is crucial to understanding how the instruments operate, and interpreting the data. (Tr. 942-46) Cottam also worked on the assembly of the flight instrument itself, development of software and scientific analysis of the data, and wrote scientific papers associated with that work. (Tr. 943-45) John Peterson, another GRA, worked on the software and played a significant role in analysis of the scientific observations, as well as post-launch calibration of the instruments. (Tr. 947-49) Masao Sako primarily worked on the analysis of scientific observations particularly with regard to astrophysical issues. (Tr. 950) Finally, Peter Leutenegger has been working on interpreting the astrophysical observations and particular kinds of sources. (Tr. 951)

The tasks performed by these GRAs satisfied specific obligations enumerated in the scientific data analysis section of the grant proposal. (EX 69 at 3; Tr. 959-60) Their work was “crucial to the success of both the development of the instrument and its utilization to do astrophysical science” and it resulted in the publication of scientific papers which helped Professor Kahn to secure future grants and contracts for other experiments. (Tr. 953) Not all of the work done by the GRAs for the grant was related to their dissertations and some of it was “completely unrelated.” (Tr. 957-58)

Similarly, Natalie Seiser has been working with Professor George Flynn as a GRA on a Department of Energy research grant on “Laser Enhanced Chemical Reaction

Studies.” (Tr. 1895-96; EX 99) In the most recent grant proposal, Professor Flynn described four types of proposed experiments that would be funded with the requested grant money. (EX 99 at 8-18) Seiser performed the experiments identified as item 1 on the grant application, pertaining to probing angular momentum constraints. (Tr. 1898-1901; EX 99 at 8-12) The grant also funded the purchase of certain lasers that Seiser used in performing those experiments. (Tr. 1901; EX 99 at 47-48)

In addition to her completion of these necessary experiments, Seiser has performed various other tasks that were required for the grant. When she first began working on the grant, Seiser assisted another GRA operating lasers for his experiments. (Tr. 1907-08) She has chaired the group seminar for Professor Flynn’s lab, organizing the weekly meetings and ensuring progress reports are ready. (Tr. 1898, 1913-14) She has also assisted Professor Flynn with preparation of slide material for him to use at various presentations, including the Department of Energy’s annual combustion contractors meeting where he was expected to present a progress report on the grant work. (Tr. 1898-99, 1908-12) In addition, Seiser has supervised undergraduates in the lab and worked with an undergraduate last summer on a paper that satisfies item number 4 of the proposed experiments as outlined in the grant application. (Tr. 1899, 1905-07; EXs 99 at 18, 100) Finally, because Seiser is completing her dissertation and going on to further studies, she has been training the post-doctoral fellow who will be taking over her responsibilities on the grant. (Tr. 1914-16) None of these tasks were required for Seiser’s dissertation. (Tr. 1893-95, 1905, 1908, 1910-12, 1914, 1916)

In fact, witness after witness testified — and it is undisputed on this record — that all GRAs perform work that is necessary to fulfilling Columbia’s obligations under its research grants (Tr. 952, 974 (Kahn), 1160 (Hood), 1309, 1325, 1342, 1349 (McKeown), 1903, 1917 (Flynn), 2489, 2493-95 (Shortliffe), 2661-62 (Messeri), 3004, 3010 (Bulinski), 3903-04 (Ruttenberg), 3260 (Laine), 3606 (Honig), 3385 (Crow), 205 (Sohn), 183-84 (Israel), 89 (Cohen)); and that if a GRA was not performing that particular work, it would be necessary to replace him or her — usually with another GRA or a post-doctoral fellow (“post-doc”) who would be paid out of the grant to perform that same work. (Tr. 99-100 (Cohen), 952-53 (Kahn), 1160-61 (Hood), 1309-10, 1342-43, 1349, 1415 (McKeown), 1914-16 (Flynn), 2494 (Shortliffe), 2662 (Messeri), 3004 (Bulinski), 3260 (Laine), 3601-02 (Honig))

Indeed, it is instructive to compare the GRAs with post-docs whom the Union contends are employees under the Act.⁴² GRAs and post-docs perform similar work and provide similar services to the University. (Tr. 2867-69 (Krantz), 3386, 3417-20 (Crow), 3604 (Honig)). As noted, a number of faculty principal investigators testified to the possibility of replacing a GRA on their grant with a post-doc. For example, Professor Flynn testified that when his GRA (Natalie Seiser) graduated, he attempted to recruit another graduate student to take over Seiser’s work on the grant as a GRA. When he was unsuccessful in doing so, Flynn hired a post-doc to take over from Seiser. (Tr. 1914-16 (Flynn)) Other GRAs who have received their doctorates have continued to perform the same work on the grant in the position of post-doc. (Tr. 3603-04 (Honig), 3386-7 (Crow), 2828-29 (Krantz), 3008 (Bulinski); EX 202 at 34)

⁴² The term “post-doc” is frequently used at Columbia to refer to the title of post-doctoral research scientist.

During the hearings, the Union did not contest the overwhelming evidence that GRAs provide a service to Columbia. But the Union argues that the GRAs are nonetheless students and not employees because the work that the GRAs perform for Columbia is required for their degree.

