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Shelter from the Storm: Rekindling Research on Collective Bargaining and Representation Issues

William A. Herbert¹

The National Center for the Study of Collective Bargaining in Higher Education and the Professions (National Center) is a four-decade old institution that is supported by and located at Hunter College, City University of New York. The National Center was founded in the wake of the granting of collective bargaining rights by various states and localities to public employees including higher education faculty members (Altbach, 2011; Herbert, 2010/2011; Murphy, 1990), and shortly after the National Labor Relations Board (NLRB) asserted jurisdiction over private institutions of higher education. (*Cornell University*, (1970)).²

Since its creation, the National Center has organized conferences that bring together scholars, administrators, labor representatives and other practitioners to examine contemporary issues, and to exchange best practices in collective bargaining and labor-management relations. The convening of on-site conferences satisfies one of the central components of the National Center's mission: providing a collegial venue for the presentation of scholarly works, encouraging principled airing of labor-management differences in higher education, and shedding light on the similarity of issues facing administrators, faculty members, and labor representatives. The publication of the proceedings of the national conference, which are also posted on the National Center's website, ensures that the papers presented at the conferences are available to a much wider audience. In the future, webcasts and other on-line tools might provide the National Center with supplemental tools for distributing substantive content throughout the country and the world.

The program for the National Center's 41st annual conference reflects the diversity of contemporary labor relations issues facing higher education institutions and faculty. The theme

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² The NLRB overruled *Trustees of Columbia University*, 97 NLRB 424 (1951) which had held that it would not effectuate the purposes of the National Labor Relations Act of 1935, 29 U.S.C. §150, *et seq.*, "to assert its jurisdiction over a nonprofit, educational institution where the activities involved are noncommercial in nature and intimately connected with charitable and educational activities of the institution.") In reaching its decision in *Cornell University*, *supra*, the NLRB relied upon the fact that the NLRA's definition of an employer under 29 U.S.C. §152(2) did not exempt nonprofit educational institutions from its jurisdiction, the legislative history of the 1947 amendments to the NLRA, and the massive impact educational institutions have on interstate commerce.

of the conference is achieving successful results in higher education through collective bargaining. The conference will have multiple panels discussing issues associated with organizing and collective bargaining relating to contingent faculty, as well as issues connected to on-line learning and social media. There will also be individual panels on such topics as labor-management trends in historically black colleges and universities, the development of labor-management responses to bullying in higher education, the future of pensions for the academic workforce, and an update on the Affordable Care Act and wellness programs. In addition, there will be a series of workshops offered aimed at enhancing the practical skills of attendees. It is our intent to record some of the conference events for possible future webcasts.

In addition to organizing national and regional conferences, the National Center publishes a *Directory of U.S. Faculty Contracts and Bargaining Agents in Higher Education* (Berry & Savarese, 2012) that analyzes and reviews existing collective bargaining agreements concerning faculty members, graduate students and teaching assistants and the certified or recognized bargaining representatives in institutions of higher education. The *Directory* provides statistical data about the composition and size of bargaining units and the particular campuses covered. Data from the *Directory* is frequently relied upon by researchers studying collective bargaining issues in higher education.

The National Center remains dedicated to studying “collective bargaining as an important means for advancing higher education and the working conditions of faculty and staff in colleges and universities” in the private and public sectors through a “knowledge-based dialogue concerning labor-management and educational issues”³ at a time of significant changes in higher education. The decision to begin publishing the *Journal of Collective Bargaining in the Academy* (JCBA) in 2006 is indicative of the National Center’s commitment to rekindling, initiating, and producing scholarly research. Toward meeting that end, the National Center is in the process of forming a Council of Scholars comprised of a diverse group of labor and employment scholars with different expertise and emphasis. The purpose of the Council will be to further promote interdisciplinary scholarship by members of the academy and practitioners on issues relating to labor organizing and representation, collective bargaining, labor history, and labor relations issues in the private and public sectors. Among the tasks for Council members will be identifying and encouraging contributions to JCBA.

