

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2**

**TRUSTEES OF COLUMBIA UNIVERSITY
IN THE CITY OF NEW YORK**

and

**COLUMBIA POSTDOCTORAL WORKERS
AND UNITED AUTOMOBILE, AEROSPACE
AND AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA**

Case No. 02-RC-225405

COLUMBIA UNIVERSITY'S POST-HEARING BRIEF

TABLE OF CONTENTS

	Page
Preliminary Statement	1
Statement of Facts.....	3
I. Columbia’s Research Program	3
A. Principal Investigators	4
B. Professional Officers of Research	5
i. Associate Research Scientists/Scholars	5
C. Postdoctoral Officers of Research	7
i. Generally.....	7
ii. Postdoctoral Research Scientists/Scholars	9
iii. Postdoctoral Research Fellows	10
Argument	14
I. The Petitioned-For Associate Research Scientists Do Not Share The Requisite Community of Interest with Postdoctoral Trainees.	14
A. The University Has A Separate Process For Hiring ARSs As Compared to the Process For Appointing Postdoctoral Trainees.....	15
B. The University Requires Different Qualifications For Hiring ARSs Than It Does For Appointing Postdoc Trainees.	16
C. ARSs and Postdoc Trainees Have Different Skills.....	18
D. ARSs Receive Higher Compensation Than Postdoc Trainees.	19
E. Being an ARS is a Permanent Career Position Whereas Postdoc Trainees Are Temporary Appointments.....	20
F. There is No Temporary Interchange Among ARSs and Postdoc Trainees.	22
G. ARSs and Postdoc Trainees Do Not Have Legally Sufficient Contact.	24
H. ARSs and Postdoc Trainees Are Supervised Separately.	25
II. The University Does Not Control the Terms By Which Fellows Conduct Research.....	26
A. The Petitioned-For Postdoctoral Research Fellows Are Not Employees of Columbia.....	26
B. Even if Fellows Work for the University, They are Independent Contractors and Not Employees under the Act.	28
i. Fellows Control the Research that they Conduct	28

ii.	Fellows are Minimally Supervised or Controlled by PIs.....	29
iii.	Fellows are Compensated by External Agencies, not Columbia.....	30
iv.	Fellows Have Specific Skills.....	31
v.	A Fellow’s Duration of Service to the University is Temporary and Limited.....	31
III.	Directing a Mail or Mixed Mail-Manual Ballot Election Would Be Inappropriate in This Case.	32
	CONCLUSION.....	34

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>American Cyanamid Co.</i> , 110 NLRB 89 (1954)	14
<i>Amerihealth Inc./Amerihealth HMO</i> , 329 NLRB 870 (1999)	30
<i>Bashas', Inc.</i> , 337 NLRB 710 (2002)	22, 23, 24
<i>Bergdorf Goodman</i> , 361 NLRB 50 (2014)	25
<i>City Cab Co. of Orlando</i> , 285 NLRB 1191 (1987)	29, 30
<i>Dial-A-Mattress Operating Corp.</i> , 326 NLRB 884 (1998)	28
<i>DTG Operations, Inc.</i> , 357 NLRB 2122 (2011)	17
<i>Fordham Univ.</i> , 193 NLRB 134 (1971)	22, 26
<i>Grace Industries</i> , 358 NLRB 502 (2012)	20
<i>Macy's Inc.</i> , 361 NLRB 12 (2014)	22, 24
<i>McLean Hosp. Corp.</i> , 311 NLRB 1100 (1993)	15
<i>Moore Business Forms, Inc.</i> , 204 NLRB 552 (1973)	14
<i>N.L.R.B. v. Action Auto., Inc.</i> , 469 U.S. 490 (1985)	14
<i>New York Univ.</i> , 205 NLRB 4 (1973)	20, 21, 22

<i>NLRB v. United Ins. Co. of Am.</i> , 390 U.S. 254 (1968).....	28
<i>Overnite Transp. Co.</i> , 322 NLRB 723 (1996)	14
<i>Pa. Interscholastic Athletic Assn.</i> , 365 NLRB No. 107 (2017)	28
<i>PCC Structural, Inc.</i> , 365 NLRB No. 160 (2017)	14
<i>Pennsylvania Acad. of the Fine Arts</i> , 343 NLRB 846 (2004)	30, 31, 32
<i>Porter Drywall, Inc.</i> , 362 NLRB 6 (2015)	28
<i>Sonoco Prod. Co., Downingtown Paper Co.</i> , 192 NLRB 310 (1971)	24
<i>Specialty Healthcare</i> , 357 NLRB No. 83 (2011)	14
<i>Swift & Co.</i> , 129 NLRB 1391 (1961)	14
<i>The Neiman Marcus Group, Inc.</i> , 361 NLRB 50 (2014)	22, 25, 26
<i>United Operations, Inc.</i> , 338 NLRB 123 (2002)	18
<i>Univ. of San Francisco</i> , 265 NLRB 1221 (1982)	15
<i>Univ. of Vermont</i> , 223 NLRB 423 (1976)	17
<i>Univ. of Miami</i> , 213 NLRB 634 (1974)	23
<i>Young & Rubicam Int’l, Inc.</i> , 226 NLRB 1271 (1976)	29

PRELIMINARY STATEMENT

The Columbia Postdoctoral Workers and United Automobile, Aerospace and Agricultural Implement Workers of America's (the "Union") petitioned-for unit is inappropriate for three reasons: (1) the petitioned-for Postdoctoral Research Scientists, Postdoctoral Research Scholars, and Postdoctoral Research Fellows ("Postdoc Trainees") are not "employees" as defined under Section 2(3) of the National Labor Relations Act ("NLRA" or "Act");¹ (2) the petitioned-for Postdoc Trainees do not share the requisite community of interest with the petitioned-for Associate Research Scientists and Associate Research Scholars ("ARSs"); and (3) assuming *arguendo* the Postdoctoral Research Fellows ("Fellows") are found to be Section 2(3) employees, they are not employees of Columbia University ("Columbia" or the "University").²

A requisite community of interest does not exist between the petitioned-for unit of Postdoc Trainees and ARSs because it groups a classification of Professional Research Officers, ARSs, who are clearly employees under Section 2(3) of the Act, with Postdoc Trainees who are just that: trainees. As its name suggests, a postdoctoral program is an extension of a doctoral program. While it is true that Postdoc Trainees typically already have their PhD degree, such individuals are research trainees who require additional mentoring and training on how to conduct independent research. Such individuals receive this additional mentoring and training

¹ During the pre-election hearing, the University submitted an offer of proof which presented the facts it believes would prove that the Postdoc Trainees are not "employees" as defined by Section 2(3) of the NLRA. While the Regional Director accepted the University's Offer of Proof, he precluded it from litigating that issue at the pre-election hearing. (Tr. 182-83.) The University believes the Regional Director erred by denying it the opportunity to present evidence and litigate this issue. The University reserves its right to argue this issue in potential subsequent appeals and/or other proceedings.

² The only difference between titles such as Postdoctoral Research *Scientist* and Postdoctoral Research *Scholar* or Associate Research *Scientist* and Associate Research *Scholar* relates only to the discipline the individual in that classification is in. Scientists typically perform research in the "hard" sciences (*e.g.*, biomedical sciences, engineering), whereas Scholars typically perform research in social sciences and humanities. (Tr. 42 [Purdy], 87 [Peterson].)

by becoming a Postdoc Trainee for a limited period of time, usually two to three years.

Conversely, Professional Research Scientists, including ARSs, hold permanent career positions and are considered equivalent to professors. As such, ARSs, as a prerequisite, must already have significant competence and expertise in performing research tasks and conducting independent research. Thus, upon hire, the University expects that ARSs be already proficient at conducting independent research, whereas the University has no such expectations for Postdoc Trainees because it is understood that such individuals will need two to three years of additional training before they are proficient at conducting their own independent research. Consistent with their qualifications and responsibilities, ARSs are also paid considerably higher compensation than Postdoc Trainees. Therefore, the two positions—ARSs and Postdoc Trainees—do not share the requisite community of interest to be included in the same bargaining unit as the Union has attempted to do in this case.

