

Will a New NLRB Overturn the *Columbia* Decision?

By Josh Ulman, Christi Layman and Basil Thomson

In August 2016, the National Labor Relations Board (NLRB or Board) issued a decision in *Columbia University* finding that student workers at private institutions are employees entitled to collective bargaining and other rights and protections under the National Labor Relations Act (NLRA). The decision reversed long-standing precedent and divided the Board along partisan lines, with the three Democrats voting in favor of employee status for students, and the lone Republican at the time, Phil Miscimarra, dissenting.

Fast forward a year — while colleges and universities have experienced a rapid increase in union organizing among students, the Board’s composition has changed, and the newly-seated Republican majority may end up revisiting the *Columbia* decision. The path forward is unclear, however. Structural changes at the Board, recusal issues and the long and complex history on this issue will all play a role in determining *Columbia*’s fate.

History Behind the *Columbia* Decision

The first time the Board considered the question of whether students should be considered “employees” for purposes of the NLRA was in 1972 in a case involving Adelphi University. In *Adelphi*, the question before the Board was whether graduate teaching and research assistants should be included alongside faculty in the petitioned-for bargaining unit. The Board ruled that “the graduate teaching and research assistants ... are primarily students and do not share a sufficient community of interest with the regular faculty to warrant their inclusion in the unit.” Shortly thereafter, in 1974, the Board went one step further in a case involving The Leland Stanford Junior University. In that decision, the Board held that certain university research assistants were “primarily students” and thus “not employees within the meaning of Section 2(3) of the Act.” Twenty-five years later in the fall of 2000, the Clinton-era NLRB revisited the issue in a petition by the United Auto Workers (UAW) seeking to represent graduate teaching

assistants, graduate assistants and research assistants at New York University. In its decision, the Board relied on the common-law agency test to find that the petitioned-for unit were employees within the meaning of the NLRA. The Board reasoned that the students perform services under the control and direction of the university for which they are compensated and rejected “the contention of the employer and several of the amici that, because the graduate assistants may be ‘predominantly students,’ they cannot be statutory employees.” The Board’s decision in this case paved the way for NYU to recognize the UAW union — becoming the first private university to do so.

Shortly following NYU’s recognition of its graduate assistants, the Board composition changed as the Bush administration came to power. The new Board returned to its 30-year precedent in a case involving Brown University and overruled the NYU decision. In *Brown*, the Board declined to assert jurisdiction over graduate teaching assistants, “including those at Brown [because they] are primarily students and have a primarily educational, not economic, relationship with their university.”

Despite the Board’s ruling in *Brown*, and NYU’s subsequent withdrawal of recognition of the UAW, graduate students continued to push for collective bargaining rights and in 2011, NYU graduate students once again petitioned for representation by the UAW. Although the regional NLRB official in this case dismissed the petition based on the *Brown* ruling, the NLRB announced it would use the grad student appeal to revisit the 2004 decision. However, before such review could take place, NYU chose to voluntarily recognize the UAW — and the appeal to the NLRB was withdrawn. Then in late 2014, the Graduate Workers of Columbia (GWC), an affiliate of UAW, filed an election petition seeking to represent both graduate and undergraduate teaching assistants at the university. The NLRB regional director dismissed the petition based on the NLRB’s 2004 ruling in *Brown*.

On December 23, 2015, the Board announced that it would review the rejection of the GWC's bid, setting up the backdrop for the NLRB to reverse its *Brown* decision. On August 23, 2016, the Board issued a 3-1 decision in *Columbia University*, ruling that graduate and undergraduate students who perform work at private institutions as part of their education may be considered in certain cases employees under the NLRA — effectively requiring private institutions to collectively bargain with student assistants in some circumstances.

CUPA-HR and six other higher education associations filed amicus briefs on December 16, 2015, in the *New School* case and on February 26, 2016, in *Columbia*, arguing that the Board should not overturn its *Brown* decision and that student workers should not be considered employees under the NLRA. As Philip Miscimarra, the sole Republican member of the Board at that time, wrote in his dissent, “it will wreak havoc to have economic weapons wielded by or against [students in the form of] strikes and lockouts ... and the permanent replacement of the [students] themselves ... [as] for most students, including student assistants, attending college is the most important investment they will ever make.”