Over the next year, the National Center will also be examining other ways it can function as an incubator and producer of new scholarship. A primary means for reaching that goal will be the possible creation of internships for post-doctoral scholars, graduate students, law students,

³ See, Mission Statement, National Center for the Study of Collective Bargaining in Higher Education and the Professions available at: <http://www.hunter.cuny.edu/nscsbhep>.

and undergraduates. If the National Center is successful in creating such internships, it will be able to prepare and issue reports and studies, expand the scope of the *Directory* to include greater analysis of the substantive provisions of collective bargaining agreements, and archive National Center historical material.

The National Center is exploring possible technological means for electronically distributing written updates on new developments from around the country with respect to collective bargaining and labor relations issues. For many years, the National Center published a regular newsletter that included articles on various contemporary topics. For example, following the 1980 United States Supreme Court decision in *NLRB v. Yeshiva University* (*Yeshiva*) holding that full-time Yeshiva University faculty members were managerial, and, therefore, exempt from the statutory associational rights granted by the National Labor Relations Act of 1935 (NLRA), the National Center published a series of articles examining the adverse impact that decision had on collective bargaining for full-time faculty members at other private sector colleges and universities.⁴ One of the many consequences of the Supreme Court's "seismic shift in the law of labor relations in American higher education," (*Point Park University v. NLRB*, 2006) and the subsequent decisions by the NLRB applying the factors identified in *Yeshiva* to other colleges and universities, is the fact that the vast majority of organized full-time faculty members today are employed in public colleges and universities subject to distinct public sector collective bargaining laws applicable to their particular geographical area (Berry & Savarese, 2012).

The relative paucity of contemporary scholarship examining collective bargaining and labor representation issues is not due to a shortage of engaging and important topics. Organizing efforts concerning contingent faculty and graduate students at private colleges and universities constitute a rich ocean of subjects worthy of nonpartisan scholarship. The large growth in the use

⁴ See, *The Impact of the Supreme Court Decision*, National Center for the Study of Collective Bargaining in Higher Education Newsletter, Vol. 8, No. 1 (Jan.-Feb. 1980); *The Yeshiva Case: One Year Later*, National Center for the Study of Collective Bargaining in Higher Education and the Professions Newsletter, Vol. 9, No. 2 (Apr.-May 1981); *Distinguishing Yeshiva: A Troubling Task for the NLRB*, National Center for the Study of Collective Bargaining in Higher Education and the Professions Newsletter, Vol. 10, No. 3 (Aug.-Sept. 1982); "Yeshivawatch" –Year Four, National Center for the Study of Collective Bargaining in Higher Education and the Professions Newsletter Vol. 11, No. 3 (Jul.-Aug. 1983); *Yeshivawatch* – Year Six, National Center for the Study of Collective Bargaining in Higher Education and the Professions Newsletter Vol. 13, No. 5 (Nov.-Dec. 1985); *Yeshivawatch* – Year Seven, National Center for the Study of Collective Bargaining in Higher Education and the Professions Newsletter Vol. 14, No. 4 (Sept.-Oct. 1986); Thomas E. Matteoli, *Yeshivawatch* – Year Eight: The Impact of Post-Yeshiva Decisions, National Center for the Study of Collective Bargaining in Higher Education and the Professions Newsletter Vol. 15, No. 4 (Sept.-Oct. 1987); *Yeshivawatch* –Year Nine, National Center for the Study of Collective Bargaining in Higher Education and the Professions Newsletter Vol. 16, No. 5 (Nov.-Dec. 1988). See also, *The Impact NLRB v. Yeshiva University of Faculty Unionism at Public Colleges and Universities*, National Center for the Study of Collective Bargaining in Higher Education and the Professions Newsletter Vol. 18, No. 2 (Apr.-May. 1990). The cited articles were published in the National Center's newsletter, which commenced publication in 1973. See, *Newsletter of Newsletters 1973-1993*, National Center for the Study of Collective Bargaining in Higher Education and the Professions Newsletter, Vol. 21, No. 4 (Nov.-Dec. 1993) (setting forth the content of each National Center newsletter for the period 1973-1993).