Whether or not ARSs share the requisite community of interest with Postdoc Trainees, any unit certified by the National Labor Relations Board (“NLRB” or “Board”) in this case cannot include Fellows because they are not employees of the University. The University generally does not dictate or control the terms under which Fellows work because Fellows conduct their research—their “work”—pursuant to very specific plans contained in a grant awarded to the Fellow directly by an external funding agency. Fellows are generally responsible for drafting their proposal to be considered for receiving the grant. Moreover, many of the external funding agencies provide the funds from the grant directly to the Fellow. Thus, Fellows have a higher degree of independence to conduct their own research than other Postdoc Trainees, like Postdoctoral Research Scientists/Scholars. Therefore, even assuming *arguendo* Fellows are

found to be Section 2(3) employees, they are not “employees” of the University and should not be included in a bargaining unit with individuals who are employed by the University.

Therefore, the petition must either be dismissed in its entirety or the proposed unit be amended to exclude all Fellows and ARSs.

STATEMENT OF FACTS

I. Columbia’s Research Program

Established in 1754, Columbia is one of the preeminent institutions of higher education and research in the United States. Columbia’s research mission is to advance scholarship and generate new knowledge for the benefit of humankind. (Tr. 35 [Purdy].)³ Consistent with its mission, Columbia is home to over 200 research centers and institutes, and receives approximately \$800 to \$900 million dollars in research funding from external agencies each year. (Tr. 33 [Purdy].) Research at Columbia is conducted across the University’s many schools, departments, and programs, and plays a major role in training undergraduate students, graduate students, and Postdoc Trainees to become independent researchers.

The Executive Vice President for Research at Columbia, Dr. G. Michael Purdy, is responsible for overseeing all research activities at Columbia. (Tr. 31-33 [Purdy].) There are several research units that report to Dr. Purdy, including strategic planning, research initiatives, and regulatory units. (Tr. 33-34 [Purdy]). Of particular significance to this case is the Office of Postdoctoral Affairs (“OPA”).

The OPA is led by Dr. Ericka Peterson, as its Director. (*Id.*) Dr. Peterson is responsible for developing policies, programs, and other initiatives for the benefit and development of Postdoc Trainees at Columbia. (Tr. 33-34 [Purdy], 81-82 [Peterson].) She regularly meets with

³ References to the Hearing Transcripts are cited herein as “Tr. ___”; Employer Exhibits are cited as “Er. Ex. ___”; and Petitioner Exhibits are cited as “Pet. Ex. ___”.

Postdoc Trainees for one-on-one counseling and support, and generates developmental and educational programs and policies. (Tr. 81-82 [Peterson].) As such, the OPA plays an integral role in the education and development of Postdoc Trainees. (Tr. 33, 36 [Purdy], 81 [Peterson].) Specifically, the OPA has two primary missions: (1) advocating on behalf of Postdoc Trainees regarding policies, benefits, and methods to improve the training and experience of Postdoc Trainees; and (2) enhancing the career and professional development opportunities for Postdoc Trainees. (Er. Ex. 4; Tr. 81-83 [Peterson].) For example, the OPA implemented targeted career development programming and counseling services tailored to the specific needs of Postdoc Trainees. (Er. Ex. 4; Tr. 81-83 [Peterson].) The OPA is also responsible for implementing training and mentoring programs mandated by external funding agencies as a condition to receiving funding. (Tr. 44, 49-50 [Purdy], 81, 107 [Peterson].) The programming, resources, and support mechanisms offered by the OPA is exclusively provided to Postdoc Trainees. (Tr. 83-84 [Peterson].) Other officers of research, such as ARSs, do not have access to these resources. (*Id.*)

Much of the research at Columbia takes place in research labs. A typical research lab comprises a number of researchers at various stages of experience and independence, including the following:

A. Principal Investigators

Each research project at the University is led by a Principal Investigator (“PI”) who oversees the project and the lab in where the research is conducted. (Tr. 34 [Purdy].) The PI must ensure the quality and effectiveness of the research, that the research be adequately communicated, and that the research adheres to federal, state, and city regulations. (Tr. 35, 37 [Purdy].) PIs are typically tenured, or tenure-track, faculty members who, in addition to overseeing their lab, are primarily responsible for writing research proposals and obtaining

grants from external funding agencies to ensure that adequate funds are secured to sustain their labs. (Tr. 37 [Purdy].)

PIs also play an integral role in the training, mentoring, and professional development of Postdoc Trainees. (Tr. 36-37 [Purdy].) Indeed, as Dr. Purdy testified, the “single most important word” to describe the PI’s role as it relates to Postdoc Trainees is “mentor.” (Tr. 36 [Purdy].) To that end, PIs are generally responsible for mentoring and training Postdoc Trainees and assisting them with developing individualized career plans and the skills needed to succeed in their careers after their postdoctoral training ends. (Tr. 36-37, 45 [Purdy].)

B. Professional Officers of Research

One step below the PI are the Professional Officers of Research. There are three classifications of Professional Officers of Research at Columbia: (1) Associate Research Scientists/Scholars (equivalent to Assistant Professors); (2) Research Scientists/Scholars (equivalent to Associate Professors); and (3) Senior Research Scientists/Scholars (equivalent to Full Professors). (Er. Ex. 1.) In general, Professional Officers of Research are hired to “perform independent research in the area of their training” and, depending on the classification, have varying degrees of independence, with those in the Senior Research Scientist/Scholar title obviously having the most. (Er. Ex. 1; Tr. 41 [Purdy].) The Union only included one of the three classifications of Professional Officers of Research in the petitioned-for bargaining unit—ARSs.

i. Associate Research Scientists/Scholars

ARSs are professional researchers who are considered equivalent to Assistant Professors. (Er. Ex. 1.) The rules and policies governing Professional Officers of Research, including ARSs, are set forth in the Faculty Handbook. (Er. Ex. 1.) Like all Professional Officers of Research positions, the ARS position is a “permanent” career position where one is given “substantial

independence in performing their responsibilities.” (Er. Ex. 1; Tr. 41-42, 46 [Purdy].) Although ARS appointments are for one year at a time, it is not unusual for ARSs to stay within such roles for five to ten years, and sometimes longer. (Tr. 45, 41 [Purdy].) ARSs may work for several years in that classification before being promoted to Research Scientist/Scholar and another term of years before moving to Senior Research Scientist/Scholar. (Tr. 41 [Purdy]; Er. Ex. 1.)

Anyone seeking to become an ARS must apply through a formal job posting. (Tr. 42, 44 [Purdy].) Postings for ARS positions typically appear on Columbia’s public website or other advertising channels (*e.g.*, job postings in Science magazine, Nature magazine, or other industry journals, etc.). (Tr. 44 [Purdy].) Since the ARS classification is a career position, ARS job postings are filled through a competitive process which must strictly adhere to equal employment opportunity and affirmative action (“EOAA”) regulations to ensure that recruitment of ARSs is fair and open to a diverse pool of candidates. (Er. Ex. 1; Tr. 46 [Purdy].) Even Union witness Dr. Manu Vanaerschot’s testimony confirmed that applicants for all ARS positions must go through a competitive process, even where one of the applicants may currently hold a position as a Postdoc Trainee in the lab looking to hire an ARS. (Tr. 143 [Vanaerschot].)

Qualified ARS applicants are selected through a multi-tiered approval process. First, a PI makes an initial selection of an ARS applicant for hire. (Er. Ex. 1.) Next, the PI’s selection must be approved by the unit chair or director, and then by the appropriate Dean and/or Executive Vice President. (*Id.*) Finally, approval must be granted by the Provost.

The University typically requires that ARS applicants have a PhD degree, a record of research accomplishments, peer-reviewed publications, and letters of reference. (Tr. 44 [Purdy].) Hiring an ARS is a long-term commitment of five, ten, or even twenty-plus years, over which the lab may need the ARS to perform skilled work, such as running a particular instrument or

equipment. (Tr. 50, 68 [Purdy].) Therefore, the University looks for ARS candidates to have an established background and specific set of skills that will assist in and support the long and short term research objectives of the particular lab. (*Id.*)

The University compensates ARSs with a salary paid bi-monthly. (Er. Ex. 2; Tr. 48 [Purdy].) The University's Office of the Provost promulgates salary guidelines for Professional Officers of Research, including ARSs, each year. (Pet. Ex. 1.) For the 2018-19 academic year, the minimum salary for an ARS is \$56,300 per year. (*Id.*) ARSs are also eligible for all University employee benefits. (Tr. 57 [Purdy].)