If history is any indicator, the Board will likely revisit the *Columbia* decision. The 25-year-precedent-changing *NYU* decision was issued by the Democratic-majority Board appointed by President Clinton; the *Brown* decision was issued by the Republican-majority Board appointed by President Bush; and the *Columbia* decision was issued by the Democratic-majority Board appointed by President Obama. With a Republican-majority Board appointed by President Trump, it stands to reason the Board may reconsider *Columbia*. However, structural changes may make the process less straightforward than one might think.

Structural Changes at the Board

The NLRB is composed of five members appointed by the president to five-year terms and confirmed by the Senate. While vacancies are common, the Board needs at least a quorum of three to issue decisions. At the start of President Trump's administration, the NLRB had two vacancies and three sitting members: Republican Philip Miscimarra and two Democrats, Mark Gaston Pearce and Lauren McFerran. In addition, the Obama-appointed general counsel, Richard Griffin, was serving out the end of his four-year term. While President Trump's

inauguration ushered in many rapid changes throughout the government, including several Executive Orders aimed at reducing regulatory hurdles, the political appointment process has not moved as swiftly. In fact, it took eight months for the president to install a Republican majority at the Board. Despite inheriting an NLRB with two vacancies, President Trump did not send his nominations of Marvin Kaplan (R) and William Emanuel (R) to the Senate until the end of June 2017. The Senate confirmed Kaplan on August 2 and Emanuel on September 25. The Board's Republican majority was fleeting, however, as Miscimarra left the agency when his term ended on December 16. Miscimarra's departure leaves the NLRB with a 2-2 split for as long as it takes President Trump to nominate and the Senate to confirm a successor. While the president can nominate a successor prior to the end of Miscimarra's term, he did not do so. If the Board hears a case involving graduate students during this split, it is unlikely it would revisit *Columbia*.

The other notable change in the structure of the Board, and to many NLRB experts the most important, is the change in the general counsel's office. The general counsel, who is appointed by the president to a four-year term, operates independently from the Board. He or she is responsible for the investigation and prosecution of unfair labor practice cases and for the general supervision of the NLRB field offices in the processing of cases, and is in essence the “gatekeeper” for the Board. Former NLRB member Brian Hayes states that “there is no more complex and influential role at the NLRB than that of the general counsel” and describes the difference between a Board member, who “can determine a case outcome or change the direction of the law only with the concurrence of colleagues” and the general counsel, who has sole decision-making power over not only whether the “agency will pursue a case, but also the legal theories it will advance in doing so.”

For these reasons alone, the confirmation and swearing in of Peter B. Robb, President Trump's nominee for general counsel, is seen as the catalyst demarcating the difference between the Obama Board and the Trump Board. Robb has spent decades advising and representing employers. Griffin, who occupied the general counsel position until October 31, 2017, is known for his expansionist and pro-labor agenda. On December 1, Robb outlined many of these stark contrasts in his Mandatory Submissions to Advice, a customary practice for all new general counsels,

setting forth the types of unfair labor practice charges and issues the NLRB's regional offices should send to the NLRB's Division of Advice in Washington D.C. before any regional action is undertaken. While the list is long and varied, issues and case types that the regions should send to Washington for review are those that "involve significant legal issues, [including] cases over the last eight years that overruled precedent and involved one or more dissents, cases involving issues that the Board has not decided, and any other cases that the Region believes will be of importance to the general counsel."

Importantly, Robb also rescinded six memos from former general counsels, including prior Griffin's "General Counsel's Report on the Statutory Rights of University Faculty and Students in the Unfair Labor Practice

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Context" issued on January 31, 2017. GC 17-01 was "intended as a guide for employers, labor unions and employees that summarizes Board law regarding NLRA employee status in the university setting and explains how the office of the general counsel [would] apply these representational decisions in the unfair labor practice arena." The three decisions covered — *Pacific Lutheran University*, *Columbia University*, and *Northwestern University* — all had huge impacts on higher education, and the memo took the "prosecutorial" position that scholarship football players in Division I FBS private-sector colleges and universities are employees under the NLRA and that "students performing non-academic work who meet the common-law test of performing services for and under the control of universities, in exchange for compensation, fall within the broad ambit of [NLRA's definition of employee under] Section 2(3)."

While Robb has yet to expose a view on *Columbia* and student organizing, his decision to rescind the aforementioned memo indicates that his view on student workers may be more in line with other Republicans who

have opined on the issue than with Griffin. If he guides cases to the Board that are appropriate vehicles for revisiting *Columbia* and the Republicans are able to maintain a majority, we could see a shift in the law with respect to student organizing under the NLRA.