of contingent faculty in higher education over the past few decades is well documented (Ehrenberg, 2012; Julius & DiGiovanni, 2013). Among the issues deserving additional scholarly attention are the methodology of each organizing campaign, the response by the respective administration, the composition of the units sought and obtained, the level of support from tenured faculty members and others (Perlstein, 2013; Schmidt, 2013a), and the substantive collective bargaining results following certification or recognition. The fact that contingent faculty members are usually excluded from the governing structure of a college and university ensures that they will not be treated as managerial employees under the Supreme Court's decision in *Yeshiva*, and therefore, will not be excluded from labor representation and collective bargaining under the NLRA. Successful efforts at obtaining a role for contingent faculty members in the governing structure of a particular private institution of higher education might have the unintended consequence of removing them from NLRA coverage under *Yeshiva*.

The examination of contingent faculty issues at the National Center's 41st annual conference should inspire participants and attendees to apply their training, skills and time toward producing future works of dispassionate scholarship on those subjects.

Other potential subjects for private sector research may result after the eventual NLRB decision from the judicial remand in *Point Park University* (2006) regarding whether full-time faculty members at that university are eligible for union representation under the factors set forth in *Yeshiva*. After the remand from the United States Court of Appeals for the District of Columbia, the NLRB issued a decision in 2012 inviting briefs addressing eight specific questions concerning how it should weigh the factors identified in *Yeshiva* for determining managerial status of full-time faculty members (*Point Park University*, 2012). Among the questions raised by the NLRB was whether "[t]here have been developments in models of decision making in private universities since the issuance of *Yeshiva* that are relevant to the factors the Board should consider in making a determination of faculty status?" (*Point Park University*, 2012). In response to the NLRB's solicitation, over a dozen parties filed *amicus* briefs.

While predicting an outcome in a litigated case is always an act of speculation, the fact the NLRB majority in *Point Park University* sought input from the parties and *amici* concerning the specific questions was a clear indication that some NLRB Board members wanted to reconsider the proper application of *Yeshiva* and its progeny, and to consider the changes that have taken place in higher education over the past three decades. Since the NLRB requested and received the briefs, there has been a substantial change in the NLRB Board composition. A final administrative decision in *Point Park University* may be delayed by a pending motion seeking to

disqualify one of the recently confirmed NLRB Board members on the ground that her former colleague represented the petitioning union and the AFL-CIO in the case.⁵

The National Center will be closely monitoring developments in *Point Park University*. An NLRB decision that modifies the application of the *Yeshiva* factors in a manner favorable to private sector full-time faculty members being covered under the NLRA, which is subsequently confirmed in federal court, will inevitably set off a renewal of full-time faculty organizing campaigns at some private colleges and universities, which might result in new collective bargaining relationships. While members of the National Center's constituencies will likely differ over the wisdom of a new modified NLRB approach for determining statutory coverage under *Yeshiva*, there is little question that any future campaigns and collective bargaining relationships concerning private-sector full-time faculty will offer a feast of ripe topics for future scholarship.

As a practical matter, researching and analyzing public sector collective bargaining issues can be more challenging than studying analogous private sector issues under the NLRA. This is due to the fact that public sector "collective bargaining is a complicated patchwork of varying sizes, shapes and colors" with each locality having "a unique political and legal history, with different policies regarding public sector collective bargaining" (Herbert, 2011). The quality of the debate over the past few years concerning the coordinated nationwide effort to ban or restrict public sector collective bargaining and other rights was substantively disappointing, and reflective of the lack of enough scholars from various disciplines studying the related fields of public sector labor relations, law and history (Herbert, 2011; Malin, 2012). Encouraging research on public sector labor issues can lead to a deeper and nuanced societal understanding of those issues. Moreover, such research has a greater likelihood of generating interdisciplinary scholarly collaboration because public sector issues, by their very nature, touch upon multiple areas of social science (Hebdon, Slater & Masters, 2013).

A recent public sector higher education development at the University of Kansas points to important and related modern-day labor issues warranting careful scholarly attention: the scope of protections concerning the use of social media by faculty members, and the proper elements of a social media policy in higher education.

