

STUDENTS OR EMPLOYEES?

The NLRB issues a landmark decision that could help any musician who's in a graduate program



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THE NATIONAL LABOR Relations Board has issued another landmark decision that may very well have a notable impact on graduate music students. The decision, handed down on Aug. 23, 2016, has ruled that student assistants who receive stipends from private universities to engage in research or teaching functions are **employees** under federal labor law and thus entitled to unionize and engage in collective bargaining. Under the National Labor Relations Act, only employees are protected and given the right to form a union.

In Columbia University and GWC, UAW (364 NLRB No. 90), the NLRB overruled a 12-year precedent that held that teaching assistants were not entitled to unionize. In so doing, the current NLRB has proven once again that it is allied with and protective of labor's interests. With this decision, the board's prolific trend towards expanding organizing rights continues. (For more news

coming out of the NLRB, see my previous column from November 2015, available at www.Local802afm.org.)

In its previous decision on this issue, Brown University, 342 NLRB 483 (2004), the NLRB ruled that graduate and student assistants may *not* be deemed statutory employees since they are "primarily students and have a primarily educational, not economic relationship with the university." Thus, at that time the board determined that even though the students earned some remuneration for their services to the university, they were essentially students and the job functions they engaged in were secondary and thus insignificant. The fact they were primarily students allegedly barred them from the protections of the labor law.

But now, the NLRB has disagreed with that previous ruling. Instead, the board found individuals may be both employees and students at the same time, and that while students may work for a university as part and parcel of their educational requirements, they can still unionize.

In coming to this conclusion the board relied upon the traditional common law concept that an employment relationship exists when an individual is under the direction and control of an agent, who provides compensation for specific services rendered.

In this case, the board analyzed the teaching assistants' duties and found that the common law employment test was satisfied. In the process, the board revealed a significant error in the previous Brown University decision. There the board failed to consider the fact that even though the assistants' teaching functions were secondary to their role as students, while they were engaged in teaching or research functions, they were in fact employees. In this regard the NLRB has stated that it has now



A recent NLRB decision may allow graduate student musicians (like those in Bard College's program called *The Orchestra Now*, pictured above) to form a union and be covered under a Local 802 contract.

"rejected an inquiry into whether an employment relationship is secondary to or coextensive with an educational relationship... the fact that a research assistant's work might advance his own educational interests is not a barrier to finding statutory employee status."

The board also distinguished its recent decision in Northwestern University, 362 NLRB No. 167 (2015), which denied student athletes the ability to organize. The board noted that there it had "denied the protections of the act to certain college athletes - without ruling on their employee status - because, due to their situation within and governance by an athletic consortium dominated by public universities, we found that our extending coverage to them would not advance the purposes of the act. Here, conversely, we have no reason to believe that extending bargaining rights will not meaningfully advance the goals of the act."

A companion NLRB decision is also expected involving teaching assistants employed at the New School, which has acknowledged that the underlying principles determined in the Columbia decision are also germane to their case. (Local 802 represents the faculty of the jazz program at the New School, which effectively is now part of Mannes School of Music.) We eagerly await that determination.

The future impact of this decision may be profound. As I've written in this space recently, Bard College has created a master's degree program that entails student performance in a training orchestra called *The Orchestra Now*. Student musicians are paid a \$24,000 stipend (plus health benefits) to perform orchestral music at various major venues, including some in NYC. They also are required to take graduate level courses at the Bard Conservatory. And there are other graduate level programs for musicians that also contain compensated performance requirements, such as Florida's New World Symphony. As a result of the Columbia University decision, students enrolled in these programs may now file election petitions to seek bargaining rights with these schools. In fact any music program that requires compensated services may now be unionized.

I strongly suggest that Local 802 and other AFM locals encourage students enrolled in these programs to take advantage of this remarkable opportunity to organize and bargain collectively. In addition to obtaining training as a musician, they can now also obtain experience negotiating the terms and conditions of their employment, an essential component of employment as a musician.

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