C. Postdoctoral Officers of Research

One step below Professional Officers of Research are Postdoctoral Officers of Research. There are four classifications of Postdoctoral Officers of Research at Columbia: (1) Postdoctoral Research Scientists/Scholars ("PDRSs"); (2) Fellows; (3) Postdoctoral Clinical Fellows; and (4) Postdoctoral Residency Fellows. (Er. Ex. 1.) The Union petitioned to represent two of the four classifications—PDRSs and Fellows.⁴

i. Generally

A Postdoctoral Officer of Research ("Postdoc") is defined as "an individual holding a doctoral degree who is engaged in a *temporary period of mentored research and/or scholarly training* for the purpose of acquiring the professional skills needed to pursue a career path of his or her choosing." (Er. Ex. 3 (emphasis added); Tr. 84 [Peterson].) While Postdocs generally hold PhD degrees, and are highly skilled, intelligent, and accomplished individuals, they have not yet developed an established track record of professional accomplishments or skillsets to be able to conduct research independently. (Tr. 43-44 [Purdy].) The University provides Postdocs

⁴ On August 22, 2018, the Union with permission from the Regional Director, amended its petition to specifically exclude Postdoctoral Clinical Fellows and Postdoctoral Residency Fellows from the petitioned-for unit. (Tr. 19.)

with additional training and mentoring so they are prepared to perform independent research.

(Er. Ex. 1.)

Prospective Postdocs may apply for an appointment to a PI's lab. While Columbia always seeks to attract a diverse pool of applicants for all positions, including Postdoc appointments, the fact that EOAA regulations do not technically apply to Postdoc appointments is indicative of how their status is viewed generally and by the federal government in particular. As such, any postings for Postdoc positions (*i.e.*, those on Columbia's website or in industry journals) are not required to comply with equal opportunity or affirmative action regulations. (Tr. 46 [Purdy].) At Columbia, Postdoc positions are "for a limited duration lasting not more than three years." (Er. Exs. 1, 5, 7; Tr. 35, 51-52 [Purdy].) Postdoc appointments are made for up to twelve months at a time, and are renewable for a maximum of three years. (Tr. 89 [Peterson]; Er. Exs. 5, 7.) Twelve-month extensions for up to two years are available under narrow circumstances and require Provostial approval. (*Id.*) Postdoc appointments are not career positions; rather they are temporary intermediate traineeships during which trainees undergo educational and professional development focused on skills-building in order to prepare them for independent careers. (Tr. 36, 42-44 [Purdy], 82, 86-87 [Peterson].)

To that end, it is the mutual goal of both PIs and Postdocs for the trainee to achieve a prestigious career appointment after holding a Postdoc appointment for up to two to three years training and research in the PI's lab. (Tr. 36 [Purdy].) PIs are personally invested in the quality of the mentorship they provide to their Postdocs, and even list their most successful Postdocs—those who have gone on to secure prestigious faculty positions—on their CVs "as a badge of honor." (Tr. 36-37, 40 [Purdy].)

ii. Postdoctoral Research Scientists/Scholars

A PDRS is a classification of a Postdoc Trainee engaged in a temporary period of scholarly, mentored training in the lab of a PI who is pursuing an established research project of interest to the PDRS. (Er. Ex. 1.) The primary difference between a PDRS and a Fellow is that a PDRS has not secured his/her own funding, and therefore must find and select a lab that has funding available to support the PDRS's particular research project. (Tr. 87-89 [Peterson].)

After a prospective PDRS identifies a lab with a sufficient subject matter connection to his/her research goals and interests, he/she must apply for an opening in that PI's lab. (Tr. 87-89 [Peterson].) Because a PDRS applicant's stipend must be supported by the PI or the University, the number of PDRS appointments available at the University is limited based on the amount of available funding. (Tr. 87-89 [Peterson]; Er. Ex. 5.) Thus, during the application process, PDRS applicants must not only find a lab that is the best fit for their ultimate career path and demonstrate the value they would bring to that lab as part of a competitive application process, but must also contend with factors outside of their control—namely, the lab's funding. Qualified PDRS applicants are initially proposed for appointment by a PI. (Tr. 87-90 [Peterson].) The PI's proposed appointment must then be vetted through three additional layers of approval, amounting to a four-tiered approval process: (1) the department chair or institute/center director; (2) the appropriate Dean or Executive Vice President; and (3) the Provost. (Er. Ex. 1.)

If and when a PI's proposed PDRS candidate is approved, the PDRS applicant is given an offer letter which details the terms of the appointment, including the amount of the PDRS's stipend. (Er. Ex. 5.) The offer letter states that the PDRS's stipend is "contingent upon the availability of funding" from the University or PI's grant. (Er. Ex. 6.) After an offer is accepted, PDRSs are issued an appointment letter from the Secretary of the University which confirms the amount of their yearly stipend, and, like the offer letter, reiterates that the stipend is contingent

upon the availability of funding. (Er. Ex. 6.) Because PDRSs do not have their own funding, they receive a bi-monthly stipend check issued by Columbia from which taxes are withheld. (Tr. 88-89, 92-93 [Peterson]; Er. Ex. 5.) PDRSs are also eligible for the University's full employee benefits package, which includes all tax-dependent and fringe pool benefits. (Tr. 92-93 [Peterson].)

Once appointed, all PDRSs perform mentored research under the guidance of a PI. (Tr. 91-92 [Peterson].) Because PDRSs are funded by the PI's grant, and because the PI is responsible for administering his/her own grant, the duties of a PDRS are not only dictated by the terms of the PI's grant but are also subject to significant direction and control by the PI. (Tr. 91 [Peterson], 147 [Vanaerschot].) Accordingly, the research tasks, and duties of PDRSs are tightly controlled by the PI. (Tr. 119 [Peterson].)

iii. Postdoctoral Research Fellows

A Fellow is a classification of Postdoctoral Research Officer who receives his/her own grant funding from an external agency, rather than from University-controlled funds.⁵ (Er. Ex. 1, Tr. 94 [Peterson].) Fellows are typically awarded funding from an external agency prior to seeking a Postdoc Trainee appointment at Columbia. (Tr. 99 [Peterson].) To secure individual research funding, PhD degree holders independently identify original research project ideas and submit grant applications including detailed project goals and budgets as part of a rigorous and highly competitive process. (Tr. 94, 99 [Peterson].) The testimony of Union witness Dr. Tulsi Patel, a Fellow at Columbia, confirmed that Fellows are responsible for developing and writing the substance of their research proposals to receive grant funding. (Tr. 169-70 [Patel].) Because securing an individual funding award is a challenging process, individuals who are successful at

⁵ To be clear, if a Postdoc Trainee receives funds from Columbia, rather than an external agency, that individual is classified as a PDRS, not a Fellow. (Er. Ex. 1.)

doing so have a competitive advantage over their peers (*i.e.*, PDRSs) who have not successfully secured their own funds. (Tr. 95-96 [Peterson].) Successful applicants who receive funds from external granting agencies have greater independence in their research once they decide where to carry out that research. (*Id.*)

After a Fellow applicant's grant is awarded, their funding is generally portable and may be taken to an institution of their choice, as long as the institution has the space and instrumentation necessary to carry out the research called for in the grant. (Tr. 97-99 [Peterson].) Given this flexibility, as well as the prestige associated with individual grant awards, Fellow applicants have more opportunities available to them than other Postdoc Trainees both in that they have more freedom to choose which institution they want to bring their funding to, and in that they have an advantage in successfully securing a postdoctoral appointment at Columbia. (Tr. 95-96 [Peterson].) For example, a Fellow applicant may reach out to a PI directly with information about their award and research project to determine if that particular PI's lab would be a good fit for them and their research. (Tr. 96 [Peterson].) Because the Fellow's research project has already been vetted by a granting agency as part of a highly competitive process, the Fellow applicant starts from an enhanced position as compared to a PDRS applicant because his/her qualifications and research idea have already been favorably scrutinized by the granting agency. (Tr. 95, 97-99 [Peterson].) As Dr. Peterson testified, Fellow applicants "really are in essence picking Columbia versus Columbia choosing them." (*Id.*) Further, unlike PDRS offers, the number of offers extended to Fellow applicants is not limited by funding constraints. (Tr. 99-100 [Peterson].)

