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## The New Focus of Academic Organizing: Private Institutions Now Face Academic Collective Bargaining

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# **The New Focus of Academic Organizing: Private Institutions Now Face Academic Collective Bargaining**

Nicholas DiGiovanni, Jr., Esq.<sup>1</sup>

## **Introduction**

Faculty unionization has now been with us for more than half a century. A decision by the National Labor Relations Board (NLRB) to assert jurisdiction over private institutions in 1970, plus the steady passage of state enabling legislation during the 1960s and 1970s<sup>2</sup> opened the doors to faculty unions at both public and private colleges and universities. But in looking back over those many years, it is apparent that faculty collective bargaining has largely remained a decidedly public sector affair.<sup>3</sup> Due to decisions of both the NLRB and the U.S. Supreme Court, private colleges and universities have not had to deal with faculty unions of any type to any appreciable degree.

However, I would submit that all that is changing. Academic labor unions will likely become a growing presence on the campuses of private colleges and universities in the years ahead due to three main factors. First, the NLRB has agreed to hear a case involving a petition by the United Auto Workers to represent graduate teaching assistants at The New School, and it is quite likely that the NLRB will reverse past precedent and find that graduate teaching and research assistants will have the right to unionize at private institutions.

Second, the Board also issued a highly consequential decision in December of 2014 which will make it exceedingly difficult for colleges and universities to establish that their faculty are collectively managerial employees and therefore without the right to unionize. This decision will

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<sup>2</sup> Between 1963 and 1978, there were 26 states that passed enabling legislation authorizing collective bargaining. Hurd and Bloom, *Directory of Faculty Contracts and Bargaining Agents in Institutions of Higher Education*, (National Center for the Study of Collective Bargaining in Higher Education and the Professions: 1998), p. 149

<sup>3</sup> According to the National Center for the Study of Collective Bargaining in its 2012 *Directory of U.S. Faculty Contracts and Bargaining Agents in Higher Education*, ed. Joe Berry and Michelle Savarese; Richard Boris, Senior Editor) only 3% of all organized full time faculty were found in the private sector, and only 8% of all organized part-time faculty were from the private sector.

open the door to the unionization of many full time contingent faculty and possibly tenure track/tenured faculty themselves.

Finally, and perhaps of greatest immediacy, a growing and sprawling movement to organize adjunct and part-time faculty throughout the country has already brought academic collective bargaining to numerous institutions that heretofore only had to deal with the occasional staff union. These three factors will be reviewed in this paper.

### **History of Private Sector Faculty Unionization**

By way of brief history, private sector unionization began in 1970 when the NLRB decided *Cornell University*,<sup>4</sup> a decision in which the Board said it would change its previous policy and assert jurisdiction over private colleges and universities. With unionization coming into vogue in the public sector through emerging state enabling legislation around that time, faculty unions would now spring up on many private university campuses.

Bargaining units in those early days largely involved full time tenured and tenure-track faculty, who back in the 1970s made up about two-thirds of all faculty members in the U.S. In that first decade after asserting jurisdiction, the NLRB—and indeed a number of state labor boards—issued many decisions dealing with proposed full time faculty bargaining units. Many of them centered on such questions as whether department chairpersons were supervisors or not or whether certain professional schools, like law schools, should be included in units comprised of undergraduate faculty. The early Board decisions struggled at times with trying to apply the traditional industrial model of labor relations to the amorphous and sometimes managerial responsibilities of faculty,

As for other types of academic labor, there was very little union activity. Two early Board cases found that graduate teaching assistants were primarily students and that became settled law for many years,<sup>5</sup> thus shutting the door to unionization for that group in the private sector. Similarly, adjunct faculty, a limited universe in the 1970s, were found not to share any community of interest with full time faculty,<sup>6</sup> and in another case, the Board actually found that adjunct faculty were so diverse and scattered that they did not even share a community of interest with each other!<sup>7</sup> (Indeed, in some state jurisdictions, adjuncts were deemed to be “temporary

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<sup>4</sup> 183 NLRB 329 (1970)

<sup>5</sup> *Adelphi University*, 195 NLRB 639 (1972) and *Leland Stanford University*, 214 NLRB 621 (1974).

<sup>6</sup> *New York University*, 205 NLRB 4 (1975)(excluded from full time faculty unit);

<sup>7</sup> *Goddard College*, 216 NLRB 457 (1975)

employees,” and thus not allowed to unionize.<sup>8</sup>) Thus, most of the attention in the 1970s focused on the growth of full time faculty unions.

But then in 1980, while organizing in the public sector continued apace, private sector faculty unionization was halted in its tracks when the Supreme Court issued its decision in *Yeshiva University*.<sup>9</sup> In a 5-4 decision, the Court ruled that faculty at certain mature universities, like Yeshiva, were in fact “managerial employees,” and, as such, did not have the right to unionize under the NLRA. At such institutions, the Court found that the faculty collectively served as managers, with their interests closely aligned with the administration for the well-being and growth of the institution. Accordingly, given their collective role as managers, it would be incompatible for them to unionize.

Despite its sweep, the Court’s ruling had its limits. The Court did not, for example, rule that *all* private sector faculty were *prohibited* from unionizing, but its ruling certainly was applicable to many institutions who could demonstrate similar managerial responsibilities for its faculty. Since 1980, then, the NLRB has dealt with scores of cases involving the question of whether faculty at particular colleges and universities were indeed managerial and ruled in each case based on the evidence. In some cases, the Board found managerial status; in others, it did not.

