



BACKGROUND (MARCH 2018)

In the Matter of the Employees of Pennsylvania State University

THE EXECUTIVE SUMMARY

The Fairness Center represents Michael Cronin, a doctoral student and graduate assistant at Pennsylvania State University (“Penn State”). At the request of the Pennsylvania State Education Association (“PSEA”), a hearing examiner at the Pennsylvania Labor Relations Board (“PLRB”) recently determined that Mr. Cronin and nearly 4,000 other graduate assistants at Penn State were “public employees” who could be unionized against their school.

Mr. Cronin became a graduate assistant to further his education and believes that a union would interfere with that opportunity. Indeed, if the union wins its election, expected in April, it will become the “exclusive representative” for Mr. Cronin and every other graduate assistant—even those who voted against the union or neglected to vote. Mr. Cronin would lose the opportunity to determine his own educational future.

Mr. Cronin will ask the PLRB to allow him to intervene and participate in the union’s still-pending proceeding before the PLRB and will also request that the PLRB review the hearing examiner’s decision and stay the election until his decision has been reviewed. Ultimately, longstanding Pennsylvania Supreme Court precedent establishes that those paid to perform work primarily for educational or training purposes should not be subjected to exclusive representation.

THE PROBLEM

In early 2017, a group called the “Coalition of Graduate Employees” (“Coalition”)—organized under the PSEA—initiated “representation proceeding,” an administrative proceeding which often culminates in an up-or-down election to determine whether a union will represent all individuals within a particular bargaining unit. Election results under Pennsylvania’s Public Employee Relations Act (“PERA”) are determined by a majority of those voting, which means a small majority can allow a union to “represent” many individuals who either voted against the union or neglected to vote at all.

Graduate assistants have been a popular target for many unions. In 2016, [in a case involving Columbia University](#), the National Labor Relations Board reversed its prohibition on unions’ exclusive representation of graduate students at private universities. Many other private universities, including the University of Pennsylvania, Harvard University, Yale University, and Massachusetts Institute of Technology, [took a public stance against unionization of graduate students](#). The universities reasoned that unions were not appropriate for graduate students because, among other reasons, graduate assistants’ “coursework, research and teaching experiences are a fully integrated

educational experience”¹ that would not be advanced in an adversarial workplace environment.

The same reasoning applies to Mr. Cronin and other graduate assistants at Penn State. Mr. Cronin is a doctoral student of Energy and Mineral Engineering and serves as a graduate assistant while working with two faculty advisors on his dissertation. Mr. Cronin is closely supervised by professors as he, for example, conducts literature searches, develops new research toolsets, prepares grant applications and funding proposals, grades coursework, holds office hours, and conducts laboratory sessions. Each of these duties is a learning experience for him.

Penn State also financially enables Mr. Cronin’s educational work. He devotes 20 hours per week to graduate assistant service and receives health insurance, a monthly stipend, and paid tuition and fees.

But at root, Mr. Cronin objects to imposition of exclusive representation on him and other graduate assistants who want nothing to do with the Coalition or the PSEA. He desires an unmediated relationship with his supervisors and the power to negotiate his own terms and conditions. In short, he wants the freedom to speak for himself. And he believes that the Coalition and the PSEA will use members’ dues money on political issues that have little to do with research, teaching, or education generally.

Unfortunately, on February 6, 2018, the PLRB hearing examiner assigned to review the Coalition’s request to unionize graduate assistants at Penn State determined that graduate assistants could be unionized, despite longstanding Pennsylvania Supreme Court precedent holding otherwise. The PLRB has not reviewed the hearing examiner’s decision and may decline to exercise any such review until after a union election has taken place.

Meanwhile, Penn State and the Coalition have agreed to election dates beginning on April 10.

Mr. Cronin is requesting that the PLRB allow him to intervene or participate in the proceedings. He is also asking that the PLRB review the hearing examiner’s findings prior to the election and to stay the election until after the PLRB rules on whether graduate assistants may be unionized in the first place.

