

NLRB Regional Director Orders Union Election in a Unit of Undergraduate Employees

April 24, 2017

On Friday, April 21, 2017, a regional director for the National Labor Relations Board (NLRB) ordered that a union representation election must be held in a unit composed of 110 undergraduate student residential advisors at George Washington University (**Slip Opinion in Full**). The decision is a major extension of last year's decision in **Columbia University**, which extended bargaining rights to units composed of graduate student assistants. Until the decision in *George Washington*, attempts to organize units of undergraduate students employed by the institution they were attending had been rejected by the Board. (See e.g., **Northwestern University** and **San Francisco Art Institute**.)

The regional director ordered an election in a proposed bargaining unit of 110 Resident Assistants ("RA's"). The RA positions were available exclusively to the institution's undergraduate students in good academic standing. They performed the typical functions associated with RA positions such as encouraging residents to bond/socialize, monitoring residence hall conditions, being available for peer-to-peer counseling and the like. They were compensated with a small stipend and free university housing. Most served only one or two years in the position.

The University argued that the RA's should not be considered employees and that even if they were, the Board should refrain from extending jurisdiction as it had in the *Northwestern* and *San Francisco Art Institute* cases. The regional director rejected both arguments. First, he held that so long as the RA's were 1) performing a service on behalf of the university, 2) in exchange for compensation in cash or in kind, and 3) were under the control of the university in performing their duties, then the RA's were employees. The regional director rejected the University's efforts to suggest that the undergraduate status of the RA's required a finding that the relationship was educational rather than economic.

The regional director further held that there was no reason to discretionarily withhold bargaining rights from the undergraduate RA's. He gave a very narrow reading of the Board's decision in *Northwestern*, which refused to extend bargaining rights to student athletes. He viewed *Northwestern* as limited to the proposition that organization of a single team in a competitive sports league was inappropriate, and rejected any notion that *Northwestern* required any special consideration of undergraduate student employees.

What does this case mean for University employers?

The regional director's rationale while broad, is consistent with the **Advice Memorandum** issued by the NLRB's General Counsel in January of this year. If upheld by the Board, the theory would have two major consequences for university employers. First, it could encourage unionization efforts at private sector universities amongst other groups of students involved in extracurricular activities, such as the school paper, radio or TV station, if the students receive any form of compensation beyond academic credit. Second, it will extend individual rights under the act, and thus possible unfair labor practice liability to any student who is receiving financial aid of any sort in return for activities that are viewed as benefitting the university. These rights, including freedom from retaliation for "protected activities" and overly restrictive social media policies, would apply regardless of whether there is any union in the picture.

It is unclear whether the decision will ultimately receive the approval of the full Board. Throughout its history, the Board has regularly flip-flopped on the question of whether students working at the university which they attend are employees, and whether they have bargaining rights. (For a full discussion of the history of the Board's ever-changing

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positions, click **here** to read Robert Zielinski's article regarding same in the Journal of College and University Law.)

Thus, the future viability of the regional director's theory will rest on the views of the two members to be appointed by the new president.

If you have any questions or concerns related to the issues discussed herein, please contact the authors of this article or any of your Miller Canfield attorneys.

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