The Union's position that TAs are employees because they provide a service while GRAs are not employees because they are merely doing that which is required for their degree is both factually incorrect and fundamentally inconsistent. It is incorrect because witnesses in many departments and programs testified that GRAs' research and related work is not limited to their own dissertations, including: Anatomy, Biology and Pathology (Tr. 3025 (Bulinski)); Biochemistry (Tr. 3251-53, 3264-66, 3277 (Laine)); Biostatistics (Tr. 3556 (Levin)); Chemistry (Tr. 1905-19 (Flynn)); Computer Science (Tr. 1313-15, 1329-30, 1345-46, 1351, 1398-99 (McKeown)); Environmental Health Sciences (Tr. 3503 (Brandt-Rauf)); Medical Informatics (Tr. 2489-92 (Shortliffe)); Neurobiology and Behavior (Tr. 2164-66, 2170-71, 2177-78, 2180 (Kelley)); Physics (Tr. 956-58, 967-68 (Kahn)); Psychology (Tr. 1165-66, 1174 (Hood)); and Sociomedical Sciences (Tr. 2653-54, 2663 (Messeri)).⁴³ And it is inconsistent

⁴³ The Union's reliance on the description of a GRA that appears in the Faculty Handbook, as a graduate student "who is engaged in research that is in direct fulfillment of a requirement for [the] degree" (EX 2 at 121) is misplaced because the description does not state that a GRA performs such research exclusively. Indeed, in some situations the GRA research is entirely unrelated to their dissertations. (Tr. 2653-54, 2663 (Messeri) ("[I]t has been the custom and tradition at the School of Public Health that graduate research assistants are hired . . . without any specific expectations that the research activities they do are necessarily related to their ultimate choice of dissertation topic."), 3503 (Brandt-Rauf)) In other departments, such as Population and Family Health, and Computer Science, masters students serve as GRAs and their GRA research clearly does not fulfill any academic obligations. (Tr. 1302, 1305, 1315 (McKeown); EX 194)

Further, as previously discussed, the tasks performed by doctoral students serving as GRAs that
(continued...)

because in many departments, teaching, like dissertation research, is a required component of the doctoral program, and service as a TA fulfills a degree requirement. (*See Point I(B), above*) The Union cannot have it both ways. Either the academic benefit that a graduate student derives from serving as a TA or GRA precludes a claim of employee status under the NLRA, or the academic benefit is merely incidental and TAs and GRAs must be equally recognized as employees based on their provision of services to the University.

The Union's remaining attempts to apply *NYU* here are equally unpersuasive because the facts herein are clearly distinguishable from those before the Board in the *NYU* case. Columbia's GRAs — unlike the science research assistants held not to be employees in *NYU* — work under the direction and control of faculty members, with consistent supervision (Tr. 953-54, 967 (Kahn), 1163-64 (Hood), 1310-11, 1326, 1343, 1350 (McKeown), 1903-04, 1917 (Flynn), 2659 (Messeri), 3004-05 (Bulinski), 3250-51, 3260 (Lloyd), 3385-86 (Crow)); perform specific tasks (Tr. 954-56, 974-75 (Kahn), 1164-65 (Hood), 1312, 1328-29, 1345, 1350-51

⁴³ (...continued)
are unrelated to their research are not mere preliminary or incidental matters that would be required of any student researcher, regardless of the source of his or her funding. Rather, GRAs are asked to perform these tasks because they are required under the grant. (Tr. 957, 1004-05 (Kahn), 1314-15, 1329-30 (McKeown), 1909-11 (Flynn), 1207-17 (Hood), 2165-66, 2180 (Kelley), 3251-53, 3264-66 (Laine); *see also* Tr. 1005 (Kahn) (if GRA Jean Cottam refused to perform tasks because they were not related to her dissertation, he "would conceivably not agree to continue paying the student as a GRA."), 3308 (Laine) (mundane support tasks required under the grant would be assigned only to students supported by that grant, because "they are being paid a salary to perform the services of that grant or contract . . ."), 2175-76 (Kelley) (discussing a non-GRA Fellowship student who, during his three years in Kelley's laboratory performed no support services.))

In any event, research done by GRA (like teaching done by a TA) — whether related to the student's dissertation or not — usually serves two purposes: it both fulfills the student's degree requirements and provides a service to the University with respect to the grant. In the case of the TA, the student's teaching both trains the student and usually fulfills a degree requirement; while also providing a service to the University.

(McKeown), 2492-93, 2663 (Messeri)); are required to commit a set number of hours to perform the required work (EX 12, Sec. 3.6.2.2.5; EX 50 at 3); and are required to meet deadlines. (Tr. 956, 967, 975 (Kahn), 1164-65 (Hood), 1312, 1328-29, 1345, 1350-51 (McKeown), 2492-93 (Shortliffe), 3251, 3266 (Marcuse), 3386 (Lloyd)) *See NYU*, slip op. at 15-16. And, of course, most importantly, Columbia's GRAs (unlike those at NYU) provide services to the University.

Accordingly, if the Board determines that Columbia's TAs are employees who are subject to collective bargaining, then the GRAs at Columbia must also be considered employees within the meaning of the NLRA. Like research assistants in NYU's Psychology and Economics departments and Stern School of Business, GRAs in departments throughout Columbia provide an important service to the University in exchange for "compensation." They thereby satisfy the classic definition of an employee, and the import of their role is comparable to (if not more important than) that of the TAs throughout the university whom the Union contends must be considered employees.