Fellow applicants are initially proposed for appointment by the PI. (Er. Ex. 1; Tr. 100 [Peterson].) Such proposals must be approved at the departmental and Provostial levels,

specifically by the appropriate department chair or institute/center director, then by an appropriate Dean or Executive Vice President, and finally the Provost. (*Id.*) If and when a PI's proposed candidate is approved, the Fellow applicant is sent an offer letter. (Er. Ex. 7.) As compared to the appointment letter issued to PDRSs, the appointment letter issued to Fellows does not state that their appointment is contingent on the availability of funding because the Fellow is already funded by his/her own funding source. (Er. Ex. 7.) After an offer is accepted, the Fellow receives an appointment letter. (Er. Ex. 8.) Unlike the appointment letter issued to PDRS appointees, the appointment letter for Fellows does not include any information about the amount of the Fellow's stipend because it is determined by and paid by the external granting agency, not Columbia. (Er. Ex. 8.) For the same reasons listed above, the Fellows appointment letter, like the offer letter, similarly does not state that the Fellow's appointment is contingent upon the availability of funding. (*Id.*)

Even though Fellows have a higher level of independence than PDRSs regarding the autonomy, freedom, and control Fellows exercise over their research, the methods utilized to carry out that research, and the overall budgeting of their independently awarded funds, Fellows still receive mentored guidance and training from their PI. (Tr. 94-96, 119 [Peterson].) Fellows are principally responsible for ensuring that the research conducted pursuant to the grant is carried out consistent with the terms of the grant. (Tr. 119 [Peterson].) As such, Dr. Peterson testified that the level of direction and control a PI has over Fellows is less than the amount of direction and control a PI has over PDRSs. This is particularly true with regard to what a PI can direct a Fellow to do regarding his/her research conducted under the Fellow's grant. (Tr. 118-19 [Peterson].)

Fellows are compensated by a stipend paid by the external agency funding that particular Fellow's grant. (Er. Ex. 1; Tr. 100-03 [Peterson].) A Fellow's stipend may be distributed to him/her in one of three ways: (1) to the Fellow directly by the external agency funding the grant; (2) to the Fellow facilitated by the University as part of a payroll function; or (3) to the Fellow directly by the Fellow's "home" institution from which the Fellow is visiting.⁶ (Tr. 94, 101-03 [Peterson].)

Where external agencies or where the home institution pays the Fellow directly, Columbia plays virtually no role in the Fellow's compensation. (Tr. 101-04 [Peterson].) Where external agencies distribute the funds to Columbia on behalf of the Fellow, the University merely performs an administrative/clerical function for the granting agency by disbursing a monthly check in the amount determined by the funding agency on a Form 1099-MISC, with no tax withholdings taken out of the check. (*Id.*)

Fellows, unlike PDRSs who are eligible for Columbia's full employee benefits plans, are only eligible for limited benefits from the University. Fellows are ineligible for any fringe benefits pool or tax-dependent benefits that are otherwise offered to University employees. (Tr. 103-04 [Peterson].)

Fellows who come to Columbia from other institutions for a specific research purpose receive compensation and benefits directly from that Fellow's "home" institution. (Tr. 103 [Peterson].) He/she would seek a "visiting" Fellow appointment at Columbia. Columbia does not disburse any checks, withhold taxes, or offer any benefits to visiting Fellows. (*Id.*)

⁶ A visiting Fellow is a Postdoc Trainee who already holds a postdoctoral appointment at another university. (Tr. 94, 103 [Peterson].) That visiting Fellow may seek a visiting postdoctoral appointment at Columbia for a specific purpose related to their area of research, but wants to retain their position at their home institution. For example, a postdoc from a University other than Columbia may want to use a particular research instrument available at Columbia. (Tr. 100-01, 103 [Peterson].) The visiting Fellow will thus keep their postdoctoral appointment at their home institution, but be appointed as a visiting Fellow at Columbia for the time period in which they are carrying out their research on the University's campus or in the University's labs.

ARGUMENT

I. The Petitioned-For Associate Research Scientists Do Not Share The Requisite Community of Interest with Postdoctoral Trainees.

It is well-settled that in determining the scope of a bargaining unit, the Board must find that a petitioned-for unit is an “appropriate” unit. *Home Depot U.S.A., Inc.*, 20-RC-067144, slip op. at 12 (Nov. 18, 2011). The Board has long held it will not certify a grouping of employees that is “arbitrary” or “heterogeneous.” *American Cyanamid Co.*, 110 NLRB 89, 95 (1954); *Moore Business Forms, Inc.*, 204 NLRB 552 (1973). When the interests of one group of employees are dissimilar from those of another group, a single unit is not appropriate. *Swift & Co.*, 129 NLRB 1391, 1394 (1961).

More specifically, the Board must determine whether the employees in the petitioned-for unit share the requisite “community of interest.”⁷ *N.L.R.B. v. Action Auto., Inc.*, 469 U.S. 490, 494 (1985). To determine whether a community of interest exists, the Board analyzes a number of factors including “[the] difference in method of wages or compensation; different hours of work; different employment benefits; separate supervision; the degree of dissimilar qualifications, training and skills; differences in job functions and amount of working time spent away from the employment or plant situs; the infrequency or lack of contact with other employees; lack of integration with the work functions of other employees or interchange with them; and the history of bargaining.” *Overnite Transp. Co.*, 322 NLRB 723, 724 (1996).

⁷ On December 15, 2017, the Board in *PCC Structural, Inc.*, 365 NLRB No. 160 (2017) overturned *Specialty Healthcare*, 357 NLRB No. 83 (2011) and its “community of interest” analysis. Moreover, the Board in *PCC Structural* reverted back to its traditional “community of interest” analysis that existed prior to *Specialty Healthcare*.

Here, as more fully described below, ARSs are sufficiently different from Postdoc Trainees and thus do not share the requisite community of interest needed for the two groups to be appropriately included in the same bargaining unit.⁸

**A. The University Has A Separate Process For Hiring ARSs
As Compared to the Process For Appointing Postdoctoral Trainees.**

In analyzing whether a community of interest exists, the Board considers whether the employer has different job application processes and hiring systems for employees in the petitioned-for unit. *McLean Hosp. Corp.*, 311 NLRB 1100 (1993) (finding appropriate two separate units of employees where the two groups had different application and hiring processes); *Univ. of San Francisco*, 265 NLRB 1221 (1982) (finding that faculty from the university's school of professional studies lacked the requisite community of interest with other faculty at the university due in part to their distinct hiring process and should be excluded from the proposed bargaining unit). Similarly, when the University hires ARSs, it follows a separate and distinct process as compared to the Postdoc Trainee appointment process.

The University concedes that ARSs are employees, and as such, the University treats ARS hiring as it does for all other full-time employees. Specifically, the University conducts a comprehensive search for ARS candidates and publishes job postings for the open ARS position. The University goes through a rigorous and competitive process to fill that spot even if the ARS candidate is a Postdoc Trainee in the very lab that has an opening for an ARS position. (Tr. 48-49 [Purdy], 143 [Vanaerschot].) This point was even confirmed by the Union's own witness. (Tr. 143 [Vanaerschot].)

⁸ For the purposes of this argument, the University is assuming *arguendo* that the Board finds Postdoc Trainees are employees under Section 2(3) of the Act. However, as stated herein, Fellows are either independent contractors or employed by another organization. Either way, they are not employees of Columbia.

