UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

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August 31, 2016
via fax and mail

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Re: *The Trustees of Columbia University in the City of New York*
Case 02-RC-143012

Dear Counsels:

As you know, on August 23 the Board issued its Decision on Review and Order in this case. The Board has remanded the case to me for further appropriate action, including reopening the record, if necessary, to establish an appropriate voting eligibility formula. Accordingly, I am writing to solicit your positions regarding the formula to be applied and what evidence should be considered in devising the formula.

Please provide a proposed voting eligibility formula in accord with the Board's Decision and identify by exhibit number and brief description the record evidence you believe relevant to the formula. Please further identify additional evidence, if any, that you believe the Region may require to fashion an appropriate formula, with a brief description of the relevance of any such additional evidence.

Please submit your responses no later than close of business Wednesday, September 7, 2016.

Very truly yours,

Karen P. Fernbach

Karen P. Fernbach
Regional Director

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September 14, 2016

VIA EMAIL

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26 Federal Plaza, Suite 3614
New York, NY 10278-3699

RE: The Trustees of Columbia University in the City of New York
Case No. 02-RC-143012

Dear Ms. Fernbach:

On August 23, 2016, the Board issued its Decision on Review and Order in the above-captioned case, reopening the case and finding that the following unit is appropriate for purposes of collective bargaining:

> INCLUDED: All student employees who provide instructional services, including graduate and undergraduate Teaching Assistants (Teaching Assistants, Teaching Fellows, Preceptors, Course Assistants, Readers and Graders); All Graduate Research Assistants (including those compensated through Training Grants) and All Departmental Research Assistants employed by the Employer at all of its facilities, including Morningside Heights, Health Sciences, Lamont-Doherty and Nevis facilities.
>
> EXCLUDED: All other employees, guards and supervisors as defined in the Act.

The case has been returned to the region for a determination as to an eligibility formula for employees who are not on the payroll in the current semester.

The Board's Directive Regarding an Eligibility Formula

The Board and the Regional Director found that student employees in bargaining unit positions are appointed on a semester basis. They generally work in some of the semesters while they are enrolled as students but not in other semesters. The Board held that, because of these "intermittent semester appointments," some employees should be permitted to vote "because of their continuing interest in the unit" who would not be eligible "under the Board's traditional eligibility date approach." Columbia University, 364 N.L.R.B. No. 90 at 21.[1] Rather than make individual determinations as to whether a particular employee has a "reasonable expectancy" of returning to work in the unit, the Board instructed the Regional Director to devise an eligibility formula. The purpose of this formula is to identify employees who have worked in the past, are not currently working, but who are likely to have a "continuing interest in the terms and conditions of employment of the unit...." sl. op at 21.

The Board also offered some guidance as to how to develop such a formula. The Board noted that eligibility formulas generally are based upon patterns of employment in the field and the extent to which past employment "serves as an approximate predictor of the likelihood of future employment." sl. op. at 22. The Board cited three cases establishing such formulas in three varied industries, to illustrate the approach that the Regional Director should take. In the construction industry, employees who are not on the payroll at the time of the election are nevertheless permitted to vote if they have worked for the employer for at least 30 days within the year preceding the eligibility date or 45 days within two years before the eligibility date. Steiny and Co., 308 N.L.R.B. 1323 (1992). Stagehands and technicians employed at an entertainment venue are considered to have a sufficient interest in terms and conditions of employment if they have worked an average of four hours per week for the calendar quarter preceding the eligibility date. Trump Tai Mahal Casino, 306 N.L.R.B. 294 (1992). The Board in Trump emphasized that an eligibility formula should be "inclusive - not exclusive - ... to permit optimum employee enfranchisement and free choice, without enfranchising individuals with no real continuing interest in the terms and conditions of employment offered by the employer." 306 N.L.R.B. at 296. Finally, the Board in this decision discussed the eligibility formula for adjunct faculty members. Adjuncts may vote if they have been employed in at least two out of three academic years and have a contract with the university. C.W. Post Center of Long Island University, 198 N.L.R.B. 453 (1972).

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[1] 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).

