

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 4**

**THE TRUSTEES OF THE UNIVERSITY OF
PENNSYLVANIA**

Employer

and

Case 04-RC-199609

**GRADUATE EMPLOYEES TOGETHER-
UNIVERSITY OF PENNSYLVANIA (GET-UP)
A/W AMERICAN FEDERATION OF TEACHERS**

Petitioner

DECISION AND DIRECTION OF ELECTION

The threshold issue in this case is one that has challenged the Board for decades: whether graduate students at a university, who both perform compensated work for the university and engage in the typical educational process of students, are employees within the meaning of the National Labor Relations Act. Graduate Employees Together-University of Pennsylvania, a/w American Federation of Teachers (Petitioner) seeks to represent a unit of graduate students who provide instructional services and/or perform research, including teaching assistants (TAs), teaching fellows (TFs), research assistants (RAs), research fellows (RFs), student workers, and pre-doctoral trainees,¹ at the University of Pennsylvania (Employer or University) in seven of its schools: the Annenberg School for Communication, Biomedical Graduate Studies, School of Design, Graduate School of Education, School of Arts and Sciences, School of Nursing and School of Social Policy and Practice.

The Employer, which operates its private, non-profit teaching and research university in Philadelphia, Pennsylvania, opposes the petition on three grounds. First, it maintains that the students in the petitioned-for unit are not statutory employees under Section 2(3) of the Act. In this regard, the Employer argues that the Board's decision in *The Trustees of Columbia University in the City of New York*, 364 NLRB No. 90 (2016), where it found that graduate students working as teaching assistants and research assistants are statutory employees within the meaning of the Act, was wrongly decided. But even if the *Columbia University* decision is valid, the Employer contends, its own graduate students do not meet the decision's test for statutory employee status.

Second, in the event I find that the graduate students in the petitioned-for unit are employees under the Act, the Employer argues that the unit sought by Petitioner is not appropriate, and that the only appropriate unit must also include graduate students who provide instructional services and/or perform research in two additional schools within the University:

¹ The petition was amended during the hearing to exclude "educational fellowship recipients."

the Wharton School, and the School of Engineering and Applied Science. At the same time, with respect to students in the petitioned-for “student worker” classification, the Employer contends that they should be excluded from the unit because they do not perform instructional and/or research services, and therefore do not share a community of interest with the graduate students in the petitioned-for unit.

Finally, the Employer contends that certain of the individuals in the petitioned-for unit are temporary employees who should be excluded from the unit, an argument that was specifically addressed and rejected by the Board in *Columbia*, supra, slip op. at 21.

A hearing officer of the Board held a hearing in this matter and the parties subsequently filed briefs. As described below, and in accordance with the Board’s decision in *Columbia*, I find that the petitioned-for graduate students engaged in instructional and/or research services for the University are statutory employees, and that none of them should be excluded as temporary employees who lack a sufficient interest in the bargaining unit. I further find that graduate students employed in the “student worker” classification must be included in the unit to the extent that they perform instructional and/or research services.

However, based on the record and relevant Board cases, including the Board’s recently minted decision in *PCC Structural, Inc.*, 365 NLRB No. 160 (Dec. 15, 2017) overturning *Specialty Healthcare and Rehabilitation Center of Mobile*, 357 NLRB 934 (2011), enfd. 727 F.3d 552 (6th Cir. 2013), I find, in agreement with the Employer, that a unit limited to graduate student employees in the seven petitioned-for schools is not appropriate, and that to constitute an appropriate unit it must also include graduate students in both the Wharton School and the School of Engineering and Applied Science because the interests of the former group are not sufficiently distinct from those of the latter group to warrant a separate unit.

I will begin this decision with an overview of the Employer’s operations. I will then set forth the facts and my findings concerning the *Columbia* and *PCC Structural* issues. Next, I will address the University’s argument that the petitioned-for unit contains temporary employees, and thereafter I will explain my reasons for granting Petitioner’s petition to revoke a subpoena *duces tecum* from the Employer. Finally, I will set forth my conclusions, the voting eligibility formula and the election details.

THE EMPLOYER’S OPERATIONS

Founded in 1740, the University of Pennsylvania offers academic programs across a broad range of disciplinary fields. During the 2016-2017 academic year, the University enrolled 11,716 undergraduate students and 13,244 graduate students in its twelve schools: the School of Arts and Sciences, the Annenberg School for Communication, the School of Design, the School of Social Policy and Practice, the Graduate School of Education, the School of Nursing, the School of Engineering and Applied Science, the Wharton School, the Perelman School of Medicine, the School of Veterinary Medicine, the School of Dental Medicine, and the Law School.

This case involves graduate students in the first nine schools, all offering PhD programs. Because the School of Veterinary Medicine, the School of Dental Medicine, and the Law School do not confer PhDs but instead offer only professional degrees, the parties stipulated that graduate students in those schools are excluded from any appropriate unit. In addition, with respect to the Perelman School of Medicine, only students in Biomedical Graduate Studies, which encompasses seven graduate groups, are included in the petitioned-for unit because the remaining students are enrolled in professional degree programs.

The University is governed by its Board of Trustees, which appoints the University's president, currently Amy Gutmann. Vice Provost for Education Beth Winkelstein is responsible for all undergraduate and graduate education. She chairs the Graduate Council of the Faculties, a group composed of representatives from the nine schools that confer PhDs as well as Biomedical Graduate Studies. The Council reviews the graduate groups, sets academic policies applicable to all PhD students, and recommends PhD candidates to the Board of Trustees for degree conferral.

Each school has one or more departments, and every graduate group within those departments, headed by a graduate group chair, oversees a PhD program. The number of graduate groups in each school is a function of the size and academic diversity of the particular school. For example, the School of Arts and Sciences has 34 graduate groups among its 27 different departments, whereas the Annenberg School for Communication, the University's smallest school, has only one graduate group.

Generally, each faculty member has a primary appointment in a single school, and has voting rights and helps set graduate group policy in that school. While faculty members may have secondary appointments in other schools, they have no voting rights there. The only exceptions to this system are the 21 professors with Penn Integrates Knowledge (PIK) appointments, so-called PIK professors, who enjoy appointments in two or more schools conferring full voting rights and participation in more than one graduate group.

The following is a brief overview of the nine schools that offer PhD programs.

School of Arts and Sciences

The School of Arts and Sciences, led by Dean Steven Fluharty, is the second largest school in the University after the School of Medicine. In the last academic year, it enrolled 9,643 students, including 2,143 graduate students, the vast majority of whom were in PhD programs. The school houses 27 departments among three disciplinary sectors, humanities, social sciences, and natural sciences, and employs 520 undergraduate and graduate faculty.

The humanities encompass numerous departments teaching a broad range of subjects, from music and history to philosophy and languages. Cumulatively, those departments have 518 PhD students and 38 master's students. The social sciences include anthropology, sociology, demographics, economics, and political science, and in the last academic year hosted 346 PhD students and 32 master's students. Finally, the natural sciences comprise biology, chemistry,

mathematics, psychology, and physics and astronomy, with 493 PhD students and 26 master's students.

Annenberg School for Communication

The Annenberg School for Communication, helmed by Dean Michael X. Delli Carpini, offers only PhDs in Communication, although it has an undergraduate component housed in the School of Arts and Sciences. There are about 75 Communication PhD students, all in the same graduate group. The average time-to-degree for those students is 5.7 years.

School of Design

The School of Design is led by Dean Frederick R. Steiner and offers two PhD degrees: Architecture, and City and Regional Planning. In addition, the School offers master's degrees in Architecture, Environmental Building Design, City Planning, Historic Preservation, Fine Arts, Landscape Architecture and Urban Spatial Analytics. In the most recent academic year, there were 656 master's students and 43 PhD students. The school has no undergraduate degree program.

School of Social Policy and Practice

The School of Social Policy and Practice offers professional master's and doctoral degrees, and also has a PhD program in social welfare. It has no undergraduate program. At the time of the hearing, there were 27 PhD students and another 54 graduate students pursuing professional doctoral degrees. For the PhD candidates, the average time-to-degree is 4.5-5 years. The largest student population in the School of Social Policy and Practice consists of 398 professional master's students. The dean of the school is Dr. John L. Jackson Jr.