Indeed, when posting ARS job openings, the University is required to comply with specific legal obligations such as equal opportunity and affirmative action regulations. (Tr. 46 [Purdy]). Dr. Purdy testified that the University works hard to ensure that its “recruiting is fair and open and encourages the diversity of the university staff.” (*Id.*)

These EOAA requirements, however, do not apply to Postdoc Trainees because they are not permanent employee positions. (*Id.*) That is, Postdoc Trainees are not considered “university staff.” As discussed above, Columbia strives to elicit applications from a diverse pool of candidates for any and all positions, including Postdoc Trainee appointments. However, the fact that EOAA requirements do not formally apply to the application, selection, and appointment processes of Postdoc Trainees is indicative of their temporary status in general, and of the view the federal government has of Postdoc Trainees in particular. Thus, the application process for Postdoc Trainees is more informal than it is for ARSs. In fact, at times, Postdoc Trainee candidates will simply contact a PI directly to see whether the candidate can join their lab. (Tr.72 [Purdy].)

Because the University utilizes very different application and hiring or appointment processes for ARSs and Postdoc Trainees, this factor weighs in favor of finding that a sufficient community of interest does not exist between ARSs and Postdoc Trainees.

B. The University Requires Different Qualifications For Hiring ARSs Than It Does For Appointing Postdoc Trainees.

As part of its community of interest analysis, the Board also considers whether employees in the petitioned-for unit have distinct qualifications. *Univ. of Vermont*, 223 NLRB 423, 424 (1976); *DTG Operations, Inc.*, 357 NLRB 2122, 2126 (2011). In *University of Vermont*, the Board held that the university’s medical school faculty did not share a community of interest with other faculty because medical school faculty required distinct qualifications for

eligibility to be hired, namely a medical degree and practical medical experience. 223 NLRB at 424. Similarly, in *DTG Operations, Inc.*, the Board held that car rental service agents did not share a sufficient community of interest with mechanic or maintenance employees due, in part, to their lack of similar licensing and training. 357 NLRB at 2127. In so holding, the Board also found that the rental service agents were the only classification required to have nine months of car rental and sales experience. *Id.*

Here, like the medical school faculty in *University of Vermont*, ARSs are required to have qualifications in addition to and distinct from those required of Postdoc Trainees. Further, like the rental service agents in *DTG Operations, Inc.*, ARSs are required to have more experience than Postdoc Trainees. While Postdoc Trainees and ARSs must both have PhD degrees, the University looks for ARS candidates to have a “record of accomplishment in research at a reasonable level as indicated by publications in the peer reviewed literature” and “recognition by one’s peers.” (Tr. 44 [Purdy].) The University requires that ARSs have a PhD degree *in addition to* experience as a Postdoc Trainee. (Tr. 44 [Purdy].) ARSs are professional employees hired with a specific job description and they are expected to perform specific tasks. (Tr. 42, 50 [Purdy].) Hiring an ARS is the equivalent of hiring an Assistant Professor—the ARS is expected to be capable of performing independent research and is hired based on that expertise. (Tr. 41-42 [Purdy].)

Conversely, Postdoc Trainees are appointed to conduct research in the lab of a PI—their mentor—and are expected to *learn* new research skills and to continue *developing* into an independent researcher. (Tr. 42-44 [Purdy].) Though Postdoc Trainees are highly skilled, intelligent, and accomplished in their own right at the time they apply for their appointments, the University does not require or expect Postdoc Trainees to have the same level of research

experience, “accomplishment,” or demonstrated independent research experience that it would expect for an ARS. (Tr. 43-44 [Purdy].) The disparate qualifications required of ARSs and Postdoc Trainees weighs in favor of finding that the petitioned-for unit lacks the requisite community of interest.

C. ARSs and Postdoc Trainees Have Different Skills.

In analyzing whether a community of interest exists, the Board also considers whether employees in the petitioned-for unit have distinct skills. *United Operations, Inc.*, 338 NLRB 123 (2002) (holding that a unit of HVAC and other service employees was not appropriate in part because the two groups of employees had distinct skills, training, and job functions). Just as the University considers and requires different qualifications for ARSs and Postdoc Trainees, researchers in those positions possess different skills. Although ARSs and Postdoc Trainees both generally conduct research, there is a broad spectrum of skills, experience, and independence required to run a successful research lab, and ARSs and Postdoc Trainees play distinct roles in performing that research.

ARSs have a demonstrated ability to conduct independent research with a proficiency that Postdoc Trainees generally do not yet have. Dr. Purdy testified that “there are many skills that are necessary that are beyond the purely intellectual capacity” required to perform independent research. (Tr. 44 [Purdy].) In addition to the “intellectual capacity” that Postdoc Trainees have, ARSs also have the tangible skills required to perform independent research and operate equipment or instruments whereas Postdoc Trainees are still learning or improving those skills and are expected to take advantage of the training and mentorship opportunities that the

University provides to them and become proficient in that regard.⁹ (Tr. 44, 50 [Purdy], 81 [Peterson].)

Highlighting the disparity between the skills of an ARS and a Postdoc Trainee, certain external agencies (*e.g.*, National Institute of Health (“NIH”), National Science Foundation (“NSF”)) require mentorship training for Postdoc Trainees, but not for ARSs. (Tr. 49-50 [Purdy], 81 [Peterson].) The OPA ensures that Postdoc Trainees receive significant training and mentorship through the programs mandated by the external agencies, but also from many of its own original programs. For example, the OPA offers Postdoc Trainees targeted career and professional development programming and counseling tailored to their specific needs, including résumé-writing programs, one-on-one counseling, and others, all of which are not offered to ARSs because they already possess those skills. (Tr. 81-83 [Peterson].) Accordingly, the different skills possessed and utilized by ARSs and Postdoc Trainees further demonstrates that ARSs and Postdoc Trainees do not share a sufficient community of interest.

D. ARSs Receive Higher Compensation Than Postdoc Trainees.

The Board also looks at the disparity in pay between the petitioned-for classifications. *See New York Univ.*, 205 NLRB 4, 7 (1973) (part-time and full-time faculty lacked a community of interest where there was “marked difference” in their respective compensation); *Grace Industries*, 358 NLRB 502, at 505 (2012) (Board found two different classifications of

⁹ Although Union witness, Dr. Vanaerschot, testified that he performed the same research as a postdoctoral trainee as he did as an ARS, he also admitted that he already had significant experience as a postdoc—three years in Belgium and approximately two-and-a-half years at Columbia—when he finally became an ARS. (Tr. 137-139 [Vanaerschot].) Clearly, during his time as a postdoc, he developed skills beyond those that a typical postdoc possesses since most Postdoc Trainees have postdoctoral appointments that do not exceed three years. (Er. Exs. 1, 5, 7; Tr. 51 [Purdy], 67 [Peterson].) Dr. Vanaerschot had five-and-a-half years of postdoc experience. Indeed, notwithstanding this atypical amount of postdoc experience, he admitted that he had to apply for the ARS position through a competitive process and that the ARS spot could have gone to a different individual. (Tr. 143-44 [Vanaerschot].)

employees lacked a community of interest in part because one classification was paid \$2.00 per hour—approximately 5%—more than the other).

ARSs are paid significantly more than Postdoc Trainees. (Pet. Ex. 1.) Specifically, during the 2018-19 academic year, the minimum salary for an ARS is \$56,300, the minimum stipend for a PDRS is \$50,123, and the minimum stipend for Fellows is \$48,432. (*Id.*) Therefore, the difference between an ARS's salary and a PDRS or Fellow's stipend is either \$6,177 (approximately 12.3%), or \$7,868 (approximately 16.2%), respectively. This 12.3% or 16.2% difference between an ARS's salary and a Postdoc Trainee's stipend is considerably greater than the 5% pay rate disparity that the Board found demonstrated a lack of community of interest in *Grace Industries*. See *Grace Industries*, 358 NLRB at 505. Accordingly, the significant difference in the rate of pay for ARSs and Postdoc Trainees weighs in favor of finding that the petitioned-for unit lacks the requisite community of interest.