Findings Relevant to the Eligibility Formula

Doctoral students admitted to the Graduate School of Arts and Sciences ("GSAS") are awarded a standard Dean's Fellowship, which provides a five-year funding package including tuition, health insurance and a stipend (R.D. Dec. at 6; Er. Ex. 36, 37 and 38). Columbia requires doctoral students in the Humanities and in the Social Sciences to perform teaching or research duties in order to receive this funding during the second, third and fourth years. Students may be excused from these "service obligations" during a given semester if they obtain a grant from a government or other outside funding source to cover that semester (Tr. 216-17). No work is required during the first or the fifth years (R.D. Dec. 6).

Doctoral students in the Natural Sciences at GSAS are required to begin teaching in the first year in order to receive funding (Er. Ex. 39; Tr. 749). Student employees are appointed for one or two years in teaching positions and then move on to research appointments (Tr. 749; Er. Ex. 100). The process at the Fu School of Engineering and Applied Science is similar. The Fu School typically awards doctoral students four or five years of funding, all of which require service as either a Teaching Assistant or a Research Assistant. Normally, the student employee will work as a Teaching Assistant in the first year and then obtain a position as a Research Assistant (R.D. Dec. 22; Tr. 657; Er. Ex. 886-88).

Most Ph.D. students, particularly those in the Humanities or the Social Sciences, do not obtain their degrees during the period for which they receive funding. Students typically require eight or nine years to complete their studies in the Humanities, six or seven years in the Social Sciences, and five or six years in the Natural Sciences (R.D. Dec. 5). After the fifth year, students continuing to pursue their degrees are offered teaching positions in exchange for the same funding package as is provided to Dean's Fellows, as long as there is a need for their instructional services (R.D. Dec. 6; Tr. 463-64). The Dean of GSAS testified that it is "customary" for students to be provided additional teaching opportunities (Tr. 463).

A statistical study introduced by the Employer confirms that most doctoral students perform teaching or research responsibilities for more than the three years required of Humanities and Social Science students as a condition of their Dean's Fellowship packages. Thus, Ph.D. students who completed a degree program during the two and one-half year period beginning with the 2012-13 academic year through the Fall term of 2014-15 had an appointment to either teach or perform research for an average of 9.19 semesters (Er. Ex. 4; R.D. Dec. 15). That is, on average, doctoral students perform services for more than a year and one-half beyond the amount

required under the standard Dean's Fellowship in the Humanities and the Social Sciences.

Thus, student employees who are pursuing their doctoral degrees are likely to leave the bargaining unit and return to it before graduation. Their employment is "intermittent" as described in the Board's decision. They may leave the bargaining unit because they have found funding that does not require services during a semester, or because they have entered the fifth year, when services are not required to receive the funding package. In either event, they are likely to resume working in the bargaining unit before graduation and therefore to retain an interest in the terms and conditions of the bargaining unit. Accordingly, a formula should be devised with respect to doctoral student employees who have been employed in the bargaining unit in the past but are not employed in the current semester.

The evidence is very different with respect to the masters' and undergraduate student employees in the bargaining unit. The Regional Director found that these student employees, on average, serve for only two semesters, normally during the final year of their studies (R.D. Dec. 30). Thus, unlike doctoral student employees, the employment of masters' and undergraduate students in bargaining unit positions is not "intermittent." Once they leave their positions, they are unlikely to return. Accordingly, there is no need to develop an eligibility formula for masters' and undergraduate student employees.

A Suggested Eligibility Formula

The eligibility formulas in the cases cited by the Board contain two essential elements: an amount of work required to be eligible (a "work requirement"), and a period of time during which the employee must have performed that amount of work (a "lookback period"). Both elements are determined by the nature of the industry and by the relationship between the amount of work performed and the likelihood of an interest in the terms and conditions of unit employees.

The Petitioner proposes a "work requirement" of one semester. A period of one semester is related to the work of the University. The University provides services and conducts its operations on the basis of semester units. Employees are generally appointed to unit positions for a period of a semester.

Doctoral students who have worked at least one semester in the recent past share interest with student employees currently working. A student may receive outside funding for a semester or a year that excuses him from working after only one semester

In the unit. Such a student would be likely to return to the unit when the outside funding expires. This may occur after one semester of employment in the unit or after two years in the unit. In either event, the student retains an interest in her employment in the unit. The likelihood that the student will return to active employment is the same, regardless of how many semesters she has worked before receiving the outside funding. If a student is on a funding package, the number of semesters he has worked in the past is not predictive of whether he will return to performing unit work. Indeed, the more semesters an employee has worked, the more likely he may have used up his work opportunities. Therefore, a work requirement of one semester is sufficient to establish an interest in terms and conditions in the unit.