THE LAW

In 1977, the Pennsylvania Supreme Court determined that certain Temple University students—paid to perform work primarily for educational or training purposes—could not be subjected to exclusive representation. *Philadelphia Ass’n of Interns and Residents v. Albert Einstein Medical Center, Temple University*, 369 A.2d 711 (Pa. 1977) (“*PAIR*”). The Pennsylvania Supreme Court reasoned:

In our opinion, while appellants herein are clothed with the indicia of employee status, the true nature of their reason for being at Temple University negates their employee status. Appellants do not go to work at Temple in the true bargained-for exchange normally associated with the employer-employee relationship. Appellants are not primarily

¹ See Br. of Amici Curiae Brown Univ., Cornell Univ., Dartmouth College, Harvard Univ., Mass. Institute of Tech., Univ. of Pa., Princeton Univ., Stanford Univ., Yale Univ., at 1 (Feb. 29, 2016), http://ogc.harvard.edu/files/ogc/files/amicus_brief_-_case_02-rc-143012_0.pdf.

seeking monetary gain, but rather are attempting to fulfill educational requirements, either to initially practice medicine, or obtain certain specialties in the medical field. Moreover, appellants herein are not, because of certain medical board requirements, free to obtain this training from any hospital in the Commonwealth; appellants must work at a hospital approved as a teaching hospital, such as Temple. This again evidences that the general bargained-for exchange of the normal marketplace is absent in the instant case...

Lastly, we, as was the Commonwealth Court, are of the opinion that the spirit of [PERA] would not be served by allowing appellants to form a bargaining unit. Appellants do not comprise a group of persons who are attempting to establish a continuous relationship with appellee, but rather, after they have fulfilled their educational requirement in either one, two or three years, leave appellee-hospital for new areas of endeavor.

PAIR, 369 A.2d at 568–70.

Decades later, when unionization efforts resurfaced at Temple University, the PLRB decided in favor of the union, despite the Pennsylvania Supreme Court’s ruling in *PAIR*. The PLRB believed that *PAIR* only applied when graduate students were required to undertake educational work as a part of their educational curriculum. This time, the case was not appealed.

In his proposed decision and order (“[Proposed Order](#)”), the hearing examiner assigned to Penn State’s case recognized that *PAIR* was relevant, but he remarked that, as a hearing examiner, he was bound to apply the PLRB’s later decision:

As a Hearing Examiner of the Board it is my duty to apply Board decisions and i[s] not my duty to overrule Board authority. Thus [Penn State’s] arguments on these grounds are more properly addressed to the Board.

Proposed Order 25.

The PLRB has not exercised its ability to review the hearing examiner’s decision thus far. *See* 34 Pa. Code § 95.98(g).

PLRB Rules and Regulations allow interested parties to intervene or otherwise participate in matters brought by other parties. 34 Pa. Code § 95.44. They also permit those participating in a case to request PLRB review and a stay of the election after the hearing officer’s proposed decision has been reviewed by a Board Representative. 34 Pa. Code § 95.91(k)(2)(iii).

THE CASE LOGISTICS

Putative Intervenor

Michael Cronin is a doctoral student of Energy and Mineral Engineering at Penn State, where he is

working with two faculty advisors on his dissertation and expects to graduate in 2020. He is married and recently became a father to a beautiful little girl.

Relief Sought

Ability to participate in ongoing proceedings involving Penn State and the Coalition of Graduate Employees, the union seeking to impose exclusive representation on graduate assistants.

Date Filed

March 23, 2018

THE LEGAL TEAM

David R. Osborne is President and General Counsel at the Fairness Center. David helped to launch the Fairness Center in 2014, provides advice and counsel to clients, and directs and manages the firm. Prior to joining the Fairness Center, David practiced law in Florida, where he had previously served as clerk to a Florida Supreme Court justice and served as official staff to a member of Congress. David graduated from the Florida State University College of Law.

Nathan J. McGrath is Vice President and Director of Litigation at the Fairness Center, where he litigates and develops legal strategy to advance the Fairness Center's clients' best interests. Prior to joining the Fairness Center, Nathan was a staff attorney with the National Right to Work Legal Defense Foundation, Inc. Nathan was also an associate attorney with Lawlor & Lawlor, P.C., a general practice firm in Pittsburgh, Pennsylvania.