E. Being an ARS is a Permanent Career Position Whereas Postdoc Trainees Are Temporary Appointments.

As part of its community of interest analysis, the Board also considers the temporary versus permanent nature of various positions. See *New York Univ.*, 205 NLRB at 7. In *New York University*, the Board held that part-time faculty did not share a community of interest with full-time faculty due to the part-time faculty's "transient" relationship with the university. 205 NLRB at 7. In finding an insufficient community of interest, the Board found it to be critical that part-time faculty were appointed on a single-semester basis and could never receive tenure, whereas full-time faculty were tenure-eligible. *Id.*

ARSs are hired to fill a "career" position. As stated above, the ARS position is a professional position that is equivalent to Assistant Professor. (Tr. 41 [Purdy]; Er. Ex. 1.) ARSs may advance to Research Scientist and Senior Research Scientist positions, which are the

equivalents of Associate Professor and Full Professor, respectively. (*Id.*) Although ARSs may be promoted to Research Scientist or Senior Research Scientist—just as an Assistant Professor may be promoted to Associate Professor or Full Professor—ARSs typically hold their position for five to ten years or more, and may stay in that role for their entire career. (Tr. 45 [Purdy].) Conversely, Postdoc Trainees hold their position for only two to three years. (Tr. 35-36, 51-52 [Purdy]; Er. Ex. 1.) In fact, the University with limited exception generally prohibits individuals from remaining a Postdoc Trainee for more than three years. (Tr. 51 [Purdy]; Er. Ex. 1.) While a postdoctoral appointment can be extended for a potential fourth or fifth year, such exceptions are rare and require the Provost’s approval. (*Id.*) As Dr. Peterson testified, “[t]he purpose of a postdoc is a *temporary period* of mentored research or scholarly training.” (Tr. 87 [Peterson] (emphasis added).) A Postdoc Traineeship is not a career position, and unlike ARSs, Postdoc Trainee positions are not equivalent to Assistant, Associate, or Full Professor positions. (Er. Ex. 1; Tr. 153 [Vanaerschot].)

Postdoc Trainees, while an important group of individuals to the University’s overall research mission, like the part-time faculty in *New York University*, have a somewhat “transient” relationship with the University. Postdoc Trainees are appointed on a yearly basis for a maximum of two to three years, whereas ARSs, though also appointed on a yearly basis, hold permanent “career” positions that are not time-limited. In addition, Postdoc Trainee positions are also not equivalent to Assistant Professors, Associate Professors, or Full Professors, and are not eligible for the same promotion track of Professional Research Officers, like moving from an ARS to Research Scientist/Scholar or Senior Research Scientist/Scholar. The fact that ARS positions are permanent “career” positions and Postdoc Trainee appointments are temporary

demonstrates that the ARS and Postdoc Trainee positions in the petitioned-for unit do not share a sufficient community of interest.

F. There is No Temporary Interchange Among ARSs and Postdoc Trainees.

The Board considers the degree of interchange among individuals in a petitioned-for unit when determining whether such individuals share a community of interest. *See, e.g., Bashas', Inc.*, 337 NLRB 710, 711 n.7 (2002); *Fordham Univ.*, 193 NLRB 134, 137 (1971) (law school faculty lacked a community of interest with other faculty, in part, where there was little to no interchange between the two groups of faculty). There are two different types of interchange: temporary and permanent. The Board generally defines “temporary interchange” as ad hoc substitution or short-term replacement of other employees, whereas permanent interchange is defined as employees moving from one position to another as a permanent transfer. *See, e.g., Macy's Inc.*, 361 NLRB 12, 21 (2014); *The Neiman Marcus Group, Inc.*, 361 NLRB 50, 51-52 (2014).

For community of interest analysis purposes, the Board gives much greater weight to examples of temporary interchange than it does to permanent interchange. *Bashas', Inc.*, 337 NLRB 710, 711 n.7 (2002). Indeed, the Board has held that “permanent interchange is a less significant indicator of community of interest, and thus is given less weight by the Board in deciding unit scope issues.” *Id.* In *Bashas'*, the union demonstrated that there were approximately 50 instances of permanent transfers within the petitioned-for unit. *Id.* Yet, despite the union’s evidence of *permanent* interchange, the Board held that the petitioned-for employees did not share the requisite community of interest in part because there was no evidence of any temporary interchange leaving the Board to conclude that there was “[n]o significant interchange.” *Id.* at 711. Even where there is evidence of temporary interchange, the

Board will not necessarily find that two groups share a community of interest. For example, in *Univ. of Miami*, 213 NLRB 634, 635 (1974), the Board found that medical school faculty did not share a community of interest with other university faculty. The evidence of temporary interchange showed that 20 to 25 out of 577 medical school professionals—approximately 4%—taught courses at the main university campus as opposed to their home medical school campus. Nevertheless, the Board found that this amount of interchange was limited and insufficient to establish a community of interest between medical school faculty and other university faculty. *Id.*

The record is absolutely devoid of any examples of temporary interchange between ARSs and Postdoc Trainees. ARSs and Postdoc Trainees neither perform each other's work on a daily basis nor on a sporadic basis like in instances of absences. (Tr. 75 [Purdy].) Rather, ARSs and Postdoc Trainees conduct separate research experiments and perform different tasks and generally do not perform each other's work on a temporary basis. Additionally, any examples of permanent interchange only occur in one direction—from Postdoc Trainees to ARS, not the other way around. In reality, the Union's examples of "permanent interchange" are more accurately characterized as promotions, rather than instances of interchange. Just because an employee can eventually be promoted to a higher-level position—requiring more skill, responsibility, and different job duties—it does not mean that the two classifications share a community of interest. *See e.g., Sonoco Prod. Co., Downingtown Paper Co.*, 192 NLRB 310, 312 (1971). In *Downingtown*, production and maintenance workers were eligible for promotion to and were in fact promoted to the over-the-road truck driver position. *Id.* Indeed, former production employees occupied four out of five, or 80%, of the over-the-road truck driver positions. *Id.* Nevertheless, the Board found there was no community of interest between over-the-road truck

drivers and production and maintenance employees. *Id.* Thus, even if a Postdoc Trainee applies for and later fills an open ARS position, such permanent interchange is insufficient to show a community of interest between Postdoc Trainees and ARSs.

The Union will likely argue that Postdoc Trainees are casually promoted from a Postdoc Trainee to an ARS. This is not true. As Dr. Purdy testified, before an open ARS spot is filled, the job must be posted, the University must comply with certain legal requirements (EOAA), and the Postdoc Trainee must go through a competitive application process. (Tr. 48-49 [Purdy].) Even the Union's witness, Dr. Vanaerschot testified that when he became an ARS he still had to go through a competitive application process even though he already trained as a Postdoc Trainee in the lab that was hiring an ARS. (Tr. 143-44 [Vanaerschot].) Even if such permanent transfers were as seamless as the Union suggests, the Board gives little weight to such permanent interchange, particularly in light of the lack of any temporary interchange among ARSs and Postdoc Trainees. *Macy's*, 361 NLRB at 21 (excluding other selling employees from bargaining unit on the basis that there was insignificant permanent interchange and temporary interchange was "infrequent, limited and one-way"); *see also Bashas', Inc.*, 337 NLRB at 711 n.7. Therefore, the lack of any temporary interchange and the minimal permanent interchange demonstrate that the petitioned-for unit lacks the requisite community of interest.

G. ARSs and Postdoc Trainees Do Not Have Legally Sufficient Contact.

The Board considers the level of contact among employees in determining whether those employees share a community of interest. *Bergdorf Goodman*, 361 NLRB 50, 51 (2014). In *Bergdorf Goodman*, the Board found that the limited contact among sales associates in different departments—storewide meetings and incidental contact as a result of sharing the same locker room or cafeteria—failed to establish the requisite community of interest. *Id.* Here, many ARSs and Postdoc Trainees conduct research on their own. Although ARSs and Postdoc Trainees have

contact in the lab, like the sales associates in *Bergdorf Goodman*, that contact generally does not rise to the level of contact needed and is not significant enough to support the requisite community of interest among ARSs and Postdoc Trainees. As Dr. Vanaerschot testified, he does most of his work as an ARS by himself. (Tr. 145 [Vanaerschot].) Dr. Patel testified that she attends joint lab meetings which involve everyone in her PI's lab, as well as another PI's lab, but that these meetings only take place once per week. (Tr. 174 [Patel].) Based on this testimony, ARSs and Postdoc Trainees generally conduct their research independently; thus their contact is somewhat limited.

Accordingly, the lack of significant contact between ARSs and Postdoc Trainees weighs in favor of finding that the petitioned-for unit does not have a sufficient community of interest.