A lookback period of one academic year is appropriate for this formula. The cases cited by the Board utilize lookback periods ranging from as little as three months to as much as three years. A three-year lookback period is used for adjunct faculty in academia, C.W. Post, supra, but the employment pattern for adjuncts is very different from the pattern for graduate assistants. Adjuncts may work for extended periods of time, often many years, but only when there is work available. Doctoral students working to fulfill the work requirements of a funding package are unlikely to cease working for an extended period. There may be a break of one year during the fifth year of the Dean's Fellowship or because of an outside grant. A longer break in service, on the other hand, is an indication that the doctoral student is no longer relying upon unit employment for financial support during her studies. The longer a student employee is out of the bargaining unit, the less likely she will return. Therefore, a single year lookback period is appropriate.

In conclusion, based upon the record of this case and the nature of academic operations, any doctoral student employee at Columbia who worked at least one semester during the past academic year should be entitled to vote, in addition to those on the payroll during the eligibility period. No eligibility formula is necessary with respect to masters' and undergraduate student employees. There is no reason to reopen the record to decide upon an appropriate formula. The purpose of an eligibility formula is to eliminate the need to take evidence regarding the likelihood that particular employees will return to work. The formula should be based upon the pattern of employment at this University. The record contains sufficient evidence with respect to that pattern. No additional evidence is needed.

A doctoral student employee at Columbia who has worked in a unit position for at least one semester within the past academic year or who is currently employed has a sufficient interest in working conditions to be permitted to vote.

Very truly yours,

Thomas W. Meiklejohn

TWM:vds
Enclosures

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September 14, 2016

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VIA FAX AND MAIL

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Re: The Trustees of Columbia University in the City of New York
Case 02-RC-143012

Dear Ms. Fernbach:

Columbia agrees that "the unique circumstances of student assistants' employment" raise significant voter eligibility issues," and shares the view that a balance needs to be struck "between the need for an ongoing connection with [the] unit and concern over disenfranchising voters who have a continuing interest," despite the intermittent nature of their employment. *The Trustees of Columbia University in the City of New York, Case 02-RC-143102 (August 23, 2016)* at 21 -22. To be clear, Columbia supports striking that balance so as to ensure that every student with a bona fide, continuing interest is entitled to vote.

Based on considerable effort expended analyzing student appointment patterns, with particular emphasis on students who will not be appointed this semester but whose history of appointments might signify a "reasonable prospect" of their being appointed again, Columbia believes that the following eligibility criteria are clear:

1) All students who hold a semester long appointment or training grant for fall 2016 should be eligible to vote.
2) Doctoral students in their second through fourth years who were previously appointed but do not hold a semester long appointment for fall 2016 should be eligible to vote.
3) Students on the casual payroll who work in instructional or research positions should be eligible to vote only if they have been engaged for the full fall semester.
4) Any student who has never been appointed and does not hold a semester long appointment or training grant for fall 2016 should not be eligible to vote.
5) Doctoral students in the fifth year or beyond who do not hold a semester long appointment for fall 2016 should not be eligible to vote because their past appointment history in light of the available data does not tend to signify a reasonable prospect of future appointment as required by the Board's decision.
6) Masters and undergraduate students without a semester long appointment for fall 2016 should not be eligible to vote; traditional eligibility requirements should apply to these

students because their brief tenure at the University does not tend to signify a reasonable prospect of future appointment as required by the Board decision.

Appointment patterns for doctoral students vary based on factors that include: (i) area of study, because different departments have different minimum teaching requirements, and students in different departments typically teach during different years (Tr. 447:17-19; Tr. 657:6-10; Tr. 749:16-22; Tr. 856:1-6); (ii) availability of external funding, which enables (and sometimes requires) a student to forgo appointments beyond the minimum department requirement (Tr. 72: 5-15; Tr. 465:23-466:2; Tr. 600:22-24), and (iii) availability of appointment opportunities beyond those required, which vary from department to department and year to year, together with each student's willingness to seek such optional appointments. (Tr. 463:22-464:2; Tr. 466:2-14; Tr. 820:15-19; Tr. 831:16-21)

In the Graduate School of Arts and Sciences, for example, many doctoral students are not appointed in the first year, are appointed for the next three, and then have a fifth, "fellowship" year to work on their dissertations full time. (Tr. 301:16-302:6) This "pattern" is borne out by a statistical analysis of instructional appointments, which shows that only approximately 20% of doctoral students beyond their fifth year hold instructional appointments, and that only approximately 25% of fifth year students without an instructional appointment will be appointed again. These statistics show, at least with respect to instructional appointments, that students in the fifth year or beyond who are without an appointment this fall should not vote, regardless of their prior appointments, because the available data does not tend to signify a reasonable prospect of their being appointed again.

