

Education

## Sides Clash Over Graduate-Assistant Organizing Outlook

### BNA Snapshot

- Question of whether graduate assistants are employees might end up in appeals court
- New NLRB composition could yield board-level reversal, but not soon



By John Herzfeld

The National Labor Relations Board's August decision giving graduate teaching and research assistants at Columbia University the right to organize, if it survives possible appeals, would lead to "years and years of unnecessary litigation" over grievances spilling over into matters of academic freedom, an attorney for the "Ivy-plus" universities said March 27.

Joseph W. Ambash, a management attorney with Fisher & Phillips LLP in Boston, said he expects the Columbia decision to be reversed, "if not by the NLRB, then by the courts." But in the meantime, the ruling "will and does intrude" on management rights and academic decision-making, he said. The Ivy-plus group includes Brown, Columbia, Cornell, Dartmouth, Harvard, Penn, Princeton, and Yale, as well as the Massachusetts Institute of Technology and Stanford.

Ambash represented Brown University in the 2004 case that resulted in the board's reversing its earlier decision finding graduate assistants to be employees. He has filed friend-of-the-court briefs for the Ivy-plus group, opposing graduate-assistant organizing rights in the Columbia case and others.

He was speaking in a panel discussion at an annual conference in New York held by the National Center for the Study of Collective Bargaining in Higher Education at Hunter College-City University of New York.

Taking the opposite point of view was Julie Kushner, a United Auto Workers regional director who coordinated graduate-assistant organizing drives at Columbia, New York University and elsewhere in the Northeast. Universities never offered specifics to support their expressed concerns about threats to academic freedom, she said.

Any employer would prefer not to have to take disputes to arbitration, but "it's critically important in a democracy" that workers have the freedom to bargain and due process rights for grievances, she said in the panel discussion.

### Impact on Research?

The board's Columbia decision, by grouping research assistants with teaching assistants, could have a "significant impact" on universities if contract terms or grievances interfere with research activities, Ambash said. But Kushner said that "we haven't seen" any disruption of research at the University of Connecticut, a public institution where the UAW organized 2,300 graduate assistants in 2014.

Wilma Liebman, a former Democratic NLRB member and chairman, declined to "venture a guess" during the panel discussion on whether a board reconstituted by appointees of President Donald Trump would reverse the Columbia decision, which itself reversed the 2004 Brown decision that overturned a Clinton administration board finding. Liebman is a visiting scholar at the Rutgers University School of Management and Labor Relations.

The board is known for its policy "oscillation"--also known as flip-flopping--but at some point the back-and-forth settles down, Liebman said. "I'm not suggesting it will here," she said. "To some extent, that will depend on what the Ivies do in response

and who's appointed to the board.”

One possibility is that a university can negotiate a contract with the stated understanding that, if the governing law changes, it will withdraw its recognition of the union, Ambash said.

Columbia is pursuing objections at the NLRB regional level to the conduct of a December organizing election ordered in the case.

### **Unions Will Persist: UAW Organizer**

“I don't think graduate assistants are going to stop organizing,” as the litigation uncertainty continues, Kushner said. At NYU, graduate assistants have ridden the ups and downs for more than 15 years, she said, adding: “We're not going to walk away from these fights.”

It's up to the Ivy League, she said, “to come to its senses” and end a dispute that it's “not going to win in the long run.”

But the outcome of the question of whether graduate assistants are employees won't necessarily depend on the cases involving Ivy League institutions, which are in varying procedural stages, Ambash said in comments after the panel discussion.

“Any institution that loses an election has the right to refuse to bargain and litigate the underlying question,” he told Bloomberg BNA. An unfair labor practice proceeding would be reviewed by the board, producing a decision that would be automatically reviewable by the U.S. Court of Appeals for the District of Columbia Circuit, he said.

Ambash said another policy flip-flop could come from a board composed of Trump appointees, but “it seems inevitable” that the graduate-assistant question will go to the courts.

### **Don't Hold Your Breath**

Whatever scenario plays out, it will probably take more than a year, Liebman told Bloomberg BNA after the session.

No NLRB transition has ever taken less than a year, so “unless this White House is more efficient,” a new board composition is still far off, she suggested. Two seats on the five-member board remain unfilled.

The December expiration of the term of acting NLRB Chairman Philip A. Miscimarra (R) and the November expiration of the term of board General Counsel Richard F. Griffin (D) would suggest that a package of nominations could come out in the fall, Liebman said.

It's also impossible to say now whether the nominees would be familiar members of the labor-management bar, she suggested.

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