Graduate School of Education

The Graduate School of Education has a single graduate group with six academic programs: Education Policy; Educational Linguistics; Higher Education; Human Development and Quantitative Methods; Literacy, Culture and International Education; and Teaching, Learning and Leadership. The School offers only master's degrees, PhDs, and executive and residential doctorates of education (EdDs). Executive EdD students are typically education professionals who attend the University part-time. All part-time EdD and master's students are self-funded, and the University depends on their tuition dollars to fund the Graduate School of Education. The PhD students are all fully funded, while full-time EdD students receive only one year of guaranteed funding, with a second year of optional funding. Of the 1,300 graduate students in the school, 90-100 are enrolled in the PhD program and 50 are full-time EdD students. The average time-to-degree in the doctoral programs is 5.5 years, although that average is skewed by the part-time EdD students. Dr. Pam Grossman serves as the school's dean.

School of Nursing

The School of Nursing offers bachelor's degrees, professional master's degrees, and PhDs. Although it is divided into two departments, Biobehavioral Health Sciences and Family and Community Health, there is only one graduate group with about 55 to 60 PhD students. Master's students are self-funded and can pursue a degree on one of 15 tracks. Unlike other schools, where PhD students are often admitted after earning their bachelor's degree, most PhD students in the School of Nursing enter the program after earning a master's degree. The average time-to-degree for PhD students is about 4.5 years.

Biomedical Graduate Studies

Residing within the Perelman School of Medicine, the Biomedical Graduate Studies program consists of seven graduate groups offering PhD degrees: Neuroscience, Pharmacology, Cell & Molecular Biology, Biochemistry & Molecular Biophysics, Epidemiology & Biostatistics, Immunology, and Genomics & Computational Biology. There are about 720 graduate students enrolled in Biomedical Graduate Studies. While it does not itself house any undergraduate programs, the Neuroscience Graduate Group has an undergraduate program called Biological Basis of Behavior located within the School of Arts and Sciences. Dr. Kelly Jordan-Sciutto serves as the Director of Biomedical Graduate Studies.

Wharton School

The Wharton School, led by Dean Geoffrey Garrett, offers a variety of undergraduate and graduate business degree programs. Its flagship program, conferring a Master of Business Administration degree, has 2,000 self-funded students. In addition, the school hosts about 2,000 undergraduates and 200-225 PhD students. The Wharton School has ten departments: Accounting; Business Economics and Public Policy; Finance; Health Care Management; Legal Studies and Business Ethics; Management; Marketing; Operations, Information, and Decisions; Real Estate; and Statistics.

School of Engineering and Applied Science

Operating under the leadership of Dean Vijay Kumar, the School of Engineering and Applied Science offers various undergraduate, master's, and PhD programs in fields such as bioengineering and mechanical engineering. As of the hearing, the School had 1,816 undergraduate students, 939 master's students, and 476 PhD students in various graduate groups.

THE BOARD'S *COLUMBIA* STANDARD

In *Columbia University*, 364 NLRB No. 90 (2016), the Board held that student assistants are statutory employees within the meaning of Section 2(3) of the Act when, in connection with their studies, they provide services under the direction of the university in exchange for compensation. The decision overruled *Brown University*, 342

NLRB 483 (2004), where the Board determined that students could not be statutory employees because they were “primarily students and ha[d] a primarily educational, not economic, relationship with their university.” *Id.* at 487.

In assessing whether the petitioned-for students were statutory employees, the *Columbia* Board applied the common law doctrine of agency, which “generally requires that the employer have the right to control the employee’s work, and that the work be performed in exchange for compensation.” *Columbia*, supra, slip op. at 15. The Board concluded that the Columbia students were statutory employees because they performed teaching and research services directed by the university in exchange for compensation. Addressing the *Brown* rationale, the Board explained that “[s]tatutory coverage is permitted by virtue of an employment relationship; it is not foreclosed by the existence of some other, additional relationship that the Act does not reach.” *Id.*, slip op. at 2. Even where the economic component is relatively small in comparison to other aspects of the relationship, the Board noted, “the payment of compensation, in conjunction with the employer’s control, suffices to establish an employment relationship for purposes of the Act.” *Id.*, slip op. at 6.

Applying *Columbia*, the issue in this case is not whether the petitioned-for unit of individuals are students *or* employees. Because it is clear that they are students of the University, the issue is whether they are *also* employees of the Employer by virtue of services they provide to the University, at its direction, and in exchange for compensation.

Academic Requirements and Funding for Graduate Students

The Employer provides funding to all of its PhD students. While the duration and financial value of the funding packages vary, they universally consist of three elements: (1) full tuition remission and fees, valued at approximately \$35,074 per year; (2) enrollment in the Penn Student Health Insurance Plan; and (3) an annual stipend paid in monthly allotments. The funding has attendant obligations: in addition to the requirements that they maintain full-time status and achieve satisfactory academic standing, PhD students must provide teaching and/or research services to the Employer. In order to graduate from their degree programs, they have to satisfy their graduate group’s service requirement, complete course work, pass qualification examinations, and write and defend a dissertation.

According to Vice Provost Winkelstein, the average time-to-PhD for the entire University is 5.75 years, but the average time-to-PhD for different schools and programs varies widely. In general, graduate students in the hard sciences tend to complete their PhD studies more quickly than their counterparts in the humanities. Once their funding packages expire, graduate students are expected to self-fund their educational costs and living expenses.

To accomplish this, graduate students may apply for competitive service-free fellowships or secure work opportunities provided by the Employer in exchange for stipends or hourly compensation. Master’s students are generally not funded by the University, but may apply for University jobs, such as teaching or research assistantships in exchange for compensation.

The University Provost sets a universal minimum stipend, but schools and graduate groups can choose to award higher amounts. It appears that funding awards are generally uniform in each school, apart from the School of Arts and Sciences, the most disciplinarily diverse school; that school provides all PhD students in the humanities and social sciences with the Ben Franklin Fellowship, while students in the natural sciences receive other, more generous funding packages. School of Arts and Sciences Dean Fluharty testified that graduate groups determine stipend amounts and duration based on market demands, in order to attract the best students.

The following chart shows the stipends and funding duration provided to PhD students in the respective schools:

School	Stipend	Duration
School of Arts and Sciences, Ben Franklin Fellowship	\$27,500/ten months \$4,530/summer	Five years; Three years of summer funding
School of Arts and Sciences, Chemistry Graduate Group	\$30,000/year	Unlimited
School of Arts and Sciences, Biology Graduate Group	\$30,000/year	Minimum of five years
Annenberg School for Communication	\$27,000/academic year \$4,000/summer	Four years
Biomedical Graduate Studies	\$32,000/year	Unlimited
Graduate School of Education	\$25,000/nine months \$5,388/summer	Four years; Three years of summer funding
School of Nursing	Unknown	Three years
School of Social Policy and Practice	\$25,500/nine months (2015-16 school year)	Four years
School of Engineering and Applied Science	\$31,500/year	Unlimited
Wharton School	\$36,109/year	Five years for 80-85% of students; four years for the remainder

Most graduate groups make receipt of the living stipend expressly contingent on the student providing research or teaching services. For example, in the Graduate School of

Education's acceptance letter to applicants, the School delineates two separate funding awards—a Dean's Fellowship that covers tuition, fees, and health insurance, and a Research Apprenticeship that provides a stipend "in exchange for" work as an RA. Moreover, the Graduate School of Education provides PhD students with summer funding only if RA positions are available, although such positions are generally available to all students who request summer funding. As further evidence of the quid pro quo, a TA appointment letter for Political Science PhD student Danielle Hanley indicated that payment of her stipend "depends on satisfactory academic and work performance." Finally, the Economics Graduate Group Rules and Policies Manual states that "a substantial number of students [are appointed] as teaching assistants...based on both performance as well as likely effectiveness," and "a large number of students find other [financial] support by acting as research assistants in Economics (or in other departments at the University)."