The data is clearer with respect to doctoral students who hold research appointments. Our analysis indicates that unlike teaching appointments, which are more often intermittent, graduate research assistants are typically appointed for several years in a row; once they experience a "break in service" such students are very unlikely to be appointed again. Indeed, no more than 10% of fifth year doctoral students who held a research appointment in the past but are without an appointment this fall will be appointed again.

Although our analysis supports the eligibility criteria we suggest above, Columbia remains willing to participate in a conference with the Regional Director to review this proposal and answer any questions necessary to ensure that the eligibility criteria are consistent with the balance described by the Board.

Very truly yours,

Bernard M. Plum

cc: Tom Meiklejohn, Esq.
Nicole M. Rothgeb, Esq.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

THE TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK, **Employer** **and** **GRADUATE WORKERS OF COLUMBIA-GWC, UAW** **Petitioner**	**Case No. 02-RC-143012**

Date of Electronic Mailing: September 15, 2016

AFFIDAVIT OF SERVICE OF: Conditional Request For Review Of The Trustees Of Columbia University In The City Of New York

I hereby certify that, on the 15th day of September 2016, I served the above-entitled document(s) by the methods indicated below, upon the following persons at the following addresses:

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Dated: September 15, 2016

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September 22, 2016

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VIA FAX AND MAIL

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Region 2
26 Federal Plaza, Suite 3614
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Re: The Trustees of Columbia University in the City of New York
Case 02-RC-143012

Dear Ms. Fernbach:

Columbia writes with regard to the Union's letter to the Regional Director dated September 14, 2016, in order to clarify points of agreement and disagreement with the Union regarding the proposed eligibility criteria.

Columbia and the Union agree that only Masters and Undergraduate students who are appointed for the fall 2016 term should be eligible to vote. Columbia and the Union further agree that First through Fourth Year doctoral students in the Graduate School of Arts and Sciences who were either previously appointed or are appointed for fall 2016 should be eligible to vote. With respect to doctoral students who do not have an appointment this fall, Columbia's proposed eligibility criteria is actually broader than the criteria proposed by the Union: Columbia proposed that any such doctoral students who had been previously appointed - at any time - should be eligible to vote, whereas the Union proposed a one year "lookback" to determine eligibility.

Columbia and the Union disagree, however, on the eligibility of doctoral students in their fifth year or beyond who do not hold an appointment for the fall. For these students, Columbia contends that eligibility should hinge on the likelihood of their being reappointed in the future rather than on their past appointments. Because its statistical analysis demonstrated that these students have no "reasonable prospect" of reappointment, Columbia proposed that doctoral students in their fifth year or beyond should be eligible to vote only if they hold an appointment for fall 2016. The Union, without reference to the students' likelihood of reappointment, proposed that doctoral students in their fifth year or beyond should be eligible to vote if they are appointed for fall 2016 *or* if they have been appointed at any time in the past year.

The Union's proposal effectively ignores the Board's mandate to develop a formula that serves as an "approximate predictor of the likelihood of future employment." *Trustees of Columbia University in the City of New York, Case 02-RC-143102 (August 23, 2016)* at 22. The Regional Director should not make the same mistake.

In fashioning its proposal, the Union presented no data tending to indicate the likelihood of reappointment for doctoral students in the fifth year or beyond. Instead, the Union relied on an exhibit showing the average number of past appointments, Employer's Exhibit 4, and claimed that the exhibit showed that doctoral students "either teach or perform research for an average of 9.19 semesters." The Union further claimed that 9.19 terms were "more than a year and one-half beyond the amount required under the standard Dean's Fellowship[,]" and alleged that this statistic proved that "student employees who are pursuing their doctoral degrees are likely to leave the bargaining unit and return to it before graduation."