Possible Changes to *Columbia*

The primary path by which current law could change is through what is known as an election petition. During the representation election process, generally, a union seeking to file a petition with the NLRB regional office must obtain a sufficient showing of interest to warrant an election. A union seeking to represent a group of graduate students or other student workers must demonstrate that 30 percent of the proposed unit is interested in joining. The union would then file to represent that group of graduate

students or other students, and the NLRB's regional office would hold a hearing. Following the hearing, the regional director could apply *Columbia* and issue a decision that directs that an election take place as long as the petition and unit otherwise meet requirements under

the law. If the union then goes on to win the election, the college or university could file a request for review of the regional director's decision to the NLRB. The newly appointed Republican-majority Board could take the case and change the law back to where it was pre-*Columbia*.

Current Cases Before the NLRB

There are three current cases before the NLRB that may provide a path toward reversing *Columbia*. Despite the fact that there has been a post-*Columbia* rush to unionize students on campus, only New York University has a union contract with their graduate students. Of the remaining private universities that have seen unionization activity following the August 2016 decision, the results have been mixed. Four universities — Tufts, Brandeis, American and The New School — accepted a vote in favor of unionization and have advanced to contract negotiations but no collective bargaining agreements have been finalized. At other universities — Duke, Washington University in St. Louis, Emory and George Washington University — the prospective unions withdrew either before or after a preliminary tally of votes cast.

While there remain additional cases out there at various stages of review before the NLRB, there are three — *Yale University*, *Boston College* and *Chicago University* — that could serve as the proper vehicle for a Trump Board to reverse the *Columbia* decision. Importantly, because the regional directors limited the record in *Yale University* and *Boston College* and thus prevented the defense from creating a full record on the facts in *Columbia*, experts believe that the full record in the *University of Chicago* case provides the strongest chance for reversing *Columbia*.

Yale University

On August 29, 2016, UNITE HERE, a union seeking to organize teaching assistants at Yale University, filed 10 separate election petitions for graduate assistants in 10 academic departments at the university — essentially creating 10 different and independent units that the university would have to bargain with. Subsequently, one unit withdrew its petition. While in the past, the Board might have rejected such units as inappropriately “fracturing” the workplace, in its 2011 decision in *Specialty Healthcare*, it announced it would allow unions significantly more control over the scope of a bargaining unit and thus open the door to this method of organizing.

In October 2016, the Board’s regional director, John Walsh, held hearings, and on January 25, 2017, he issued a decision and direction of election (DDE), where he found that the teaching fellows at Yale are statutory employees per *Columbia* and that the nine petitioned-for units are appropriate pursuant to the Board’s analysis in *Specialty Healthcare*. [**Ed. note:** *A few days before this article went to print, the NLRB issued a ruling in PCC Structural Inc. abandoning the Obama Board’s Specialty Healthcare decision, which allowed employees to organize in “micro units.” The PCC Structural decision reinstated the previous standard that employees have to share an “overwhelming community of interest” to be an appropriate bargaining unit.*]

Following his decision, Walsh issued a notice of election on February 15, 2017, setting up a vote for unionization on February 23, 2017. On the same day that the notice of election was issued, Yale filed a request for expedited review of Walsh’s decision and a motion to stay an election so as to “correct the misapplication of *Specialty Healthcare* in this case” and to allow the Board to “provide guidance as to the proper scope of graduate student employee bargaining units following its very recent decision in *Columbia University*.”

Yale’s request for expedited review was denied by the Board, with then Chairman Miscimarra dissenting, and a vote was held on February 23, with eight of the nine departments voting in favor of forming a union. However, following the tally of ballots, Yale University submitted a request for review on the “employee status issue,” whether Yale’s graduate students should be considered employees for purposes of the NLRA, stating that “the university will urge the Board to reconsider *Columbia*.” The Board has not yet ruled on the merits of Yale’s requests for review which, when and if that happens, could cause the NLRB to revisit its *Columbia* decision.

Boston College

On March 3, 2017, the United Auto Workers filed an election petition seeking to represent a bargaining unit of graduate students in various classifications from every school at Boston College. That same month, regional director Walsh held hearings where Boston College made the argument that it is exempt from the Board’s jurisdiction, as it is a religious institution due to its relationship to the Catholic Church. Additionally, Boston College argued that even if Walsh did not find that the institution as a whole is exempt from the NLRB’s jurisdiction, its Theology and Philosophy departments are. Lastly, the university argued that its graduate students are not statutory employees as was found in *Columbia*.

