BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2

In the Matter of

Trustees of Columbia University
In the City of New York,

Employer,

Case No.: 02-RC-225405

and

Columbia Postdoctoral Workers
and United Automobile,
Aerospace, and Agricultural
Implementation Workers of
America (CPW-UAW),

Petitioner.

PETITIONER'S OPPOSITION TO REQUEST FOR REVIEW

I. INTRODUCTION

The Columbia Postdoctoral Workers and United Automobile, Aerospace & Agricultural Implement Workers of America ("CPW-UAW" or "the Union") has been certified as the bargaining agent for the following unit:

> All postdoctoral researchers who have received a doctorate or its professional equivalent who provide services to the University, including Postdoctoral Research Scientists/Scholars, Postdoctoral Fellows, and Associate Research Scientists at all of the Employer's facilities.

("the Unit"). The Trustees of Columbia University in the City of New York ("Columbia", "the University" or "the Employer") has filed a request for review of the Regional Director's Decision and Direction of Election in the Unit. Review should be denied because the Employer has failed to establish "compelling reasons" within the meaning of section 102.67(d) of the Board Rules and Regulations.

The Employer attempts to establish grounds for review by arguing that the Board should reconsider its holding in *Columbia University,* 364 NLRB No. 90 (2016) (*Columbia I)* that student-employees are employees within the meaning of section 2(3) of the NLRA. The Employer argues that the Board should return to the holding of *Brown University* 342 NLRB 483 (2004) that student employees are not statutory employees because they have a primarily academic relationship with the school. Regardless of the merits of such an argument, this case does not raise this issue. None of the employees in the Unit are students enrolled at Columbia. On the contrary, the Unit consists of some of the most highly educated employees in the world. All of the employees in the Unit have been awarded a doctoral or equivalent degree. A doctorate degree is "the last step in education, that you wouldn't expect to go beyond that." (Tr. 106).[1] Thus, this case is not an appropriate vehicle to consider the section 2(3) status of student employees because it does not involve students.

The Employer also argues that the Regional Director made certain factual errors in finding the Unit to be appropriate. As discussed below, there is ample record support for the Regional Director's findings. The Employer is essentially asking the Board to second guess the Regional Director's analysis of the record. The Regional Director's findings are not "clearly erroneous." Indeed they are not erroneous at all. If the Board were to do as the Employer requests and conduct its own analysis of the record and

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[1] References to the record shall be as here indicated:
Transcript references shall be denoted as ..... Tr. (followed by the page number(s))
Board Exhibits shall be denoted as ..... Bd. Ex. (followed by the exhibit number)
Employer Exhibits shall be denoted as ..... Er. Ex. (followed by the exhibit number)
Petitioner Exhibits shall be denoted as ..... Pet. Ex. (followed by the exhibit number)
Regional Director's Decision and Direction of Election.....DDE (followed by page number)
Employer's Request for Review .....Req. for Rev. (followed by page number(s))

make a new set of findings of fact, it would reach the same conclusion as the Regional Director.

Accordingly, the Request for Review should be denied.

II. THE BOARD SHOULD NOT GRANT REVIEW TO RECONSIDER THE EMPLOYEE STATUS OF STUDENT EMPLOYEES BECAUSE THIS CASE DOES NOT INVOLVE STUDENTS

The Employer's principal argument is that that Board should overrule *Columbia I* and return to the holding of *Brown University*. According to the Board in *Brown*, that case "present[ed] the issue of whether graduate student assistants who are admitted into, not hired by, a university, and for whom supervised teaching or research is an integral component of their academic development, must be treated as employees for purposes of collective bargaining under Section 2(3) of the Act." 342 NLRB 483 at 483. The individuals in that case were enrolled in "graduate programs steeped in the education of graduate students through research and teaching." *Ibid* at 484. The Board explained:

> In their pursuit of a Ph.D. degree, graduate students must complete coursework, be admitted to degree candidacy (usually following a qualifying examination), and complete a dissertation, all of which are subject to the oversight of faculty and the degree requirements of the department involved. In addition, most Ph.D. candidates must teach in order to obtain their degree. Although these TAs (as well as RAs and proctors) receive money from the Employer, that is also true of fellows who do not perform any services. Thus, the services are not related to the money received.
>
> The faculty of each department is responsible for awarding TAs, RAs or proctorships to its students. To receive an award, the individual usually must be enrolled as a student in that department.

342 NLRB at 485. The Board relied upon these factors to conclude that the graduate assistants at Brown were "primarily students" and therefore not statutory employees. 342 NLRB at 487.