To begin with, the Union's characterization of Employer's Exhibit 4 misconstrues the record, which makes clear that there are three terms per year for Columbia University doctoral students (fall, spring, summer). *See* Tr. 73: 10-15. To the extent that an average of past appointments is meaningful at all in this analysis, it would be closer to three years rather than four and one-half years. Furthermore, the exhibit shows the average number of terms of appointment for all doctoral students, not just the doctoral students in the Humanities and Social Sciences that the Union focuses on; it cannot be used to demonstrate the average number of terms for doctoral students in any specific school or division, particularly because that number differs from department to department and school to school.

Most importantly, the Union's reliance on Employer's Exhibit 4 ignores what the Board said about that document. The Board stated that "the record contains data concerning the average number of semesters worked relative to a student assistant's time enrolled at the University[,]" *Columbia University*, *Case 02-RC-143102* at 22, but that it did not indicate what would be the "appropriate formula under these circumstances." *Id.* As the Board noted, the issue with this data is that it only shows the average terms of enrollment and appointment for doctoral, masters and undergraduate students. The Exhibit provides no information on the patterns of appointment for doctoral students either by school or by division. Furthermore, and most harmful to the Union's proposal, the statistics provide no basis on which to predict whether students without a current appointment are reasonably likely to have a future appointment. The Union's reliance on this data, and its failure to introduce any information indicating the likelihood that doctoral student in their fifth year or beyond will be reappointed, should be fatal to their proposed eligibility criteria.

Columbia's proposal, on the other hand, is based on a statistical analysis that demonstrates the "reasonable prospect of future employment" for doctoral students in their fifth year and beyond. *Id.* These statistics show, as stated in Columbia's initial letter, that: (i) only approximately 20% of doctoral students beyond their fifth year hold instructional appointments; (ii) only approximately 25% of fifth year students without an instructional appointment will be appointed again; and (iii) no more than 10% of fifth year doctoral students who held a research appointment in the past but are without an appointment for this fall will be appointed again. These statistics show that students in the fifth year or beyond who do not have an appointment for fall 2016 have no reasonable prospect of being appointed again and therefore should not be eligible to vote. To hold otherwise would ignore the exhortation of *Trump Taj Mahal Casino*, 306 N.L.R.B. 294 (1992), that the eligibility criteria should not "enfranchise[e] individuals with

no real continuing interest in the terms and conditions of employment offered by the employer." *Id.* At 296.

Although the analysis supports the eligibility criteria Columbia suggested regarding doctoral students in their fifth year and beyond, any questions regarding eligibility should be resolved at an evidentiary hearing. As noted in our original letter, Columbia remains willing to participate in a conference with the Regional Director to review Columbia's eligibility criteria proposal and answer any questions necessary to ensure that the eligibility criteria are consistent with the balance described by the Board.

Very truly yours,

Bernard M. Plum

cc: Tom Meiklejohn, Esq.
Nicole M. Rothgeb, Esq.

bcc: Jane Booth
Pat Catapano
Ed Brill
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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

THE TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK, **Employer** **and** **GRADUATE WORKERS OF COLUMBIA-GWC, UAW** **Petitioner**	**Case No. 02-RC-143012**

Date of Electronic Mailing: September 23, 2016

AFFIDAVIT OF SERVICE OF: Conditional Request For Review Of The Trustees Of Columbia University In The City Of New York

I hereby certify that, on the 23rd day of September 2016, I served the above-entitled document(s) by the methods indicated below, upon the following persons at the following addresses:

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Dated: September 23, 2016

Yonatan L. Grossman-Boder

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October 6, 2016

VIA EMAIL

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RE: The Trustees of Columbia University in the City of New York
Case No. 02-RC-143012

Dear Mr. Murtagh:

I am writing on behalf of the Petitioner to respond to the Employer's position regarding eligibility to vote in the election in the above-captioned case. On August 23, 2016, the Board remanded the case for the Regional Director to establish an eligibility formula and to conduct an election in the Unit found appropriate. The Board stated, with respect to the open issue, "There remains the issue of which of the employees in the petitioned-for unit – some of whom, on account of intermittent semester appointments, may not be eligible to vote under the Board's traditional eligibility date approach – should nonetheless be permitted to vote because of their continuing interest in the unit." Columbia University, 364 N.L.R.B. No. 90 at 21. After discussing the sporadic nature of Unit employees' employment and cases in which the Board has established eligibility formulae, the Board concluded, "Having determined the appropriate unit, we therefore remand this case and instruct the Regional Director to take appropriate measures, including reopening the record, if necessary, to establish an appropriate voting eligibility formula." sl. op. at 22.