On May 17, 2017, Walsh issued a DDE, where he found that the graduate workers in the Theology department are exempt from the Board’s jurisdiction but that the Board has jurisdiction over the rest of the petitioned-for student workers and that the student workers were not sufficiently distinct from those in *Columbia* that a different result would have been warranted. On August 21, 2017, Boston College submitted a request for review of Walsh’s DDE to the NLRB, arguing that he applied the wrong test when concluding that the NLRB had jurisdiction over the institution despite its relationship to the Catholic Church and that because *Columbia* “was wrongly decided,” Boston College’s student workers are not statutory employees. Additionally, the university requested a stay of the election and alternatively an impoundment of the ballots pending review by the Board.

On September 11, 2017, the NLRB denied the university’s request to stay the election or to impound the ballots without ruling on the merits of the request for review — Chairman Miscimarra dissented to the Board’s decision

— and elections were held, after which the union won its bid by a final tally of 270 to 224 with 16 challenged votes. While the vote went in favor of the union, it is unlikely that Boston College will enter into contract negotiations until the NLRB rules on its request for review of the DDE, which could ultimately provide a platform to overturn *Columbia*.

University of Chicago


Of the three cases featured in this article, labor experts believe that the *University of Chicago* case currently before the Board may have the strongest chance at overturning *Columbia* due to the nature of the regional director's DDE and the full record in the case. On May 8, 2017, the American Federation of Teachers, AFL-CIO, filed an election petition seeking to represent a bargaining unit of full-time and part-time graduate workers at the university. Hearings took place the same month, and Regional Director Peter Ohr issued a DDE on August 8, dismissing the university's arguments that the Board wrongly decided *Columbia* and should return to its decision in *Brown University* and that master's students and non-lab research assistants should be excluded from the petitioned-for unit, as they do not share a community of interest with the institution's Ph.D. students.

Ohr also sided with the AFT, finding that any graduate student who has served in the petitioned-for positions during the past year, regardless of whether he or she is currently serving, would be eligible to vote. Ohr directed an election to be held October 17-18, 2017, and the university on September 22 submitted a request for review of his decision. The request for review — which is still pending before the Board — made four arguments: (1) there are compelling reasons for the Board to reconsider and reverse the *Columbia* decision; (2) Chicago's graduate student teaching and research students are distinguishable from those found to be employees in *Columbia*; (3) only graduate students serving as student workers at the time of the vote should be eligible to vote — there should be no look-back period; and (4) the regional director did not provide enough time for the university to file the voter eligibility list. The request for review concludes that “the Board should grant the University of Chicago's request for review, reverse the regional director's DDE, reconsider and reverse *Columbia*, and dismiss the petition.”

The DDE was followed by a motion to stay the election on September 25, 2017, which was denied. The vote was held and the union won representation by a margin of 1,103 to 479. As is the case with Boston College, the University of Chicago will not negotiate with the graduate students until a decision is issued on its pending request for review. If the Board does grant the university's request for review, a decision reversing *Columbia* could still be a long way off — in *Brown*, the Board granted the request for review two years before issuing a decision reversing NYU. However, it is likely that such a granting would inevitably quiet the current unionizing drives on campus.

Issues of Recusal

One last wrinkle in both the *Boston College* and *University of Chicago* cases relates to motions to intervene issued by the Graduate Workers of Columbia-GWC, who are affiliated with the UAW. The GWC argues that because a Board decision in either *Boston College* or *University of Chicago* “may have an impact on the disposition of the *Columbia* case,” new Board member Marvin Kaplan should recuse himself from any case which asks the Board to revisit the *Columbia* decision — as Kaplan has recused himself from the *Columbia* case due to his wife's employment by the university.

The institutions in both cases opposed the GWC's motion to intervene and argue that “the absurdity of the motion could not be more self-evident.” While we will not speculate on which way the Board will rule on the GWC's motion, we will say that it is an untested theory to have Kaplan recuse himself and a novel approach which has not been seen before. 

Josh Ulman is chief government relations officer for CUPA-HR. He can be reached at julman@cupahr.org.

Christi Layman is manager of government relations for CUPA-HR. She can be reached at clayman@cupahr.org.

Basil Thomson is government relations specialist for CUPA-HR. He can be reached at bthomson@cupahr.org.