Significantly, in departments that do not require any service, they make that fact clear to their students. For example, the Marketing Department in the Wharton School is one of its few graduate programs without a service requirement for its PhD students, as reflected in its acceptance letters to students:

This financial offer does not require any Research Assistant or Teaching Assistant responsibilities. We anticipate that you will pursue research projects with the faculty and embark on independent research after you arrive. Teaching opportunities (for additional compensation) will be made available to you toward the end of your time in the PhD program.

(emphasis in original)

Across the University, each graduate program sets its own service requirements for stipends. In the School of Arts and Sciences, Ben Franklin Fellowship recipients must provide at least two years of service, usually during students' second and third years of study, in exchange for their five-year funding awards. However, individual graduate groups may set a greater service requirement; the Philosophy Department, for example, mandates that its PhD students provide two-and-a-half years of service as a TA to earn their Ben Franklin Fellowship. In the School of Nursing, PhD students are required to serve as TAs every semester they receive University funding, including their first year. In most of the natural, applied, and medical sciences (collectively referred to as the hard sciences), graduate students serve as Research Fellows (RFs) for the duration of their academic careers.

In the humanities and social sciences within the School of Arts and Sciences, PhD students may supplement their annual stipend up to 30% with additional University employment that does not exceed 10 hours per week.

Students pay income taxes on their stipend payments during the semesters they provide services to the University in exchange for their stipend. In those graduate programs where students are not required to provide services every semester they receive funding, the Employer

classifies graduate students as “Education Fellowship Recipients” in its payroll system during semesters without such obligations, and does not deduct income taxes from their stipends.

Some graduate students are self-funded and do not require tuition or stipend support from the University for some portion of their graduate careers. Such outside funding can come from a number of sources, including government support from international students’ country of origin. For students with outside funding, many departments and schools, such as the Anthropology Department and the School of Nursing, eliminate the teaching requirement altogether, while others, like the Psychology Department, reduce it. However, such policies are not uniform; the Biology Department, for example, requires all its PhD students to perform two semesters of teaching, regardless of their funding source.

To graduate, every PhD student must satisfy all of her group’s academic requirements, including the service requirement, and must write and defend a dissertation before a faculty committee. Master’s students are generally required to complete course work and write a thesis or research paper in order to graduate. On occasion, the University awards master’s degrees to PhD students who are unable to complete their PhD requirements.

Instructional Services

For those graduate students who perform instructional services, the University considers the requirement to be a vital part of students’ training and education, and indeed, the majority of PhD students enroll in graduate programs with the goal of becoming professors in teaching universities. To that end, it is evident that the experience and training students receive by providing instructional services to the University serve to advance their own professional development.

Teaching Assistants and Teaching Fellows

The most common form of instructional service provided by students to the Employer is as TAs or TFs, positions with identical duties and functions. Although some schools draw a distinction between the two positions based on whether the teaching occurs during a funded or non-funded period, for ease of reference, both classifications will be referred to as TAs below.

Prospective TAs bid on teaching assignments by ranking their top three choices from a list of available classes. They do not always receive their first choice, and can even be assigned to a course unrelated to their dissertation topic or area of expertise. As illustration, former History Department PhD student Salar Mohandesi served as a TA four times during his degree program, was never awarded his first choice of class, and was given a TA assignment for a course called The Modern Middle East— a topic far removed from his area of interest, modern intellectual European history. Similarly, Annenberg School for Communication PhD Student Rosemary Clark testified that she was assigned to serve as TA in courses unrelated to her dissertation topic or field of interest, and once had a TA position for a course related to her dissertation topic rescinded due to low enrollment. Although Clark lobbied to keep her original assignment, the University declined and she was reassigned to another course.

Training for Teaching Assistants

Most of the mentoring and support for a TA comes from the professor in charge of the course. TAs begin meeting with their supervising professors before classes begin to discuss their duties and the professors' expectations, and to plan the course. In most cases, TAs and their supervisors meet regularly throughout the semester for mentoring purposes and to review course assignments, exams, and student matters. In classes with multiple TAs, those with more experience also help train their less experienced colleagues.

In the School of Nursing, graduate students must also complete a teaching residency training program early in their graduate career. The teaching residency is distinct from a TA assignment in that it is entirely student-driven: the students themselves select the professor with whom they will work, and decide which areas of their work should receive attention.

Some graduate programs also require students to attend a two-day TA training course offered by the University's Center for Teaching and Learning. TAs can also receive a teaching certification from the Center by meeting certain requirements, such as attending a minimum number of training seminars and having a recitation recorded and evaluated. Many of the Center's services are offered by experienced graduate students who serve as Graduate Fellows for the Center in exchange for stipends. Graduate Fellows organize and host seven monthly training seminars and workshops for TAs in their departments and related departments. They also lead one or two University-wide training workshops per year, and observe, record and evaluate TAs' recitations.

TA Duties

TA duties are generally similar across all schools. They must attend every lecture and read all course materials. In large classes, they teach smaller recitation courses ranging from 17 to 30 students, reviewing problem sets, answering questions, and highlighting material from the lecture. Those TAs frequently give recitations on their own, but some professors choose to attend their TAs' recitations and assist in answering student questions. TAs also help prepare the course syllabus and exams, proctor exams, grade assignments and tests, hold office hours, answer emails from students enrolled in the class, and regularly meet with the course professor. In the Economics Department, the proctoring obligation of TAs is viewed as paramount, and they are expected to miss their own classes if they conflict with exams they are scheduled to proctor.

The level of autonomy given to TAs depends on several factors, including their level of experience, whether they have previously served as a TA for the same class, and the course professor's individual preferences. Political Science PhD Student Danielle Hanley testified that some professors have a "hands-off" teaching philosophy, rarely meeting with their TAs and allowing them to independently assign grades, while others take an active role in reviewing assignments graded by TAs, adjusting those grades, and mentoring TAs in the performance of their duties. Professors may also work to teach TAs particular skills, such as formulating exam questions.

TA Evaluation and Discipline

The Employer does not routinely dismiss or formally discipline TAs for poor performance. Instead, professors are expected to work with underperforming TAs to improve their performance. There are exceptions, however: chemistry professor Tobias Baumgart recalled an instance where the University removed a TA from a class assignment after the TA lost the trust of the undergraduate students in the course. The Biology Department also maintains a progressive disciplinary policy for its TAs.

Short of dismissal or discipline, students who perform poorly as TAs may face other adverse consequences. They may be asked to TA for an additional semester in order to satisfy their service requirement, or they may be denied post-funding TA positions.

Some schools grade the TA work of graduate students, while others do not. Ben Franklin Fellowship recipients receive a letter grade for each TA assignment. The School of Engineering and Applied Science similarly grades students on their TA performance, but the grades are not factored into the students' overall grade point average. The Annenberg School for Communication provides no academic credit to graduate students for their TA work.

At the conclusion of every course, students fill out evaluations of their TAs. There is evidence that graduate group chairs and the TAs' mentors review these evaluations. According to Music Graduate Group Chair Carol Muller, she reviews students' evaluations of their TAs to determine whether there are areas of concern she needs to address with them. Professors hiring a TA can also look at a graduate student's TA evaluations before making a hiring decision.

Graders

Former history PhD student Salar Mohandesi testified that graders, who perform tasks similar to TAs but in a more limited capacity, are generally graduate students who have not yet worked as a TA. According to PhD student Danielle Hanley, when she worked as a grader, she was responsible for attending lecture, completing all course readings, and grading assignments and exams. The graded exams are not just simple multiple choice tests; they include short-answer and essay questions that require the grader to be familiar with course materials and exercise a significant amount of judgment. While some professors provide their assistants with grading rubrics to guide them, others allow their assistants latitude in deciding how to assign grades. Mohandesi testified that in large courses with multiple TAs, the TAs regularly meet with each other to ensure they standardize their grading. There is no record evidence regarding the training, discipline, or evaluation of graders.