On September 14, 2016, at the invitation of the Regional Director, each party submitted its position regarding voting eligibility, and the Employer followed with a response to the Union's position on September 22. As the Employer correctly points

out in that latter missive, the parties are in agreement with respect to the following categories of student employees:

- The only Masters' and Undergraduate students who should be eligible to vote are those appointed to a bargaining unit position during the current semester, as the record shows that their employment is not sporadic.

- Ph.D. students appointed to Unit positions in the current semester are eligible to vote.

- There should be circumstances in which students in the Second through the Fourth years should be eligible, regardless of whether they are on the payroll during the semester of the election. However, the parties disagree as to the standards for determining whether students in those years should be permitted to vote. The parties' disagreement in this regard is unlikely to affect the eligibility of a significant number of individuals.

The most significant disagreement between the parties concerns doctoral students in Fifth year and beyond. The Employer argues that they should be categorically excluded unless they are on the payroll at the time of the election. The Union contends that, as directed by the Board, the Regional Director should establish a "voting eligibility formula" for doctoral students. The formula proposed by the Union would permit any doctoral student who has worked at least one semester in the past year and who is still enrolled as a doctoral student to vote in the election. As set forth in greater detail below, the Union's formula is consistent with Board precedent and with the directive of the Board. The Union would apply this formula to all doctoral students, including those in the second through the fourth years, while the Employer would permit students in those years to vote, even if they had not had appointments in the bargaining unit for as much as two years. The Union, in short, has devised a "formula," while the Employer argues for arbitrary categories of students whose eligibility would be determined on the basis of their academic progress rather than on the basis of their employment history.

The Regional Director Should adopt the Union's Formula

The remand Order from the Board is quite explicit and clear that the Board expects the Regional Director to establish a ***formula***, not arbitrary categories. Thus, the Board stated:

> The Board attempts to strike a balance between the need for an ongoing connection with a unit and concern over disenfranchising voters who have

> a continuing interest notwithstanding their short-term, sporadic, or intermittent employment. Setting such rules on a pre-election basis ***by use of eligibility formula*** also serves the efficiency goal of avoiding protracted post-election litigation over challenges to individual voters. Such ***eligibility 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. We have traditionally devised these ***formulae*** by examining the patterns of employment within a job or industry, and determining ***what amount of past employment*** serves as an approximate predictor of the likelihood of future employment.

(emphasis added). The Board then discusses examples of jobs where the Board has established such formulae, before the concluding paragraph, in which the Board repeatedly directs the Board to develop an "appropriate formula."

The Employer's position ignores this directive to establish a formula. The Employer's proposal does not take into consideration patterns or amounts of "past employment." The Employer's proposal is based entirely upon academic criteria. As we explained in our initial position letter, NLRB "eligibility formula" consistently are based upon two elements, an amount of work that the employee has performed before the date of the direction of election, and a "lookback period" during which the employee has performed that volume of work. See Seaboard Terminal and Refrigeration Co., 109 N.L.R.B. 1094 (1954) (longshore workers)[1], Hondo Drilling Co., 164 N.L.R.B. 416 (1967) (roughnecks); C.W. Post Center, 198 N.L.R.B. 453 (1972) (adjunct facility); Berlitz School of Languages of America, 231 N.L.R.B. 766 (1977) (on call language teachers); Trump Taj Mahal Casino, 306 N.L.R.B. 294 (1992) (stagehands); Steiny & Co., 308 N.L.R.B. 1323 (1992) (construction). The Employer's proposal is inconsistent with this precedent and with the Board directive to establish a "formula."

The Employer rests its entire argument on two phrases that appear in the Board's order, taking those phrases out of context. The Employer argues that the Board has directed the Regional Director to determine which students who are not currently employed have a "reasonable prospect of future employment" and to determine a "predictor of the likelihood of future employment." However, in the sentences where the Board utilizes those phrases, it instructs the Board to look to past employment history to make these findings (see the excerpt from the Board decision quoted above). The Employer ignores the portion of those sentences directing the Regional Director to consider "past history" and "amount of past employment."

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[1] Formerly known as "longshoremen."