These factors relied upon by the Board in *Brown* have no application to the postdoctoral researchers at issue in this case. As the Employer discusses elsewhere in its Request for Review, all of the employees in the Unit are "hired by" the University (Req. for Rev. 33). They are not "admitted" to the University because they are not students at the University. (DDE 2). They are not enrolled in any "graduate program." They do not take classes (other than a few optional courses designed to help them apply for grants or tenure track positions). The work that they perform is not related to obtaining a degree because they are not pursuing a degree (Tr. 54). The money that they receive is directly related to the services that they perform, as spelled out in the Employer's salary guidelines for these jobs (Pet. Ex. 1; DDE 7). The Board cannot find that postdoctoral researchers are "primarily students" because they are not students at all.

Apparently recognizing the insubstantial nature of his argument, the Employer's attorney consistently uses the label "postdoctoral trainees" for the postdoctoral research scientists, scholars and Fellows in the Unit. This is not a job classification utilized by the University. According to the University Handbook, these individuals are given appointments as "Postdoctoral Officers of Research." (Er. Ex. 1 at p. 2; DDE 2). They are classified as Postdoctoral Research Scientists, Postdoctoral Research Scholars, and Postdoctoral Research Fellows (Ibid). While the Employer's literature states that these employees benefit from the training that they receive on the job, the title "Postdoctoral Trainees" is not used in the Handbook. Rather, this is a title devised by the Employer to create the impression that these employees have something in common with graduate assistants. They spend "the vast majority of their time" actually

conducting research (Tr. 65), and they are paid for conducting that research. This case simply does not raise the issue addressed in *Brown* and *Columbia I*.

III. THE BOARD SHOULD NOT GRANT REVIEW WITH RESPECT TO THE FACTUAL ISSUES RAISED BY THE EMPLOYER

A. The Shared Community of Interest Between ARSs and Postdocs

The Employer agrees that the factors considered by the Regional Director are relevant to determining whether Associate Research Scientists and Scholars ("ARSs") share a community of interest with Postdocs. Without challenging the legal criteria applied by the Regional Director, the Employer merely argues that he did not weigh those factors correctly. A disagreement with the Regional Director's factual findings is not a basis to grant review where there is substantial evidence to support these findings.

The Employer claims that the Regional Director gave too much weight to the fact that ARSs and Postdocs share common supervision. Citing *The Neiman Marcus Group, d/b/a Bergdorf Goodman*, 361 NLRB 50 (2014), the Employer argues that supervision at the "highest level" is not a relevant factor in a community of interest analysis (Req. for Rev. at 21). The petitioner in *Bergdorf Goodman* sought to represent a unit composed of sales associates in two shoe departments, Salon Shoes and Contemporary Shoes. Employees in these two departments reported to different department managers, who reported to different floor managers, who reported to different directors of sales. It was only at the "highest level of management at the store," the general manager level, that Salon and Contemporary sales had common supervision. 361 NLRB at 52. The Board found that separate immediate supervision was a factor that mitigated against finding a community of interest. By contrast, in the

instant case, ARSs and Postdocs have the same immediate supervisors: the PIs. There are no levels of supervision between supervision of the ARSs and supervision of Postdocs. Common immediate supervision is a strong indicium of a community of interest. E.g. *TDK Ferrites Corp.*, 342 NLRB 1006, 1009 92004); *Harrah's Illinois Corp.*, 319 NLRB 749, 750 (1995); *Sears Roebuck and Co.*, 319 NLRB 607, 608 (1995). Thus, the Regional Director properly found shared immediate supervision to be a factor strongly establishing a community of interest. (DDE 9)

The Employer's other arguments are similarly baseless. It argues that ARSs and Postdocs have different skills. While the requirements are not identical, jobs in both categories require a Ph.D. degree. ARSs and Postdocs working in the same lab have doctorates in the same field. Thus, unit employees share the same extremely high skills. The Employer notes that there is no temporary transfer between ARS and Postdoc positions. This is a tautological point: ARS is a more advanced position, so there would be no movement back from ARS to Postdoc. Postdocs regularly move into ARS positions following completion of their Postdoctoral work. Of the 1017 ARSs on the list provided by the Employer with its Statement of Position (Bd. Ex. 3), 518, or more than half, had previously been employed by the University as Postdocs (Pet. Ex. 4; Tr. 178-79; DDE 6). The fact that employees in one classification regularly move up to another job classification supports a finding of a community of interest. *TDK Ferrite, Inc.*, supra; *Harrah's Illinois Corp.*, supra.

Other factors support the Regional Director's findings. The salary range for Postdocs, while starting at a slightly lower level, substantially overlaps with the salary range for ARSs (Pet. Ex. 1). They receive most of the same benefits. (Tr. 109). The

Regional Director correctly found that these factors support a finding of a community of interest. (DDE 10).