Tutors

There is almost no record evidence regarding the duties of tutors. The admission letter for history PhD students indicates that fellowship students may obtain additional employment as graders, tutors, or other hourly employment that requires less than 10 hours per week. The purpose of that limitation is to ensure that graduate students are devoting adequate time to their

academic endeavors. The Biomedical Graduate Studies Handbook also allows graduate students to secure work tutoring individual first-year students and stipulates that such assignments will be credited toward the program's teaching requirement. Music Department Professor Carol Muller testified that her department tries to hire post-fellowship graduate students to work as graders and tutors, presumably to permit them to earn additional income. There is no record evidence regarding training, discipline, or evaluation of tutors.

Instructors

After gaining experience as TAs, graduate students generally can secure appointments as the sole instructor in undergraduate courses. In the Music Department, graduate students begin teaching undergraduate classes of up to 30 students after their first year in the PhD program, and graduate students from the School of Arts and Sciences and the Wharton School teach summer undergraduate courses run by the College of Liberal and Professional Studies. Post-funding students may also win Critical Writing Fellowships that pay their tuition, fees, health insurance, and a living stipend – the same compensation as Ben Franklin Fellowships – in exchange for serving as instructors in undergraduate writing seminars. Graduate students Mohandesi and Hanley, both of whom have been awarded this fellowship, testified that they were able to select teaching subjects closely related to their academic interests, but that the course material and syllabus was designed by the Director of the Critical Writing Center, Valerie Ross.

Instructor Evaluation and Discipline

Instructors for the College of Liberal and Professional Studies are evaluated by their students at the conclusion of each course. Graduate students serving as instructors are not removed from their assignments for poor performance, but neither are non-student employees who teach summer classes. Instead, poor performance and negative evaluations could decrease the likelihood that graduate students and lecturers will be rehired in subsequent summers.

Compensation for providing instructional services

Students do not receive additional pay when they teach as part of their service requirement. However, post-fellowship TAs and instructors, and those students in programs with no teaching requirement, are paid a stipend for teaching. With respect to graders, although the Employer asserts in its brief that graders are paid on an hourly basis, political science PhD student Hanley testified that she was paid a \$1,500 stipend for her work as a grader over the summer of her second year.

In the School of Social Policy and Practice, post-funding graduate students who work as TAs and instructors are paid the same \$5,000 stipend as regular part-time faculty. Graduate student instructors teaching during the summer for the College of Liberal and Professional Studies earn a stipend of \$5,380, a rate lower, but only slightly, than the \$5,700 paid to non-student lecturers.

All of the graduate students who testified for the Petitioner stated that they took on teaching and research work beyond their academic requirements to earn additional income. Often, they begin securing additional teaching assignments even before their funding packages end to save money for the post-fellowship period. Students with limited funding frequently do not graduate until well after their funding has expired, and they rely on the income from those teaching and research assignments to fund the remainder of their education. Although post-funding students can apply for Dissertation Research Fellowships that do not require them to work, such fellowships are often competitive and are not awarded to all students.

Teaching Benefits to the Employer

The Employer relies heavily on graduate students to provide instructional services to its tuition-paying undergraduate and master's students. Graduate fellows also help train TAs to perform their duties satisfactorily. Although the University argues that it could hire non-student employees to perform the same services at a lower cost, there is no question that the instructional services provided by graduate students help the Employer to run its operations. Moreover, TAs and graders reduce the workload of tenured professors by grading assignments and exams, and holding office hours. Similarly, instructors teach full classes of tuition-paying students. And although these experiences clearly benefit the students' professional development, the University does not make such positions available solely based on academic considerations. Instead, instructors teach summer courses only if they achieve sufficient student enrollment, and graduate students are assigned as TAs depending on course size and need, regardless of the graduate students' expressed preference to teach in their areas of interest.

Differences in teaching between schools

Most of the University's hard science programs place less emphasis on their graduate students performing instructional services than do the humanities and most social science programs. For example, in almost every graduate program in Biomedical Graduate Studies, graduate students are not required to provide instructional services as a condition for receiving their living stipend. However, if those same graduate students want to teach, TA positions are available for them provided they receive authorization from their research supervisor and department chair to perform such work. At the same time, Biomedical Graduate Studies students are permitted to serve as TA only twice during their PhD career, and Neuroscience and Epidemiology, the only two of its graduate programs that require students to serve as TAs, have only a one-semester obligation. In contrast, all of the natural sciences within the School of Arts and Sciences have a teaching requirement, except for Physics and Astronomy. Even in those programs, however, the teaching requirement is lighter: in the Chemistry and Biology Departments in the School of Arts and Sciences, graduate students are required to teach for just two semesters.

Other hard sciences programs similarly limit the amount of time their graduate students spend working as TAs. For example, in the School of Engineering and Applied Science, the TA requirement is referred to as a teaching practicum and cannot exceed 10 hours per week so that students have adequate time to perform research. That ten-hour limitation is half the standard

requirement of 20 hours per week that TAs in other areas of study are expected to commit to their duties.

Graduate students in the social sciences and humanities in the School of Arts and Sciences, as well as the Wharton School, provide service to the University that is heavily tilted toward instruction as opposed to research. According to Music Department Graduate Chair Carol Muller, her department very rarely funds students to perform research. Likewise, Political Science PhD Student Hanley testified that she has never worked as an RA, only as a TA, instructor, grader, and TA trainer, during her five years at the University. Providing some contrast, the Graduate School of Education has no teaching requirement, and most of the service provided by its graduate students is as RAs.

Research

Graduate students performing research services for the University are most frequently classified as RAs, RFs, or Pre-Doctoral Trainees (collectively referred to as RFs). As with their teaching counterparts, there are no inherent differences in job duties or functions among the three classifications. However, RFs in the natural sciences perform functions quite distinct from RFs in the social sciences, arts, and humanities. Therefore, RFs' duties will be described below in relation to the respective disciplinary groupings.

Research Assistants and Fellows in the Hard Sciences

Graduate Students in Biomedical Graduate Studies, the School of Engineering and Applied Science, and the natural sciences departments within the School of Arts and Sciences all serve as RFs throughout their time at the University. These are also the only three divisions that typically provide their students funding throughout their graduate career.

During their first year, RFs in the hard sciences rotate through different laboratories in the graduate group and interview with the faculty member in charge of each laboratory. During this time, RFs work in the laboratories alongside more senior graduate students and research technicians in order to explore their interest and ultimately decide where they wish to work for the rest of their graduate career. They also begin pondering potential dissertation topics.

In Biomedical Graduate Studies, RFs are graded on their research work during their first two years of the PhD program. At the end of their rotations, students are matched to a laboratory based on a combination of student and professor preferences and whether the laboratory has sufficient funding for an additional RF. For example, Biomedical Graduate Studies PhD Student Kelly Karch wanted to work in Dr. Ben Black's laboratory, but he lacked funding to take her on as an RF.

Once assigned to a laboratory, graduate students generally spend the rest of their PhD careers working in that laboratory under the direction of its principal investigator (PI). RFs in the hard sciences serve as RFs year-round and therefore receive year-round stipends. If a PhD

student switches laboratories midway through her PhD career, she does not lose her funding during the transition period.

RFs' duties involve work at all stages of experiment development, design, research, execution, and writing about the results. Almost universally, RFs in the hard sciences spend their academic careers working on research funded by outside organizations such as the National Science Foundation and the National Institutes of Health. Because RFs' dissertation projects are subsets of a PI's overarching research, the RFs' research supports the PI's funding grant even as they advance their own dissertation work. Demonstrating this relationship, Karch testified that when she entered Dr. Ben Garcia's laboratory, he gave her a list of five projects she could work on in his laboratory and asked her to pick two of them. She chose the topics that most interested her and they have become her dissertation project.

RFs also assist other RFs with their work and perform duties as assigned by the PI. PhD students receive co-authorship credit on all publications for research to which they contributed, even if it was unrelated to their dissertation topic. RF Karch testified that out of 15 published papers for which she received co-authorship credit during her time at the University, only four were related to her dissertation topic.

Laboratories may also employ research technicians, who are solely employees, not students, to perform experiments. RFs perform all of the duties of the technicians, but unlike RFs, technicians are not involved in experiment design or in writing research papers.