H. ARSs and Postdoc Trainees Are Supervised Separately.

The Board also considers the degree of common supervision as a factor in the community of interest factor analysis. *See The Neiman Marcus Group, Inc.*, 361 NLRB 50. The Union incorrectly argues that ARSs and Postdoc Trainees in the same lab have common supervision by the same PI. It is true that a PI manages the lab generally; however, the level and type of supervision by the PI of the Postdocs and ARSs is very different. PIs mentor Postdoc Trainees, while ARSs mostly work independently with limited supervision. In *The Neiman Marcus Group*, the Board found that sales associates from different departments did not share a requisite community of interest because their common supervision occurred at the “highest level” of management, the general manager of the store. 361 NLRB at 52. To the extent that ARSs share supervision with Postdoc Trainees, they do so at a high level in that the PI supervises everyone in the lab, and is the highest level supervisor of that lab.

Moreover, the Union does not argue that every individual working in the same lab—graduate research assistants, lab technicians, etc.—share a community of interest simply because,

technically, they all work under the same PI. In fact, Fellows perform scholarly work pursuant to a very detailed plan as outlined in their grant award. Thus, their work is more generally controlled by the grant than by the PI. (Tr. 96 [Peterson].). Because ARSs and Postdoc Trainees do not share common supervision, they do not share a sufficient community of interest.

* * *

Based on a review of all the above factors, a requisite community of interest does not exist between ARSs and Postdoc Trainees to justify a finding that the unit sought by the Union is appropriate for collective bargaining. Accordingly, the petition should be dismissed, or amended to exclude ARSs.

II. The University Does Not Control the Terms By Which Fellows Conduct Research.

A. The Petitioned-For Postdoctoral Research Fellows Are Not Employees of Columbia.

Fellows are not employees of the University. In *Fordham University*, the Board held that individuals hired by faculty members to work on externally funded research grants were not employees of the university. 193 NLRB at 135-36. There, the individuals working on the research grants were compensated by the external funding source and were hired by the faculty member charged with administering the grant. *Id.* Here, like in *Fordham University*, while Fellows conduct their research on Columbia's campuses, they do so pursuant to grants provided by various external agencies to fund their research and, thus, are compensated by those agencies.

Fellows are paid in one of three ways: (1) by their "home" institution (*e.g.*, a university other than Columbia, such as Stanford University or Yale University); (2) directly from the granting agency (*e.g.*, NIH, NSF); or (3) from the granting agency after the funds have passed through the University for disbursement to Fellows. (Tr. 100-04 [Peterson].) In none of the three circumstances does the University compensate Fellows for conducting research. (*Id.*)

Where Fellows are paid by their “home” institution or directly from the granting agency, the University is completely removed from the process. (Tr. 94, 101-02 [Peterson].) The University cannot be considered the employer of these Fellows. Even where payments to Fellows are facilitated by Columbia, the University is performing merely a clerical function on behalf of the funding agency and does not control the amount of payment or other terms related to the payment from the external agency to the Fellow. (Tr. 100-04 [Peterson].)

As Dr. Peterson testified, while Fellows conduct their research under the auspices of a particular laboratory and receive training and mentorship from a PI at the University, they work independently. (Tr. 118-19 [Peterson].) In fact, they must follow the express terms of the research plan set forth in the awarded grant proposal. (*Id.*) Fellows draft their proposals and applications for obtaining a grant, and thus have full control over establishing the type of research that they hope to conduct. (*Id.*) If awarded, a Fellow’s grant will identify with specificity the research that is to be conducted pursuant to the grant. Thus, the Fellow’s research is dictated by the grant, not by the University. Conversely, PDRSs conduct research pursuant to a PI’s grant or other award to the University. (Tr. 119 [Peterson].) Therefore, PDRSs are subject to much more direction and control by the University as it related to their research.

Fellows’ grants are also portable, meaning that they may move from one laboratory to another—even to another institution—and still conduct research under the same research grant (though it may have to be re-approved by the granting agency). (Tr. 176-77 [Patel].) Therefore, it is clear that Columbia does not control the research conducted by Fellows or the compensation paid to Fellows for conducting such research.

B. Even if Fellows Work for the University, They are Independent Contractors and Not Employees under the Act.

Section 2(3) of the Act explicitly excludes from the definition of covered “employee” any “individual having the status of an independent contractor.” 29 U.S.C. § 152(3). In determining independent-contractor status, the Board considers the common-law principles of agency including, but not limited to, the extent of control over the details of the work, the level of supervision, the method of payment, the skill required and the duration of services provided. *See Pa. Interscholastic Athletic Assn.*, 365 NLRB No. 107 (2017) (adopting the common-law analysis as set forth in *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254 (1968)); Restatement (Second) of Agency § 220 (1958). In evaluating the non-exhaustive list of factors, “all incidents of the relationship must be assessed and weighed.” *Porter Drywall, Inc.*, 362 NLRB 6 (2015) (quoting *Fedex Home Delivery*, 2014 NLRB LEXIS 753 (N.L.R.B. Sept. 30, 2014)). No single factor in the analysis is determinative. *Id.*

Generally, the Board considers whether a purported independent contractor has “significant entrepreneurial opportunity for gain or loss.” *See Dial-A-Mattress Operating Corp.*, 326 NLRB 884, 891 (1998). Related to this inquiry, the Board assesses whether a putative contractor has the ability to take their work to other companies or has a proprietary interest in their work. *See Pa. Interscholastic Athletic Assn.*, 365 NLRB No. 107. Here, as stated above because a Fellow’s grant is portable and that individual can take his/her services to another institution with his/her grant and for other reasons described below, it is clear Fellows have significant independence, control, and “entrepreneurial opportunity.”

i. Fellows Control the Research that they Conduct

In determining whether an individual is an employee or independent contractor, the Board will analyze whether the individual controls the details of their work. *See City Cab Co. of*

Orlando, 285 NLRB 1191 (1987) (holding that because certain cab drivers could decide which trips or customers to drive, they were independent contractors and not employees). Here, prior to arriving at Columbia, Fellows independently develop original research projects and draft their own research proposals, which include detailed project goals, for submission to granting agencies for funding. (Tr. 95-96 [Peterson], 169-170 [Patel].) When Fellows receive funding, their grants, which are based in the individual's own plan, dictate the nature and scope of their research. Thus, Fellows have substantial control over the work that they perform, demonstrating that they are independent contractors and not Section 2(3) "employees" of the University. (Tr. 94-94, 119 [Peterson].)

ii. Fellows are Minimally Supervised or Controlled by PIs

The Board's independent contractor analysis also looks at whether workers receive significant supervision or control from superiors. See *Young & Rubicam Int'l, Inc.*, 226 NLRB 1271 (1976). In *Young & Rubicam*, the Board found that photographers were independent contractors where they had to work within certain requirements set by art directors, but they had discretion to choose the means by which to carry out the art director's instructions. *Id.* at 1273.

At Columbia, like the photographers in *Young & Rubicam*, Fellows conduct research largely independently with minimal supervision from a PI. Fellows develop their own research projects, and therefore, Fellows, not PIs, are principally responsible for ensuring that the research mission of their grant is followed. (Tr. 119 [Peterson].) Dr. Peterson testified that a PI is limited in what they can direct a Fellow to do. (Tr. 118-19 [Peterson].) Based on Dr. Peterson's testimony, Fellows receive less direction and control from PIs as compared to PDRSs. Although Fellows are mentored and trained by a PI, Fellows have more autonomy and control over their research, the methods utilized to carry out that research, and the overall budgeting of their funds. (Tr. 94-96, 119 [Peterson].) Dr. Patel, the Union's own witness who is currently a Fellow,

testified that in her lab she only meets with her PI approximately once per month. (Tr. 166-67 [Patel].) Therefore, it is clear she performs her work largely on her own. Because Fellows have such independence and lack consistent supervision as compared to PDRSs, this factor suggests Fellows are independent contractors.

iii. Fellows are Compensated by External Agencies, not Columbia

The Board considers the method by which a worker is paid and the entity that compensates that person in determining independent contractor status. *City Cab Co. of Orlando*, 285 NLRB 1191. In *City Cab Co. of Orlando*, the Board considered the fact that cab drivers were compensated through their customers' fares, and not by a cab company, in determining that the cab drivers were independent contractors. *Id.* Here, Fellows are paid stipends from external funding sources, not from the University's endowment and not even from a PI's funding source(s). Because Fellows are not compensated by the University, they are not employees of the University. Instead, they are independent contractors.

