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Student-Athletes or Statutory Employees?

In a closely-watched decision, a Regional Director for the National Labor Relations Board (NLRB) ruled on March 26, 2014 that football players receiving scholarships at Northwestern University are "employees" and eligible to unionize.

This landmark decision, *Northwestern University and College Athlete Players Association (CAPA)*, 13-RC-121359 (the Decision), involves football players who receive grant-in-aid scholarships from the University (Scholarship Players). A union formed to represent Division I football and basketball players—the College Athlete Players Association (CAPA)—filed a petition with the NLRB's Chicago office in January 2014 seeking to represent the University's Scholarship Players.

The Regional Director's Decision

The University took the position before the NLRB that the Scholarship Players were not "employees" under the National Labor Relations Act (NLRA) and therefore not eligible to unionize. The University contended that extending collective bargaining rights to the Scholarship Players was not appropriate because the Scholarship Players' relationship to the University is that of a student, not an employee. The University also argued that, even if the Scholarship Players were deemed to be employees, they would not be eligible to unionize for a number of reasons, including:

- The fact that the Scholarship Players' tenure with the University is temporary in nature;
- The proposed bargaining unit—which excludes "walk on" football players—was arbitrary

The Regional Director for Region 13 of the NLRB—the official responsible for deciding union election cases in the Chicago area—rejected the University's arguments and found that the Scholarship Players are "employees" within the meaning of Section 2(3) of the NLRA. In reaching this conclusion, the Regional Director applied the common law test of employment, relying on two principle factors.

First, the Regional Director found that the Scholarship Players perform services for the University for which they receive compensation. Under this analysis, the Scholarship Players' "compensation" comes in the form of tuition, fees, room, board, and other college-related expenses paid for by the University. The Regional Director concluded that these economic benefits constituted compensation offered in exchange for participation on the University's football team.

Second, the Regional Director found that the Scholarship Players are subject to the University's control with respect to their duties as football players. The Decision identified several facts relied on by the Regional Director, including the daily itineraries prepared by the coaches and followed by the Scholarship Players, the fact that they spend 40–60 hours engaged in football-related activities during training camp and 40–50 hours per week during the regular season, as well as the NCAA and team rules governing player conduct.

Finally, the Regional Director rejected the University's argument that the Scholarship Players have a predominantly academic—and not economic—relationship with the University and therefore are not "employees" under the standard set forth in *Brown University*, 342 NLRB 483 (2004). In the *Brown University* case, the NLRB held that graduate students are not "employees" under the NLRA based on their academic—rather than economic—relationship with the university. In the Northwestern case, the Regional Director found that *Brown University* was inapplicable because the Scholarship Players' duties "are unrelated to their academic studies unlike the graduate assistants [in *Brown*] whose teaching and researching duties were inextricably related to their graduate degree requirements." The Regional Director went on to rule that, even if the *Brown University* test were applied to the Scholarship Players, they would still be deemed "employees."

After concluding that the Scholarship Players are "employees," the Regional Director considered the University's arguments that collective bargaining rights should not be granted here because the Scholarship Players are "temporary" employees and because the proposed bargaining unit was arbitrary. The Regional Director rejected both arguments.

First, he found that, under the NLRB's caselaw governing eligibility of temporary employees to vote, the fact that the Scholarship Players' tenure with the University was for a finite term did not render them ineligible to vote. Citing the NLRB's decision in *Boston Medical Center*, 330 NLRB 152 (1999), the Regional Director concluded that the players were eligible to vote in the union election even though under NCAA eligibility rules, they could remain on the team for at most five years.

Next, the Regional Director found that the proposed bargaining unit was not arbitrary or "fractured" even though it included some players—the approximately 85 Scholarship Players at issue—but not "walk on" football players. The University argued that the walk-ons shared an overwhelming community of interest with the rest of the players, such that directing an election among the Scholarship Players only would result in a "fractured" unit. The Regional Director sided with the Union for two reasons. First, he found that the fact that the Scholarship Players receive compensation in the form of scholarships represented a "substantial difference" between the two groups. Second, because the "walk on" players do not receive compensation for their services, he found that they were not "employees" and therefore there could be no "fractured" unit due to their non-employee status.

Looking Down Field / The Potential Impact on Higher Education

This decision marks a potential sea change in Board law that could change the landscape of union organizing at private colleges and universities (public colleges and universities are not regulated by the NLRB). However, the story is far from over. Under the NLRB's rules, the University has until April 9, 2014

to file an appeal with the five-Member NLRB in Washington, D.C. Almost immediately after the decision was issued, the University announced that it would appeal the Regional Director's ruling. There will almost surely be a decision from the NLRB after the appeal is filed, and, should the Union prevail in a directed election, potentially further appeals in the federal courts.

The University and Higher Education decry the notion that traditional "student-athletes" should be considered statutory "employees" under the National Labor Relations Act. As expected, the University and the National Collegiate Athletic Association (NCAA) have issued statements strongly disagreeing with the ruling. As stated by Donald Remy, the NCAA's Chief Legal Officer, "While improvements need to be made, we do not need to completely throw away a system that has helped literally millions of students over the past decade alone attend college…. We want student-athletes—99 percent of whom will never make it to the professional leagues—focused on what matters most: finding success in the classroom, on the field and in life."

The Decision raises numerous questions pertaining to Higher Education, including:

- Does the ruling wholly ignore the intrinsic educational benefit to students who participate in inter-collegiate team and individual sports on behalf of their institutions?
- Does academic admission/eligibility need to be more closely monitored and more clearly determined and controlled by the institution's faculty and administration?
- Is there a justifiable case for treating athletic scholarship dollars differently than other forms of institutional/financial aid?
- What would be the practical effect on extra-curricular activities of students generally?
- Would significant amounts of time and generation of revenue alone also make students participating in all forms of extra-curricular activity "employees" of the institution?
- What will be the impact on Title IX?
- Are there better ways than the collective bargaining process to address legitimate student-athlete concerns such as long-term health effects and ensuring successful career outcomes for student-athletes?
- If student-athletes are "employees" under one statutory scheme, will the host of other employment statutes and regulations also apply?
- Will the NLRB attempt to take this opportunity to overrule the *Brown University* case and grant graduate students "employee" status under the NLRA?

While this is a significant first step by one Regional Director of the National Labor Relations Board, there will assuredly be great challenge to the Decision, with appeals at the Board level and likely the court of appeals and possibly the United States Supreme Court itself, before this issue will likely be resolved. Higher Education institutions should at least begin thinking about these issues as the *Northwestern* case percolates through the NLRB and court system and may wish to consider taking pro-active steps to best position themselves should the Regional Director's decision ultimately be upheld.

We will, of course, continue to monitor these developments and report on them as soon as they occur.

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