In addition, the Board makes clear that the purpose of the eligibility formula is not as a precise predictor of the likelihood of return to the Unit, but to determine whether a prospective voter has a "continuing interest in the unit." The phrase "continuing interest" in employment, or terms and conditions of employment, appears four times in the section of the decision dealing with the eligibility issue. The purpose of the eligibility formula is thus to identify employees who have a "continuing interest" in the unit. The formula, in turn, is to be based on patterns of past employment. The Employer's proposal would exclude all Fifth Year doctoral students, regardless of how much or how frequently they have worked in the past, unless they are on the payroll at the time of the election. These students have a continuing interest in the Unit, regardless of whether they are working at the time of the election. Their stipends in the dissertation year are set at the same level as actively employed Second, Third and Fourth year students, so they have an interest in terms and conditions of employment. The record establishes that most Humanities and Social Science students fail to obtain their Ph.D. within five years. Therefore, the majority of Fifth Year students can expect to be at least seeking further employment in later years. They therefore have a "continuing interest" in the unit.

The Employer claims to have statistical data to show that only approximately 25% of Fifth Year students not currently on the payroll will be appointed to instructional positions in the future. I understand that, while the Employer claimed to have this statistical analysis when it submitted its initial position letter on September 14, it still has not provided this data to the Region. Instead, the Employer expresses a willingness to "participate in a conference with the Regional Director," but claims to be unavailable for such a conference until October 13, more than a month and one-half after this case was remanded by the Board. Assuming, *arguendo*, that the Employer actually has such a statistical analysis, and is not merely raising this claim as part of a delay strategy, these statistics do not undermine the Union's formula. A doctoral student who has worked in the bargaining unit in the recent past and who has a 25% likelihood of returning to active employment has a continuing interest in the terms and conditions of employment of the unit, particularly where he or she is receiving a stipend and benefits based upon the terms and conditions of employment in the unit.

As we pointed out in our initial letter, the precedent cited by the Board holds that an eligibility formula should be "inclusive – not exclusive . . .." Trump Taj Mahal Casino, 306 N.L.R.B. at 296. The Employer claims that its position is inclusive, but that simply is not the case. Both parties' positions would include most Second, Third and Fourth Year doctoral student employees. The Employer, however, would exclude most Fifth Year doctoral students, while the Union would include those with a recent history of employment. Thus, the employer disregards the mandate that an eligibility formula be inclusive.

In summary, the Regional Director should reject the Employer's proposal, adopt the Union's position, and direct an election without further hearings, meetings or procedural maneuvers. The Employer's proposal:

1. Is inconsistent with the Board's directive to devise a "formula," as it is not based upon a formula;

2. Fails to comply with the Board directive that eligibility be based upon past employment;

3. Is inconsistent with Board precedent, which consistently bases eligibility formulae on an amount of work in the past and a lookback period;

4. Is based upon a data analysis which the Employer has declined to provide;

5. Ignores the standard that the Board directed the Regional Director to apply, "continuing interest" in the terms and conditions of the bargaining unit; and

6. Is inconsistent with precedent that the formula should be inclusive.

For all of these reasons, there is no need for further proceedings, and the Regional Director may adopt the Union's proposed formula forthwith.

Very truly yours,

Thomas W. Meiklejohn

TWM:vds

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October 11, 2016

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VIA ELECTRONIC MAIL

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Re: The Trustees of Columbia University in the City of New York
Case 02-RC-143012

Dear Ms. Fernbach:

I write on Columbia's behalf in response to the Union's letter of October 6, 2016.

The Union misconstrues the issues underlying the dispute over what eligibility formula to use, as well as the utility of "patterns of past employment" to determine eligibility. The only issue concerning a potential voter who does not have an appointment this fall is whether that voter nevertheless has a "continuing interest in the terms and conditions of employment of the unit..." i.e., is the voter likely to be appointed again. *The Trustees of Columbia University in the City of New York,* Case *02-RC-143012 (August 23, 2016)* at 21. Past employment patterns are relevant only to the extent they help answer that question. As the union acknowledges: "[t]he purpose of the formula is . . . to identify employees who have a 'continuing interest' in the unit." Union Letter at 4.

In this context, however, employees with a continuing interest cannot be identified solely on the basis of past patterns because those patterns are not predictive, and because there is a better way to identify those employees. As the Board noted, patterns of past employment are only "an approximate predictor of the likelihood of future employment" *Columbia University* at 22. They are not significant if they bear no reasonable relationship to the likelihood of future employment. *See C. W. Post*, 198 NLRB 453, 454 (1972) (dealing with adjunct professors, the Board indicated that one could look to a "regular pattern of continuing employment in past academic years," only to the extent that it indicates "the *type of expectation of future employment necessary to establish a continuing interest in the unit.*") (emphasis added).