Furthermore, the Board considers the IRS tax form pursuant to which an individual is paid in determining whether that individual is an independent contractor. *See Pennsylvania Acad. of the Fine Arts*, 343 NLRB 846 (2004); *see also Amerihealth Inc./Amerihealth HMO*, 329 NLRB 870 (1999) (holding that physicians working for HMO were independent contractors, not employees, where they were paid a flat fee and their payments were reported on an IRS Form 1099, not a W-2). In *Pennsylvania Academy of the Fine Arts*, the Board held that artist-models were independent contractors, in part because they were paid pursuant to a Form 1099, not W-2. 343 NLRB at 846. Similarly here, Fellows are paid on a Form 1099, with no tax withholdings made by the University. Therefore, Fellows are independent contractors because they are paid like contractors and by external entities, not Columbia.

iv. *Fellows Have Specific Skills*

There can be no doubt that all Postdoc Trainees are highly skilled individuals. However, Fellows have an additional and very valuable skill that PDRSs do not have—namely, the ability to successfully get their grant funded by an external agency. Fellows must go through considerable effort and intellectual rigor to draft research proposals that are ultimately funded by external agencies. Their unique skill is coming up with a new and interesting research topic that has the potential to benefit humankind. Individuals who possess this skill are more likely to be successful in getting their proposed grant funded. Individuals who do not possess this skill, while still very qualified, are more likely to be a PDRS. By definition, Fellows have demonstrated such skill by receiving funding from an external agency. Accordingly, Fellows serve a very specific purpose and have distinct skills that allow them to obtain grant funding; thus, Fellows are independent contractors, not employees.

v. *A Fellow's Duration of Service to the University is Temporary and Limited*

Fellows only hold such positions for relatively short periods of time, usually about one year. (Tr. 163-64 [Patel].) Thus, the duration of service provided to the University is limited. Being a Fellow is not a “career” position. Indeed, the University will not allow Fellows to remain as a Fellow for more than three years, with very limited exceptions. (Er. Ex. 1; Tr. 51, 67 [Purdy].) Therefore, it is clear Fellows work only on a temporary basis and for a limited duration.

Where an individual can provide services to one organization and the same services to other organizations, that is a factor weighing in favor of independent contractor status. In *Pennsylvania Academy of the Fine Arts*, the Board found that artist-models were independent

contractors because they could work as models for other schools or independent artists. 343 NLRB at 846.

At Columbia, Fellows also have considerable control in determining whether to conduct their research at Columbia or at another institution. Because they seek and obtain funding mostly on their own, Fellows can “take their work to other [institutions].” Fellows’ grants are also portable. Even after the Fellow starts conducting research at Columbia, although he or she may have to go through some administrative steps, the Fellow may be able to take his or her grant to another lab or institution. (Tr. 176-77 [Patel].) Therefore, Fellows have the requisite control over the terms of their work to demonstrate that they are independent contractors, not employees, let alone employees of the University.

III. Directing a Mail or Mixed Manual-Mail Ballot Election Would Be Inappropriate in This Case.

If the Regional Director directs an election, a manual ballot would be the only appropriate voting method. The Casehandling Manual provides that “[t]he Board’s longstanding policy is that representation elections should, as a general rule, be conducted manually.” NLRB Casehandling Manual (Part Two), Representation Proceedings, Section 11301.2 (September 2017).

In *San Diego Gas & Electric*, 325 NLRB 1143 (1998), the Board articulated the following three factors for Regional Directors to consider in determining whether to direct a mail or mixed manual-mail ballot election, suggesting that such an election is appropriate only:

- 1) Where eligible voters are “scattered” because of their job duties, over a wide geographic area;
- 2) Where eligible voters are “scattered” in the sense that their work schedules vary significantly so that they are not present at a common location and common times; and
- 3) Where there is a strike, a lockout or picketing in progress.

Here, both a mail and mixed manual-mail election are inappropriate. First, Postdoc Trainees and ARSs in the petitioned-for unit are not “scattered” in any sense of the word. Geographically, they are predominantly located on or around Columbia’s campus in New York City. Indeed, the University and the Union have agreed on five polling locations where at least 96% of the petitioned-for unit is located.¹⁰ (Er. Ex. 11.) Therefore, an overwhelming majority of the petitioned-for unit will be able to easily access the polls and will not require a mail ballot.

Second, the Union has presented no evidence—and the University is not independently aware of any information—that suggests that the schedules of Postdoc Trainees and ARSs vary so significantly to require a mixed manual-mail ballot election. Even if they did, the University and the Union have agreed to keep the polls open for sufficient periods of time to allow Postdoc Trainees and ARSs to vote while they would typically be on-campus, which favors a manual ballot election.

Third, no Postdoc Trainees or ARSs are on layoff status or on strike, locked-out of picketing. Therefore, this factor is inapplicable here.

Moreover, the Casehandling Manual states that “[a] mixed manual-mail election should be limited to situations where the group of employees which will vote manually and the group which will vote by mail are clearly distinguishable by classifications or work locations and can be easily identified by the parties.” NLRB Casehandling Manual (Part Two), Representation Proceedings, Section 11335.2 (September 2017). To the extent that there are any Postdoc Trainees or ARSs who would vote by mail, they are not clearly distinguishable by classification or work location, and are not easily identifiable by the parties. Thus, even if there are Postdoc Trainees or ARSs in

¹⁰ The remaining 4% (or less) may be located off-campus. The University is in the process of investigating the location of these individuals. Regardless, the fact that at most 4% of the unit is located off-campus does not justify having a mail or mixed manual-mail ballot election.

the petitioned-for unit who are not based on-campus, they are not distinguishable from those in such classifications who are on-campus and who would vote manually.

Accordingly, if the Regional Director directs an election, only a manual ballot election is appropriate.

CONCLUSION

ARSs and Postdoc Trainees do not share the requisite community of interest and, therefore, the petitioned-for bargaining unit is inappropriate. In addition, Fellows are not employed by Columbia and are independent contractors because they are compensated by external agencies and dictate the terms of their own research. Accordingly, the petition should be dismissed in its entirety or amended to exclude Fellows and ARSs.

Dated: September 4, 2018
New York, New York

Respectfully Submitted,

By: 

Bernard M. Plum
Steven J. Porzio

PROSKAUER ROSE LLP
Eleven Times Square
New York, NY 10036-8299
(212) 969-3000

Of Counsel:
David L. Bayer

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2**

**TRUSTEES OF COLUMBIA
UNIVERSITY IN THE CITY OF NEW
YORK**

and

**COLUMBIA POSTDOCTORAL
WORKERS AND UNITED
AUTOMOBILE, AEROSPACE AND
AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA**

Case No. 02-RC-225405

CERTIFICATE OF SERVICE

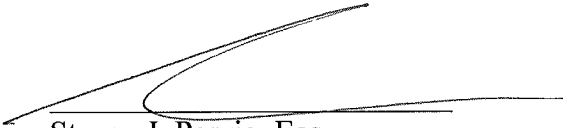
The undersigned hereby certifies that a copy of Trustees of Columbia University in the City of New York's Post-Hearing Brief for the above-referenced case was served on September 4, 2018, in the manner set forth below:

Mr. John J. Walsh Jr.
Regional Director
National Labor Relations Board, Region 2
26 Federal Plaza, 36th Floor
New York, NY 10278

E-filing on Agency website

Thomas Meiklejohn, Esq.
Livingston, Adler, Pulda, Meiklejohn & Kelly PC
Attorney for Columbia Postdoctoral Workers and United Automobile, Aerospace and
Agricultural Implement Workers of America
557 Prospect Avenue
Hartford, CT 06105
twmeiklejohn@lapm.org

By e-mail


Steven J. Porzio, Esq.
PROSKAUER ROSE LLP
Attorney for Trustees of Columbia University in the
City of New York
Eleven Times Square
New York, NY 10036
(212) 969-3079
sporzio@proskauer.com