In September 2013, a tenured journalism professor at the University of Kansas was placed on administrative leave and later reassigned following a controversial tweet about gun violence in response to recent shootings in Washington, D.C. (Burnes & Williams, 2013; Flaherty, 2013). On December 18, 2013, the Kansas Board of Regents issued a press release announcing the

⁵ See, Employer's Motion for Recusal of Member Nancy Schiffer, Nov. 27, 2013 available at <http://www.nlr.gov/case/06-RC-012276>

unilateral imposition of a new social media policy (Kansas Board of Regents, 2013a). The new social media policy grants the chief executive officer at each campus the authority to suspend, dismiss or terminate a faculty member for the “improper use of social media,” which the policy attempts to define (Kansas Board of Regents, 2013b).

The terms of the policy suggest an intention to maximize university authority to discipline and take other adverse actions in reaction to faculty social media posts within certain limitations imposed by the First Amendment on public employment (Herbert, 2012; Herbert, 2013). In particular, the policy seeks to codify the balancing test from Supreme Court precedent interpreting the First Amendment. Under the balancing test, the interests of the public employee to speak or to petition concerning an issue of public concern is balanced against the interests of the government employer to provide efficient and effective services (Herbert, 2012). In applying the balancing test, courts will defer to a public employer’s reasonable prediction that an employee’s comment might cause workplace disruption. In the context of the culture of social media, overbroad application of judicial deference to employer predictions of disruption can have the affect of empowering the electronic heckler’s veto (Herbert, 2013).

The Kansas Board of Regents’ policy also relies on the constitutional rule formulated in *Garcetti v. Ceballos* (2006) excluding public employee speech and activities from First Amendment protections when done pursuant to official duties. Notably absent from the policy is any reference to academic freedom despite *dicta* in *Garcetti* that the exclusionary rule might be inapplicable, or subject to modification, in an academic environment.⁶

The new policy, which has clear implications for academic freedom, appears to have been imposed without any dialogue with members of the faculty or a university-wide symposium concerning the benefits and risks associated with social media (Schmidt, 2013b). A principled labor-management dialogue might have resulted in a social media policy less susceptible to criticism and possible constitutional challenge on vagueness, prior restraint, and academic freedom grounds (Herbert, 2013). In response to the controversy caused by the policy, the Kansas Board of Regents announced a plan on December 31, 2013 for “University Presidents and [the] Chancellor to form a workgroup of representatives from each state university campus to review the policy” and to report back to the Board of Regents by April 2014 with recommendations for amendments to the policy (Kansas Board of Regents, 2013c). In the interim, the policy remains in effect.

⁶ See also, *Adams v. Trustees of the Univ. of North Carolina-Wilmington*, 640 F.3d 550 (4th Cir. 2011) (university professor’s academic work is not covered under the *Garcetti* exclusionary rule); *Demers v. Austin*, 729 F.3d 1011 (9th Cir. 2013) (“We hold that *Garcetti* does not apply to teaching and writing on academic matters by teachers employed by the state.”)

As I have stated elsewhere, the design of social networking and personal communicative devices encourages electronic impulsiveness that can precipitate overreactions. “The lack of facial expressions and vocal intonations, and the rapidity of the exchanges, can lead to substantial misinterpretation, a result that undermines the medium’s communicative value” (Herbert, 2013). To paraphrase Steve Earle, a smartphone can be the devil’s right hand even for a faculty member or an administrator who generally uses discernment and discretion in communicating. More generally, smartphones can have the effect of transforming users into “bad Samaritans” (Rosen, 2013).

The recent controversial tweet by the University of Kansas professor, the sharp criticism it generated, the adverse personnel action that followed, and the imposition of the university’s social media policy highlights how the quality of our societal dialogue can be undermined by the furies of electronic media as well as the mind clouds formed in an age of distraction (Jacoby, 2008). As Susan Jacoby has argued, we

must recognize that we are living through an overarching crisis of memory and knowledge involving everything about the way we learn and think. Such recognition would have to come from ordinary citizens as well as elected representatives, from nonintellectuals and intellectuals alike. The first essential step is a negative: we must give up the delusion that technology can supply the fix for a condition that, however much it is abetted by our new machines, is essentially nontechnological. (p. 309)