Research Assistants and Fellows in the Social Sciences

The social sciences involve the study of human relationships, societies, and institutions. Research projects in the social sciences are sometimes funded by outside organizations such as the National Science Foundation, but not nearly to the extent that research in the hard sciences is. As a result, social sciences departments such as Political Science and Economics do not require RF service, and such opportunities are limited. Graduate students in the social sciences may apply for RF positions working for individual faculty members or for various research centers, such as the Program on Democracy, Citizenship, and Constitutionalism.

RFs in the social sciences conduct interviews, review and summarize published scholarship for review by their supervising professor, gather and analyze data, and write reports documenting results. For example, Education PhD Student Miranda Weinberg served as an RF assisting with Dr. Nancy Hornberger's research on the Lenape language. In the course of her duties, Weinberg visited members of the Lenape Nation to study language practices, conducted interviews, and ran focus groups of students studying the Lenape language. This work was unrelated to her own dissertation and instead served only to advance Dr. Hornberger's work. In addition to the Lenape work, Weinberg also spent part of her time as an RF working on research related to her own dissertation on multilingual education in Nepal.

It is common for graduate students in the social sciences to secure RF positions during the summer to earn extra money. The Petitioner presented evidence of an RF position offer to a

linguistics student for summer work on a NSF-funded project. The position paid \$18 per hour and required a total commitment of 25 work hours over the summer months.

Graduate students in the Annenberg School for Communication are required to provide eight semesters of service in teaching or research. When students work with professors as RFs during their first three years, they work on projects headed by the professor who is overseeing their work. Their duties include conducting research, writing research papers, and preparing grant proposals. According to Joseph Turow, Associate Dean of Graduate Studies at the Annenberg School, RFs use their experiences during those first three years to begin thinking about their own dissertation topic. Turow also testified that some professors allow students to work on the students' own research, while others task their RFs with working on the professors' research, and a third group allow their RFs to carve out part of the professor's work and develop it into a dissertation topic. In any event, the evidence shows that the professor overseeing an RF's work determines what the RF will be working on.

In both the social sciences and the arts and humanities, graduate students can perform editorial duties for scholarly journals while working as RFs. In such cases, the students' work is directly overseen by the professor responsible for the journal's content. Education PhD student Weinberg spent part of her time as an RF working as an assistant editor for *Anthropology and Education Quarterly*. Similarly, former History PhD student Mohandesi edited the journal *Humanity* for one-and-a-half years. Communication PhD student Rosemary Clark accepted an RF position to work, in part, as an assistant editor for a journal her supervising professor recently started called *Communication in the Public*. Finally, School of Social Policy and Practice PhD student Allison Russell worked as an RF editing *Nonprofit and Voluntary Sector Quarterly*. In addition to helping the University and their professors operate these journals, RFs performing work as assistant editors gain an intimate understanding of the world of peer-reviewed research publications.

Research Assistants in the Arts and Humanities

According to Associate Dean Eve Troutt-Powell, faculty in the arts and humanities are valued by the single-authored articles and books they write, rather than the collaborative multiple-author publications common in the hard sciences. It is also rare for research in these fields to have outside funding. Graduate students do not conduct research for their dissertations as part of a larger funded group, and instead conduct independent research for which they are not compensated. Despite this, there are some RF positions in the arts and humanities. RFs tend to work on an hourly basis and are paid outside their Ben Franklin Fellowship stipend. Their duties include summarizing articles on a particular topic, preparing literature reviews, researching literature on a topic of interest to the supervising professor and organizing the results, editing scholarly journals, and assisting with many aspects related to the editing of single-authored books by faculty. RFs in the arts and humanities perform their duties primarily in the library and on the internet, as opposed to working in laboratories like their counterparts in the hard sciences.

RA Evaluation and Discipline

The University is an elite institution and attracts very talented students to its programs. Therefore, unsurprisingly, it is not common for RFs to be disciplined for poor work performance. Moreover, the Employer takes pains to improve deficient work performance by increasing mentoring. However, Chemistry Professor Tobias Baumgartner testified that there have been instances where an RF's performance was so poor that the RF was dismissed from the PhD program and asked to leave the University. Graduate School of Education Assistant Dean Matthew Hartley added that professors can have their RFs reassigned for unsatisfactory work performance.

Compensation for performing research

PhD students who work as RFs to fulfill their service requirement are not paid additional compensation beyond their stipends. In the hard sciences, graduate students receive their stipends as long as they serve as RFs. PhD students who serve as RFs outside their service requirement may be paid through a stipend or on an hourly basis. Master's students also work as research assistants. For example, a master's student in the Graduate School of Education was paid an hourly rate of \$21.00 to perform research as a "Graduate Assistant."

Research Benefits to the Employer

The goal of all research in the hard sciences is to publish the results in scholarly journals. Publishing research makes it easier to obtain outside funding from organizations such as the National Science Foundation and the National Institute of Health. The University and its laboratories are highly dependent on this outside funding to support their work. In fact, the University is paid 57.5 cents for every dollar of grant funding. In addition, publishing work enhances the reputation of each laboratory as well as the University and bolsters the prestige of the primary investigator.

RFs play an instrumental role in getting work published by the laboratories. While they also gain valuable experience because their research usually furthers their own dissertations, the dissertations similarly advance the funded work of their laboratories, creating a symbiotic relationship that unquestionably aids the University. In addition, RFs are often required to perform research unrelated to their dissertations, and while they may nonetheless benefit from being named coauthor of studies, it is beyond dispute that the University benefits considerably from their work.

Finally, the University owns any patents and intellectual property that result from its students' research. While students are classified as inventors and share in the proceeds of any commercially viable patents, such instances are relatively rare and only make up a fraction of any department's income. Graduate students do retain ownership of the copyright to all their individual research publications.

Application of the Columbia Standard to Facts

The Employer maintains that *Columbia University* was wrongly decided and should be overruled. As I am constrained to follow Board precedent, the Employer's challenge to *Columbia* may be resolved only by the Board.

Alternatively, the Employer maintains that graduate students who provide instructional services and perform research are distinguishable from the graduate students in *Columbia* on the following grounds: (1) graduate students teach as an integral part of their academic education, not as a service to the University; (2) the University provides financial aid and academic support services to its graduate students, not payment in exchange for services; (3) University graduate students receive training for teaching, unlike those at Columbia University; (4) graduate students who perform research are not statutory employees because the University does not direct or control their work; and (5) the University does not control the teaching activities of graduate students because it does not condition funding on satisfactory work performance or remove TAs for poor performance. These arguments can be condensed into a negation of the three elements of the *Columbia* Board's test for common law employee status—namely, that the Employer does not derive a benefit from the services of graduate students; that the Employer does not compensate graduate students for their services; and that the Employer does not direct or control the work of graduate students. In finding that the University's graduate students are statutory employees, I will address each of the Employer's contentions.

In *Columbia*, the Board explicitly rejected any analysis that focused on whether the primary relationship between graduate students and their university is economic or educational. *Columbia*, supra, slip op. at 1. The Employer's argument that the graduate students' service is an academic requirement relies on precisely the type of argument the Board rejected. There is no question that teaching and research are important to graduate students' development as scholars, academics, and scientists. However, the educational value to students in providing these services and the Employer's benefits from receiving those services need not be mutually exclusive.

Graduate students who serve as TAs reduce considerably the workload of faculty by performing tedious and time-consuming tasks, such as grading hundreds of assignments and exams throughout the semester. By taking on such tasks, TAs free up time for faculty to pursue their research and fulfill their administrative roles in the University. The fact that graduate students also have the opportunity to train for the work they will do as future academic professionals does not gainsay the tangible benefits they provide to the University.

Besides alleviating the administrative burden on professors, employing TAs allows the University to schedule more and larger classes for its tuition-paying undergraduate and master's students than would otherwise be possible. Further, graduate students who teach during the summer for the College of Liberal and Professional Studies perform the same duties as non-student lecturers hired for the same purpose. The only distinction between these lecturers and the graduate students is the additional educational relationship students have with the University. In every other respect, they perform the same function of singlehandedly teaching classes to tuition-paying undergraduate students.