The Employer points to other alleged distinctions between ARSs and Postdocs, none of which undermine the Regional Director's finding of a shared community of interest. The Employer argues that there is a different hiring practice for Postdocs (Req. for Rev. at 33-34). While there are differences in the posting processes for hiring Postdocs as opposed to ARSs, the critical elements of the hiring process are the same. The principal role in selecting an ARS or a Postdoc lies with the PI who will be responsible for his work, subject to approval by the head of the department and the provost (DDE 6; Tr. 47, 51, 97-99). While the Employer offered testimony that it has an affirmative action policy that applies to ARSs (Tr. 46), the Employer's Executive Vice President for Research, Dr. Graham Michael Purdy, testified that the Employer has a university-wide program focused on improving diversity in all segments of the university, including ARSs and Postdocs (Tr. 69-70). The Employer argues that ARS is a "Permanent Career Position" while Postdocs are temporary employees (Req. for Rev 34-36). It is undisputed that employees in both categories are appointed to one-year terms, which may be renewed (Er. Ex. 1, p. 2). The only distinction is that there is a three-year limit upon appointments as Postdocs. Employees wishing to continue beyond three years regularly become ARSs.

The Employer quotes the following excerpt from *Overnite Transport Company*, 322 NLRB 723 (1996) as an authoritative statement of factors relevant to community of interest:

> [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 sites; 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.

322 NLRB at 724 (quoted at Req. for Rev. at 20). Most of these factors have already been discussed, but the Employer ignores additional factors that support the Regional Director's findings. The hours of work for ARSs and Postdocs are the same. As the Regional Director found, their job duties are the same: they conduct original research related to the research of their PI (Tr. 66; DDE 10). As Purdy testified, "The Postdoc is obviously working on research projects in the PI's lab in the same way that an Associate Research Scientist is." (Tr. 45). The factor of working time away from the site of employment also reflects a shared community of interest. Employees in both categories spend nearly all of their time in those labs, conducting that research. While there are some workshops available for Postdocs that are not intended for the benefit of ARSs, Purdy acknowledged that Postdocs spend the "vast majority of their time" doing the work of their laboratories (Tr. 65).

In summary, the Regional Director's finding that the Unit is appropriate is supported by the record and is consistent with well-established precedent. The Employer has raised no serious issues regarding that finding. Therefore, the Request for Review should be denied.

B. Postdoctoral Fellows are Employees of the University

The Employer makes the far-fetched argument that Postdoctoral Fellows are not employees of the University, either because they are employed by their PIs or because they are independent contractors. The Employer places its primary reliance on

Fordham University, 193 NLRB 134 (1971), which the Employer describes as "virtually indistinguishable" from this case. (Req. for Rev. at 38). In fact, Fordham has almost nothing in common with this case. At Fordham in 1971, faculty members hired employees to conduct research under federal grants without any involvement by the university. Salaries were set by the funding agencies. 193 NLRB at 135. The Board found that these researchers were not hired by the faculty members on behalf of the university. 193 NLRB at 136. At Columbia in 2018, Fellows are still selected primarily by the PI, but the selection must be approved by the department chair or the dean and by the provost (Tr. 98-99). The Fellows receive a formal appointment by the President of the University, memorialized by a letter from the Secretary of the University (DDE 8; Er. Ex. 8). According to the letter, "This appointment is made in accordance with the provisions of the Statutes and the other rules of governance of the University." Columbia pays the Fellows and provides health insurance. Thus, the Fellows at Columbia are hired under very different terms from the researchers at Fordham. There can be no question that they are employed by the University.

The Employer makes the equally indefensible argument that the Fellows are independent contractors because they have succeeded in obtaining grants to support their research. The fact that a Fellow has received a grant from a funding agency makes the Fellow more attractive as an employee of a university, just as a PI who has generated a large amount of grant funding is a more attractive employee. A Postdoc with funding is in a stronger position to negotiate terms of employment and is likely to have a wider range of employment options. This does not, however, establish that she is an independent contractor.

The burden is on the Employer, in seeking to exclude the Fellows, to establish that they are independent contractors. *Minnesota Timberwolves Basketball*, 365 NLRB No. 124, sl. op. at 4 (2017); *BKN, Inc.*, 333 NLRB 143, 144 (2001). This requires a showing that the Fellows work independently, and that their work is not directed by the University. The undisputed evidence establishes that the work of Fellows is supervised by the University in the same manner as ARSs. Therefore, the Employer has not met its burden.

As recognized by the Employer, the Board relies upon common-law agency principles, including the factors enumerated in the *Restatement (Second) of Agency* sec. 220 (1958). (Req for Rev. at 41-44). These common law factors include: (1) the extent of control over the details, means and manner of the work; (2) whether the putative contractor is engaged in a distinct occupation or business; (3) whether the work is done under the direction of the principal, or by a specialist without supervision; (4) the skill required in the particular occupation; (5) who supplies the tools and place of work; (6) the length of time for which the person is employed; (7) the method of payment, whether by the time or by the job; (8) whether the work is part of the regular business of the employer; (9) whether parties believe they are creating an employment or contract relationship; and (10) whether the principal is in business. The Board also considers whether the individuals in question are engaged in an intendent business with entrepreneurial opportunity for gain or loss. *Minnesota Timberwolves*.[2] Consideration of these factors reveals that the Fellows are clearly not independent contractors.