For students in the fifth year and beyond, Columbia relied on a statistical analysis to provide a more accurate predictor of future employment. The analysis shows that if such students hold no appointment this fall, they are highly unlikely to be appointed again. Rather than rely, as the union has, on past patterns as a complete proxy, Columbia responded to the Board's request to develop the best eligibility formula for students without an appointment by proposing criteria

that rely both on prior appointments and on a forward-looking statistical analysis. Those criteria are hardly "arbitrary;" they are, in fact, directly responsive to the Board's question of who has a "continuing interest" based on a "likelihood of future employment."

Columbia's methodology is particularly well suited to a workforce with a pre-determined end, i.e., students in the Graduate School of Arts and Sciences (GSAS) can't be appointed after the seventh year, and many graduate earlier, in some cases after only five years. In either case, patterns of past employment reveal nothing about the prospect of future appointments. For example, a student with a history of appointments but without an appointment this fall or spring who is expected to graduate in the spring, would have no continuing interest in the unit regardless of his or her pattern of past employment. The same is true for a seventh year student without a fall appointment. Columbia's statistical analysis demonstrates and amplifies basic facts such as these by showing that students in their fifth year or beyond who are without a fall appointment are unlikely to have a "continuing interest."

Although employees in the cases cited by the Union, (stagehands, construction workers and adjuncts) also work intermittently, those employees – unlike graduate students - typically have a relationship with their employer of indefinite duration. For those employees, nothing stops them from starting a new job once a current "appointment" ends. In such circumstances, past patterns may be the best indicator of a continuing interest because there is no reason to assume that an employee who worked on the last project won't work on the next; quite the contrary. Thus in *Trump Taj Mahal Casino Resort*, 306 NLRB 294 (1992), stage technicians were "badged" by the employer after meeting procedural and technical requirements, and were placed on an "established list" of casual employees for indefinite duration. *Id.* at 294-295. As they remained on the employer's established list, prior employment did indicate the likelihood of future employment. Similarly, in *C. W. Post Ctr. of Long Island Univ.*, 198 NLRB 453 (1972), adjuncts were under a contract which allowed the University to hire them to teach whenever there was available work. *Id.* at 454. Unlike the situation here, in neither case was there any reason to believe that employees with a past pattern of employment would not work again.

Columbia devised and proposed a formula that relies on incontrovertible data to predict whether students in the fifth year and beyond are likely to be appointed again. The Union's claim that its proposal constitutes a "formula" while Columbia relies on "arbitrary categories" and "academic progress" is, frankly, incomprehensible and impossible to address. Semantics aside, Columbia proposed a clear, six point eligibility formula designed to give all students with a continuing interest an opportunity to vote in the election, including those in the fifth year and beyond who hold an appointment this fall.[1]

[1] This eligibility requirement should apply to Course Assistants as well. The Board asked the Region to assess the eligibility of Course Assistants. *Id.* at 15 n. 99. As described at the Hearing, course assistantships are appointed in the School of Engineering and Applied Science for one semester, and individuals are never appointed as a course assistant more than twice. *See* Tr. 667:23 – 668:13.

Finally, the Union - without basis - raises the specter that Columbia actually has no data, and that the University is engaged in a subterfuge to further a "delay strategy." That absurdity merits no response other than to note that the statistics relied on were derived from a time consuming but straightforward comparison of pre-existing enrollment and appointment databases. We will of course share those comparisons with the Union and Region, and/or explain how the data was analyzed, through a live witness if need be.

Very truly yours,

Bernard M. Plum

cc: Tom Meiklejohn, Esq.
Nicole M. Rothgeb, Esq.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

THE TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK, **Employer** **and** **GRADUATE WORKERS OF COLUMBIA-GWC, UAW** **Petitioner**	**Case No. 02-RC-143012**

Date of Electronic Mailing: October 11, 2016

AFFIDAVIT OF SERVICE OF: Third Eligibility Criteria Letter of The Trustees Of Columbia University In The City Of New York

I hereby certify that, on the 11th day of October 2016, I served the above-entitled document(s) by the methods indicated below, upon the following persons at the following addresses:

By Electronic Mail
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Dated: October 11, 2016

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