I do not find it significant that that the University offers, and sometimes requires, that TAs receive training from the Center for Teaching and Learning prior to being “thrust wholesale into many of the core duties of teaching.” *Id.*, slip op at 16. The *Columbia* Board merely noted that although teaching was a degree requirement, students still assisted in “the business of universities by providing instructional services for which undergraduate students pay tuition.” *Ibid.*

Similarly, graduate students who work as RFs for the University are invaluable to the business operations of the Employer. Although it is true that RFs working in laboratories hone the skills they will be using for the rest of their professional careers, they are also instrumental in advancing one of the fundamental missions of the University—to expand human knowledge and further the bounds of science. RFs labor to contribute to work funded by federal grants that in turn contribute money directly to the University’s coffers. Although federal grants are insufficient to fully underwrite the costs of research, as School of Arts and Sciences Dean Steven Fluharty conceded, a complete lack of outside funding would greatly limit the amount of research the University is able to undertake. In addition, the research that an RF performs is often either entirely unrelated to the individual’s dissertation, or else serves to further not only the RF’s own dissertation but also the work of the federal grant that funds the laboratory.

The Employer next argues that the stipends it provides graduate students amount to academic aid, not compensation in exchange for services, based on the fact that graduate students receive stipends even when they do not perform services for the University. The evidence contradicts the Employer’s contention. Many graduate groups have manuals and send RF and TA appointment letters that explicitly condition the receipt of a stipend on the performance of services, and some even refer to the stipends as compensation for services rendered. Moreover, graduate students hired to provide instructional services or research outside any service obligations must perform those services in order to be paid. The *Columbia* Board held that the explicit conditioning of awards on performance of teaching duties demonstrated that Columbia University offered student assistants stipends as consideration for fulfilling their duties to perform instructional duties on the University’s behalf. *Id* at 13-14, 15.

The only time University graduate students receive a stipend without condition is during their non-service years. However, during this time, graduate students are classified in the University’s payroll system as “Educational Fellowship Recipients,” a classification excluded from the unit. During semesters when graduate students are classified as Educational Fellowship Recipients, the University does not deduct payroll or income taxes from those students’ stipends.

This issue was addressed and disposed of in *Columbia*. There, graduate students received five years of funding, but were required to perform teaching and research services only during their second through fourth years. The Board found the graduate students to be employees only during the years they provided services to the university. *Id.* The same rationale applies here.

Finally, the Employer contends that it does not control or direct the work of TAs and RFs because students are free to pursue their academic goals by directing their own research, and because TAs and RFs are not discharged for poor performance. However, the evidence clearly

shows that the University exercises control over the instructional services and research performed by graduate students. That is more than *Columbia* requires; the Board there held that it would find exercise of control even if the employer merely reserved the “right to control work,” not that it actually exercised the right whenever possible. *Id* at 17.

In regard to teaching, graduate students perform the tasks assigned to them by their graduate groups and supervising professors. For example, the TA assignment letter in the Psychology Department lists the job duties and responsibilities of TAs. TAs grade according to the standards set by their supervising professors and attend the lectures and teach the recitations scheduled by the Employer. In addition, TAs adapt to the work expectations of their professors. As Political Science PhD student Hanley testified, “hands-on” professors exercise a high level of oversight over TAs’ grading and teaching, while “hands-off” professors allow their TAs to grade independently and do not require them to attend regular mentorship meetings.

In addition, the University exercises control over the very courses TAs are assigned to teach. Former History PhD student Mohandesi testified that he was never assigned to TA his first choice of course. The University rescinded a TA assignment for Communication PhD student Rosemary Clark for a course directly related to her dissertation because the course’s enrollment was too low. Instead, her graduate group reassigned her, against her wishes, to a course with higher enrollment. Thus, the University clearly exercises direction and control over the assignment, duties, and schedules of graduate students engaged in providing instructional services.

The University’s argument that control may only be exercised by showing that TAs and instructors are discharged and expelled from the University is unpersuasive. Associate Dean Nora Lewis testified that even non-student lecturers in the College of Professional and Liberal Studies who perform poorly are not discharged mid-course. Instead, the University simply chooses not to rehire poor-performing lecturers. The University exercises similar control when it comes to students performing instructional services. Poor student evaluations may impact whether the University decides to extend future TA offers to post-funding students. Similarly, professors can look at a graduate student’s TA evaluations prior to appointing them as a TA. In extreme circumstances, the University removes TAs from their assignments or requires them to teach an additional semester in order to satisfy their service requirement. Therefore, graduate students who perform instructional services for the University do so under its control and direction.

In regard to research, the Employer points to the fact that in the hard sciences, RFs’ research work furthers both the RFs’ dissertation and the federal grants that fund their work. Again, the Board in *Columbia* explicitly rejected this argument: “The fact that a research assistant’s work might also advance his own educational interests as well as the University’s is not a barrier to finding statutory-employee status.” *Id.* at 17. Moreover, RFs also contribute to research and perform duties unrelated to their dissertation. Biomedical Graduate Studies PhD student Kelly Karch testified that her PI could, and often would, ask her to perform work unrelated to her dissertation. Karch also worked on research related to other RFs’ pursuits, as evidenced by the fact that she is named as a co-author in several publications unrelated to her

dissertation. Finally, PIs unsatisfied with the work performance of their RFs can mentor them to improve their performance and even ask that the University remove an RF from their laboratory. These facts clearly show that RFs perform research for the University under its control and direction.

I conclude that the Employer has not shown any significant differences between its graduate student employees and those in *Columbia University* that would compel a different result here.

THE BOARD'S *PCC STRUCTURALS* STANDARD

Having concluded that the graduate students in the petitioned-for unit are statutory employees, I next consider whether the petitioned-for unit, which carves out the Wharton School and the School of Engineering and Applied Science from the nine that offer PhD programs, is an appropriate unit. The Act requires only that a petitioner seek representation of employees in *an* appropriate unit, not in the most appropriate unit possible. *Overnite Transportation Co.*, 322 NLRB 723 (1996). Thus, the Board first determines whether the unit proposed by a petitioner is appropriate. When the Board determines that the employees in the unit sought by a petitioner share a community of interest, the Board must next evaluate whether the interests of that group are “*sufficiently distinct* from those of other [excluded] employees to warrant establishment of a separate unit.” *PCC Structurals*, 365 NLRB No. 160, slip op. at 7 (Dec. 15, 2017) quoting *Wheeling Island Gaming*, 355 NLRB 637, 642 fn. 2 (2010) (emphasis in original). Specifically, the inquiry is whether “‘excluded employees have meaningfully distinct interests in the context of collective bargaining that outweigh similarities with unit members.’” *PCC Structurals*, supra, slip op. at 11, quoting *Constellation Brands, U.S. Operations, Inc. v. NLRB*, 842 F.3d 784, 794 (2d Cir. 2016). In making this assessment, *PCC Structurals* instructs the decision-maker to assess

[w]hether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the Employer’s other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised.

Id., slip op. at 5 (quoting *United Operations, Inc.*, 338 NLRB 123, 123 (2002)). Particularly important in considering whether the unit sought is appropriate are the organization of the facility and the utilization of skills. *Gustave Fisher, Inc.*, 256 NLRB 1069, 1069 fn. 5 (1981). However, all relevant factors must be weighed in determining community of interest.

Differences and Similarities in Job Functions Among Graduate Programs

As discussed above, the duties of TAs are fairly similar across all schools, including the excluded Wharton School and the School of Engineering and Applied Science. However, where graduate programs and schools differ is in how much emphasis they place on teaching as a

service requirement. Graduate students in the hard sciences have minimal to no requirement to provide instructional services, while graduate students in the humanities and some social sciences are required to perform at least four semesters of teaching.

In terms of research, the hard sciences differ substantially from the humanities and social sciences. Research in the hard sciences is often funded by the federal government and outside organizations, which allows graduate programs to employ many more students as RFs for longer periods of time. In fact, students in Biomedical Graduate Studies and the natural sciences in the School of Arts and Sciences, schools included in the petitioned-for unit, and those in the School of Engineering and Applied Science, an excluded school, work as RFs on a full-time basis throughout their graduate careers. In contrast, other schools must fund their own research, which can preclude them from employing many RFs for extended periods of time. In addition, as discussed above, the work tasks and locations of RFs in the hard sciences differ from those of RFs in the humanities and social sciences.