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[2] While Member Miscimarra dissented from the result in *Minnesota Timberwolves*, he agreed that these are the factors to be considered.

With respect to (1), the record establishes that the work of the Fellows is directed and supervised in the same manner as the ARSs who are admitted employees. The appointment letters (Er. Ex. 7) set out "the specifics" of the research to be performed by the Fellow. (2) The Fellows are not engaged in an independent occupation or business. They work exclusively at the University conducting research that is part of the research of their PI. (3) They work under the direction of their PI. While the Fellows are highly specialized researchers, their PIs are specialists in the same field. (4) The skills factor does not support independent contractor status because the PI supervising the Fellows possesses the same skill. (5) The Employer and the PI supply the instrumentalities, tools and the place of work, one of the hallmarks of an employment relationship. (6) The Fellows are employed for renewable one-year periods, a factor favoring a finding of employee status. (7) While the Employer does not withhold taxes from the pay of Fellows, they are paid monthly, with a minimum salary set by the University. The amount of the monthly payment is fixed and does not depend upon the amount of progress made in the research. They are not paid by the job. Therefore, this factor supports a finding of employee status. The fact that the Employer provides health insurance for the Fellows is further indicative of an employee relationship. (8) The work performed by the Fellows, original research, is a central part of the business of Columbia. (9) There is no evidence that the parties actually believe that they are creating an independent contractor relationship. None of the witnesses testified to such a belief, and even the Employer's counsel, in asserting its position, said that they were "in the nature" of independent contractors, hesitating to make a flat claim of independent

contractor status. (Tr. 187).[3] (10) The principal, Columbia, is in the business of producing original research. The Fellows are working in the laboratory conducting research that is related to the PIs research. The work of the Fellows is thus a part of the work of the University. Finally, (11) the Fellows are not engaged in independent businesses. Indeed, the offer letters state that they are offered "fulltime" positions with the University (Er. Ex. 7). They have no opportunity to engage in independent research businesses outside the University. Thus, the factors relied upon by the Board overwhelmingly support the Regional Director's finding that the Fellows are employees and not independent contractors.

IV. CONCLUSION

The Employer has failed to establish "compelling reason" for review of the Regional Director's decision. Accordingly, the Request for Review should be denied.

THE PETITIONER

By: _____

Thomas W. Meiklejohn
Livingston, Adler, Pulda, Meiklejohn
& Kelly, P.C.
557 Prospect Avenue
Hartford, CT 06105-2922
Telephone: 860.233.9821
Facsimile: 860.232.7818

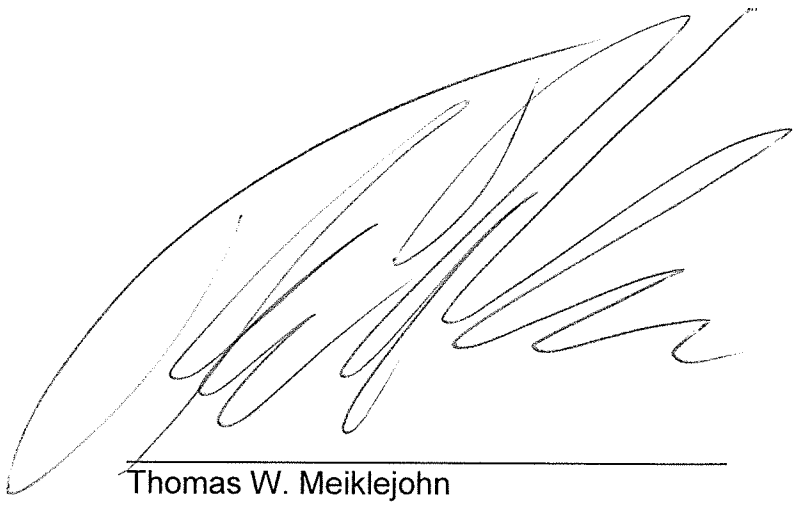
[3] Similarly, the Employer asserts in the heading of this section of its Request for Review that Fellows are "akin" to independent contractors. Clearly, the Employer's attorneys do not believe that an independent contractor relationship exists.

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Petitioner's Opposition to Request for Review was sent vial email, on this 2nd day of November, 2018 to the following:

John J. Walsh, Regional Director
National Labor Relations Board, Region 2
26 Federal Plaza, Room 3614
New York, NY 10278
John.walsh@nlrb.gov

Steven J. Porzio
Proskauer Rose LLP
Eleven Times Square
New York, NY 10036
sporzio@proskauer.com



Thomas W. Meiklejohn