The existence of social media policies and effective training are important but they do not guarantee the avoidance of an informed post precipitating a hostile electronic communications storm. Social networking ensures wide distribution of electronic content along with the potential for instantaneous hostile reactions. For example, a post by an historian stating that “John Brown rendered a great service to the cause of liberty in the earlier Kansas days,” might generate controversy and calls for discipline. The barrage of angry responses provoked by the post, however, might dissipate once the historian explains that the quote was excerpted from a 1910 article by Theodore Roosevelt, which was later republished in an anthology on John Brown’s legacy (Ruchames, 1959). The possibility of such a scenario reinforces the importance of intellectual integrity within the academy in the use of, and the response to, electronic communications.

At the National Center’s 41st annual conference, there will be two panels on social networking in academia. One panel will focus its attention on the subject of academic freedom under *Garcetti*, and a second will discuss best practices regarding social media policies in higher education. The dialogue generated at the conference concerning social media issues might help set the foundation for future work by the National Center concerning collective bargaining and other labor-management responses to social media issues in the public and private sectors.

In articulating a National Center agenda for the regeneration of scholarship concerning collective bargaining and representation issues, we must be cognizant of the obstacles. Those obstacles, however, do not make the research-related goals hopeless or forlorn.

At a time when private-sector union density in the United States is only 6.6% (Bureau of Labor Statistics, 2013), it is not surprising that the image and understanding of collective bargaining and labor representation issues are largely opaque for many. While the union density rate in public sector higher education is much higher (Berry & Savarese, 2012), the collective workplace rights guaranteed by the NLRA and similar public sector statutes run counter to the growing acceptance of at-will employment as a societal norm with anti-discrimination laws perceived as constituting one of the few limitations on employer discretion. The diminished societal understanding and appreciation for the scope of collective workplace rights were on full display when the NLRA began to be applied to workplace-related social media posts (Herbert, 2013). Many were surprised to learn that the NLRA is intended to guarantee a “full freedom of association”⁷ that includes both collective bargaining rights as well protections for unrepresented workers to engage in activities for mutual aid and protection.⁸ Within such a milieu of unawareness, it may be challenging to inspire newer scholars to focus their academic work on contemporary collective bargaining and labor representation issues.

Ignorance concerning core NLRA rights is symptomatic of a larger problem: the lack of understanding concerning collective bargaining as an effective mechanism for workplace dispute resolution and dialogue between employers and employees. As Daniel J. Julius and Nicholas DiGiovanni Jr. have concluded,

collective bargaining [in higher education] has served to codify previously informal policies so that overall administrative and human resources practices have become more structured, transparent and standardized. Unionization has brought consistency and more equity to compensation practices, finality to governance interactions and ‘binding arbitration’ to issues covered in labor agreements (many of which are very similar). (2013, p. 3)

⁷ 29 U.S.C. § 151 (2012) states:

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

⁸ 29 U.S.C. § 157 (2012) states:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Another obstacle to the rekindling of dispassionate scholarship is the corrosion of our civic dialogue. The quality of that dialogue is on daily video display by a perpetual chattering class who treat policy and societal issues as the basis for superficially informed pronouncements of opinion or predictable gladiator-like competitions. In such fora, sophistry is frequently masked as profundity with the central distinctions between fact, speculation and opinion obscured.

Lastly, the success of the National Center's revival efforts will depend on members of the academy voluntarily abandoning the comfort of self-imposed silos to apply their unique training and status to labor and employment scholarship. The structure and resources of the academy make it the logical locus for developing and refining hard scholarship on labor issues as it relates to higher education and other fields and occupations. Contemporary labor and employment issues in higher education are not unique, and stem from similar sources including: major restructuring in industries and occupations; the immediate impact of the Great Recession; the long-term consequences of government policies; the electronic communications revolution; and the decline in societal emphasis on education and continued learning, reasoned debate and active off-line social engagement. As part of an enriched research agenda, the commonality of labor and employment issues facing higher education and other workplaces need to be examined. To successfully encourage new labor scholarship from the academy, however, will require leadership, incentives, and the competition of credible scholarship by practitioners outside the academy.

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