Contact and Interchange

TAs and RFs in the hard sciences do not generally have any contact or interchange with their counterparts in the humanities and many of the social sciences. They do not work in the same laboratories or teach the same classes. On the other hand, there is evidence that graduate students in various graduate programs in the hard sciences have significant contact and interchange, as set forth below.

School of Engineering and Applied Science

The record is replete with evidence that RFs in the hard sciences often work side by side, regardless of their home graduate group or school. To illustrate, the University operates a National Science Foundation (NSF)-funded Materials Research Science and Engineering Center. In that center, graduate students from Material Sciences and Mechanical Engineering, disciplines housed in the excluded School of Engineering and Applied Science, perform cross-disciplinary research alongside graduate students in Physics and Chemistry, disciplines located in the included School of Arts and Sciences. PIK Professor Christopher Murray, who has laboratories in both the Chemistry and Material Sciences departments, supervises RFs from both programs. His RFs work together in various University research centers, such as the Laboratory for Research on the Structure of Matter and the Singh Center for Nanotechnology, the latter a co-venture between the School of Arts and Sciences and the School of Engineering and Applied Science. Murray further testified that graduate students sometimes transfer between Material Sciences and Chemistry, and when they do, the general nature of their research does not change.

Wharton School

The Wharton School houses the Statistics Department, a discipline relevant to virtually every research field in the University. That fact attracts interest from graduate students across the University who both take and teach statistics courses. Graduate students from the Applied Mathematics and Economics Departments in the included School of Arts and Sciences and

Computer Sciences in the excluded School of Engineering and Applied Science teach statistics courses along with students in the Wharton School's excluded Statistics Department. Wharton School graduate students also serve as TAs for courses in the Economics Department in the School of Arts and Sciences and in Computer Science in the School of Engineering and Applied Science.

The research conducted in the Wharton School can also parallel research in closely related disciplines in other schools. For example, the Marketing Department conducts research on economic decision-making that is similar to research in the Psychology Department and the Neuroscience Graduate Group within Biomedical Graduate Studies. In addition, many of the research interests and teaching subjects in the Wharton School overlap with those in the Economics Department.

Application of Board Law to this Case

Appropriateness of the petitioned-for unit

Applying *PCC Structuralists*, there is no basis for excluding from the unit those graduate students providing instructional services and performing research in the Wharton School and the School of Engineering and Applied Science, while including the schools sought by Petitioner in the unit, as the Wharton School and School of Engineering and Applied Science students do not have meaningfully distinct interests in the context of collective bargaining that outweigh similarities with unit members. *PCC Structuralists*, supra, slip op. at 11. In the language of the District of Columbia Circuit in *Blue Man Vegas LLC v. NLRB*, supra at 421, there is “no legitimate basis upon which to exclude” graduate students in the Wharton School and the School of Engineering and Applied Science while at the same time including graduate students in the schools sought by Petitioner.

Instead, the unit sought by Petitioner is a fractured unit, one that does not track any administrative lines drawn by the Employer, such as classification, department or function. The Board will not approve fractured units, that is “combinations of employees that...have no rational basis.” *Seaboard Marine*, 327 NLRB 556, 556 (1999). The Petitioner's proposed unit is not a classification-based unit because it seeks to exclude other employees in the same classification. Nor is the unit sought by Petitioner drawn along departmental lines. Rather, Petitioner seeks employees in seven schools, while seeking to arbitrarily exclude two schools. See *Odwalla, Inc.*, 357 NLRB 1608, 1612 (2011) (finding that a petitioned-for unit was not drawn along lines of classification because it sought an aggregate of varied classifications). Finally, the classifications sought by Petitioner are not drawn along functional lines. In fact, RFs in the School of Engineering and Applied Science are more functionally related to RFs in the natural sciences within the School of Arts and Sciences and Biomedical Graduate Studies than they are the RFs in the social sciences, arts and humanities, all of whom Petitioner contends should be in the unit. Similarly, TAs and RFs in the Wharton School are more functionally related to their counterparts in the social sciences, including the Economics Department, than those social sciences graduate students are to the graduate students in the humanities and hard sciences, all of whom Petitioner contends should be in the unit. See *id.* (noting that some of the

petitioned-for classifications in *Odwalla* shared a closer community of interest with the excluded classification than they did with other included employees).

Instead, Petitioner appears to have used the extent of its organization as the sole determining factor in deciding what collection of students it would seek to represent. The Act expressly precludes consideration of that factor: “[i]n determining whether a unit is appropriate... the extent to which the employees have organized shall not be controlling.” 29 U.S.C. § 159(c)(5).

Unit employees in Biomedical Graduate Studies and the natural sciences in the School of Arts and Sciences are significantly more similar to the graduate student employees in the School of Engineering and Applied Science than they are to any of the other included employees. Graduate students in the hard sciences work and study in much more research-oriented programs than included employees who labor and study in the humanities. They also share a much greater degree of interchange, are more likely to work side by side and share common supervision, and are the only graduate students with unlimited funding packages. Meanwhile, graduate students in the Wharton School share a closer community of interest with graduate students in other social science disciplines, particularly with those in the Economics Department in the School of Arts and Sciences. Wharton School graduate students may serve as TAs in courses in the social sciences and generally have a much more teaching-focused service requirement than graduate students in the hard sciences. The similarities of graduate student employees in the Wharton School and the School of Engineering and Applied Science with the employees in the petitioned-for unit are such that their exclusion fractures the petitioned-for unit.

In its brief, Petitioner suggested, for the first time, that I order separate elections in the seven petitioned-for departments. In *P.J. Dick Contracting, Inc.*, 290 NLRB 150, 151 (1988), the Board stated, “Board inquiry pursues not the most appropriate or comprehensive unit but simply an appropriate unit. Once this unit is determined, the requirements of the Act are satisfied. The inquiry first considers the petitioning union’s proposals. If the union’s proposed unit is inappropriate, the employer’s proposals are then scrutinized.” I find that Petitioner’s failure to amend its petition to include its alternative unit proposal precludes me from considering it as an option. Assuming, *arguendo*, that I could properly consider Petitioner’s alternative unit, I find that there is insufficient record evidence to determine whether Petitioner’s proposed units are appropriate. *Id at 151* (“The Petitioner proposes a unit which includes all 33 counties within its geographical jurisdiction. However, the limited evidence introduced by the Petitioner at the hearing provides inadequate support under the above listed factors for this proposed unit. Without supporting evidence, we cannot find the Petitioner’s proposed 33-county unit appropriate.”)

In *Bartlett Collins Co.*, 334 NLRB 484, 484 (2001), the Board noted that it “generally attempts to select a unit that is the smallest appropriate unit encompassing the petitioned-for employee classifications.” Here, the smallest appropriate unit that encompasses the petitioned-for employee classifications is the Employer’s proposed unit. Therefore, I find that the unit in this case must include all graduate students providing instructional services and/or performing research in each of the nine academic schools that offer PhD degree programs, i.e., Annenberg

School for Communication, Biomedical Graduate Studies, School of Design, Graduate School of Education, School of Arts and Sciences, School of Engineering and Applied Science, School of Nursing, School of Social Policy and Practice, and the Wharton School.² I reject the Petitioner's post-hearing suggestion that I direct elections in separate units in each of the petitioned-for schools.

Student Workers

The petitioned-for unit lists student workers as an included classification. However, the Employer contends that student workers do not share a community of interest with the petitioned-for unit because they do not provide instructional services or perform research. During the hearing, the Employer presented evidence that the "student worker" classification included graduate students performing administrative and clerical tasks unrelated to instruction or research. The Employer also contends that, unlike employees in the petitioned-for unit, student workers are paid on an hourly basis and must track their hours. However, there is record evidence that the University sometimes classifies RFs as student workers. Moreover, there is evidence that the University compensates some RFs and TAs on an hourly basis, rather than by stipend. Because there is evidence that some student workers perform unit functions, I will not list them among the included or excluded classifications. However, I find that student workers employed by the University to provide instructional services and/or research are eligible to vote.

PETITION TO REVOKE SUBPOENA *DUCES TECUM* B-1-WYMXOP

On June 14, 2017, the Employer served on Petitioner Subpoena *Duces Tecum* B-1-WYMXOP seeking, *inter alia*, documents in Petitioner's possession related to employees' terms and conditions of employment. Petitioner filed a timely request to revoke the subpoena, which I referred to the Hearing Officer for ruling. On June 21, 2017, the Hearing Officer granted Petitioner's request to revoke the subpoena and the Employer filed a special appeal with the Board. The Board referred the matter to me for ruling and I sustained the Hearing Officer's decision to revoke the subpoena.

² The Employer argues that some or all of the employees in the petitioned-for unit are temporary employees. I disagree. In *Columbia University*, supra, slip op. at 21, the Board rejected the employer's argument that certain classifications of student assistants should be excluded from the unit as temporary employees: "[N]otwithstanding the length of any individual assistant's tenure, the University will continuously employ groups of Master's and undergraduate student assistants to perform research and instructional duties across semesters (and, although the precise composition of these groups will differ from semester to semester, there will typically be some individual student assistants who are carried over from one semester to another.) Similarly, here, while the individual identities of the TAs, RFs, pre-doctoral trainees, graders, tutors, or instructors in a given academic department may change from semester to semester, each academic department will continuously employ a group of graduate students who provide instructional services and/or perform research. It is the group that must be readily identifiable rather than individual employees.

The documents requested by the Employer were likely gathered by the Union in preparation for the representation proceedings and undisputedly solely consist of Employer-created materials. In [Marian Manor for the Aged, 333 NLRB 1084 \(2001\)](#), the Board affirmed a hearing officer's refusal to seek enforcement of a subpoena in a pre-election hearing seeking to compel production of a survey the union conducted among employees concerning their supervisory authority. The Board cited [Rule 26\(b\) of the Federal Rules of Civil Procedure](#) for the principle that "a party seeking to obtain documents prepared by another party in anticipation of litigation must show both that the party seeking the documents has a substantial need for the materials in preparation of his case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means." *Id.* at 1084. The Board noted that the evidence sought was relevant and necessary, but found that there was no showing that the information could not be obtained from the employer's own employees. *Ibid.* Here, the Employer's subpoena seeks evidence gathered by Petitioner in preparation for litigation that is wholly created and maintained by the Employer in the ordinary course of its business. The University presented no evidence showing that it could not gather the requested information from its own records.

Also, the Employer's subpoena for documents the Union gathered from graduate students about their terms and conditions of employment presents an inherent risk of divulging the identity of students who cooperated with the Union during the organizing drive. For example, even if the Union were to redact a student's name and address from their admission letter, the Employer might easily be able to identify the student from secondary information contained in the letter, such as the date of the letter, the name of the University official who sent the letter, the graduate program into which the student was accepted, the type and amount of any stipends awarded, and the identity of the student's mentor. If all of this information was also redacted, the document would lose its relevance to the proceedings. Weighed against the fact that all of the subpoenaed documents were already in the Employer's possession, I find that the risks of complying with the subpoena far outweigh the evidentiary value of the documents. Therefore, for the reasons stated above, I reaffirm my decision to grant Petitioner's request to revoke Subpoena *Duces Tecum* B-1-WYMXOP.

CONCLUSIONS

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act and claims to represent certain employees of the Employer.³

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All graduate students who provide instructional services and/or perform research, including but not limited to Teaching Assistants, Teaching Fellows, Research Assistants, Research Fellows and Pre-Doctoral Trainees employed by the Employer in the following schools: Annenberg School for Communication, Biomedical Graduate Studies, School of Design, Graduate School of Education, School of Arts and Sciences, School of Engineering and Applied Science, School of Nursing, School of Social Policy and Practice, and Wharton School; **excluding** all other employees, educational fellowship recipients, office clerical employees, guards and supervisors as defined in the Act.

I am administratively satisfied that the Petitioner's showing of interest is sufficient to support the expanded appropriate unit.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by GET-UP UPENN.

A. Election Details

During the hearing, which took place prior to the start of the fall semester, the Petitioner argued, over the Employer's opposition, that I should direct an election by mail ballot because eligible voters often travel and are not necessarily at the University. This appears to be particularly the case over the summer. However, there is no evidence regarding the proportion of eligible voters who are not on campus during the fall and spring semesters. In addition, the Board held a manual election for University graduate students in 2002, in a previous representation case. Therefore, in accordance with the Board's policy preference, I use my discretion to order a manual election. The date, time, and place of the election will be specified in the Notice of Election that the Board's Regional Office will issue subsequent to this Decision.

³ During the hearing, the Employer stipulated that if I found the graduate students in the petitioned-for unit to be employees, it would agree that the Petitioner is a labor organization as defined in Section 2(5).

B. Voting Eligibility

The Employer contends that no special eligibility formula is needed and that the traditional eligibility requirement (those employees on the payroll immediately preceding the date of the direction of election) should apply. During the hearing, the Employer also argued that past service in one of the included unit positions was not indicative of an expectation of future employment.

The goal in crafting an appropriate eligibility formula is 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.” *Columbia University, supra*, slip. op. 21-22, citing *Steiny & Co.*, 308 NLRB 1323, 1325 (1992) and *Trump Taj Mahal Casino*, 306 NLRB 294 (1992). The Board noted that, as here, “there are employees in the unit 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.” *Id* at 22. Moreover, The Board in *Trump Taj Mahal* 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.” *Id.* at 296.

Here, graduate students are not required to fulfill their service semesters on a consecutive basis and TA appointments are made on a per-semester basis. Also, there is evidence that several graduate groups allow, or reserve the right to require, their students to fulfill their service years on a nonconsecutive basis. In addition, while Ben Franklin Fellowship recipients often fulfill their service requirement during their second and third years, many of them do not complete their studies during their funding years. Once their funding has ended, these students can, and often do, seek additional TA and RF appointments to cover their tuition and living expenses.

During the hearing, the Employer presented evidence purporting to support its position that a special eligibility formula is unnecessary. The Employer introduced two tables showing that graduate students classified in the ineligible Educational Fellowship Recipient position in their fourth and fifth academic years only had a 28% and 20% probability of returning to the unit in their fifth and sixth years, respectively. However, this evidence is insufficient to provide a representational portrait of the nature of graduate students’ work. For example, the data does not cover graduate students with one-semester breaks in service during their first three years at the University. Moreover, the Employer’s argument implicitly suggests that a look-back period is only appropriate if former employees are more likely than not to return to unit positions. In fact, the Employer’s data shows that graduate students have a real continuing interest in the terms and conditions of employment offered by the Employer.

Based on the evidence adduced at the hearing and the positions of the parties, I am directing an election in the unit I have found appropriate according to the following eligibility formula:

All unit employees who:

- 1) Hold an appointment in a unit position during the spring 2018 semester as of a payroll cutoff date to be determined by the Regional Director; or
- 2) Held a unit position for either the spring, summer or fall term in 2017.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

C. Voter List

As required by Section 102.67(l) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters.⁴

To be timely filed and served, the list must be *received* by the regional director and the parties by a date to be determined by the regional director, following a period of time which will allow the Employer to comply with its obligations under FERPA. The list must be accompanied by a certificate of service showing service on all parties. **The region will no longer serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on

⁴ I recognize, as stipulated by the parties, that the Employer is constrained by the Family Educational Rights and Privacy Act of 1974 (FERPA) (20 U.S.C. § 1232f; 34 CFR Part 99) from releasing certain information related to unit employees due to their student status. The Board will therefore issue a subpoena for the required information, and the Region will make arrangements for the provision of the list once FERPA requirements are met.

the NLRB website at www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The list may be electronically filed with the Region by using the E-filing system on the Agency's website at www.nlr.gov. Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

D. Posting of Notices of Election

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution.

Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 14 days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlr.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board.

Dated: December 19, 2017

/s/ Dennis P. Walsh

Dennis P. Walsh, Regional Director
National Labor Relations Board
Region 04
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Philadelphia, PA 19106-4413