Nevertheless, *Yeshiva* was a stunning blow to the faculty union movement in the private sector. Faculty unions at dozens of institutions that previously had represented full time faculty bargaining units either withdrew or were decertified in the wake of that decision.<sup>10</sup> By 1998, there were remaining only 10,798 faculty in the private sector represented by unions compared to 244,801 public sector unionized faculty. By 2012, the number of private sector unionized faculty had only modestly risen to 20,135, while the number of public sector unionized faculty had grown to 368,473.<sup>11</sup>

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<sup>8</sup> See, for example, *Keene State College Education Association v. State of New Hampshire*, 119 NH 1, 100 LRRM 2937 (1979) affirming *University System of New Hampshire and Keene State College Education Association*, PELRB Case No. U-0601 (1977). (Part-time faculty hired for one year or one semester at a time to teach specific courses are temporary employees under NH RSA 273-A. Such faculty have no reasonable expectation of continued employment.)

<sup>9</sup> *NLRB v. Yeshiva University*, 444 U.S. 672 (1980)

<sup>10</sup> According to the 1998 edition of *Directory of Faculty Contracts and Bargaining Agents in Institutions of Higher Education*, *supra*, there were 27 institutions where the certified union either was decertified or voluntarily withdrew its certification. See Table Twelve, p. 145. This list included many large bargaining units, such as at Boston University, Seton Hall University and Fairleigh Dickinson University. Such decertifications or withdrawals all took place between 1980 and 1989.

<sup>11</sup> *Directory of U.S. Faculty Contracts and Bargaining Agents in Institutions of Higher Education*, *supra*, p. viii

Despite the fact that a few full time faculty units existing at the time remained organized,<sup>12</sup> and despite the fact that some faculty in private colleges have indeed organized since 1980, union organizing fell precipitously, with the major educational unions largely giving up private sector organizing efforts in the face of what they anticipated to be strong *Yeshiva*-centered arguments by administrations.

Now, however, three separate developments have triggered a possible renaissance in union activity on college campuses, especially in the private sector. First, the NLRB's decision in *The New School* case to revisit whether graduate teaching assistants and research assistants are employees under the Act could have wide implications. Second, in the NLRB's controversial decision in *Pacific Lutheran University*,<sup>13</sup> decided in December 2014, the Board has now made it much more difficult for an administration to prove the managerial status of its faculty under *Yeshiva University*. While the Board did not, and indeed could not, overturn *Yeshiva*, it has created significant barriers to any college or university that tries to fit its full time faculty under the *Yeshiva* umbrella. Third, the nationwide drive to organize contingent faculty, spearheaded by the Service Employees International Union, has placed adjunct faculty unions front and center at bargaining tables everywhere, and many private institutions are finding themselves in the midst of academic bargaining for the very first time.

### **Graduate Teaching Assistants and Research Assistants: Employees or Students?**

In *Brown University*,<sup>14</sup> the Board, in a 3-2 decision, reversed its decision in *New York University*,<sup>15</sup> and held that graduate students working as teaching assistants or research assistants are *not* employees covered by the Act. *New York University*, the Board noted, had been an aberration, as for the previous 30 years, such individuals were not deemed statutory employees and had no organizing rights. Now, only four years later, the Board majority returned to its pre-*NYU* stance and held that such individuals “have a predominantly academic rather than economic relationship with their school.” They were thus primarily students, not employees.

While the Board extensively sorted out the various responsibilities that graduate teaching assistants had at Brown and underlined both the employee and student aspects of such work, the core of the Board's decision was best expressed in this paragraph:

The rationale... is a relatively simple and straightforward one. Since the individuals are rendering services which are directly related to—and indeed constitute an integral part of—

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<sup>12</sup> For example, the University of Scranton, Curry College and Emerson College all maintained their AAUP bargaining units, among some others.

<sup>13</sup> *Pacific Lutheran University*, 361 NLRB No. 157 (2014)

<sup>14</sup> 342 NLRB No. 42, 175 LRRM 1089 (2004)

<sup>15</sup> 332 NLRB No. 111 (2000)

their educational program, they are serving primarily as students and not primarily as employees. In our view this is a very fundamental distinction for it means that ***the mutual interests of the students and the educational institution in the services being rendered are predominantly academic rather than economic in nature.*** Such interests are completely foreign to the normal employment relationship and, in our judgment, are not readily adaptable to the collective-bargaining process. It is for this reason that the Board has determined that the national labor policy does not require—and in fact precludes—the extension of collective-bargaining rights and obligations to situations such as the one now before us. 229 NLRB at 1002

As the Board's membership changed after President Obama's election in 2008, however, and the majority assumed a more pro-labor friendly face, it was just a matter of time before the Board would find a case in which it could reconsider *Brown*. Initially, this opportunity came in 2012 when the Board invited briefs from interested parties in two cases, *New York University*, Case No. 2-RC-23481 and *Polytechnic Institute of New York University*, Case No. 29-RC-12054. Both cases dealt with the overall issue of the employee status of graduate teaching and research assistants.

The Board invited *amici* briefs from the public to address the issues of graduate student unionization, and many organizations filed such briefs, including the American Council of Education, the Association of American Medical Colleges, the Association of American Universities, the College and University Personnel Association for Human Resources, and the National Association of Independent Colleges and Universities, and, of course, all three of the major educational unions, the AAUP, NEA and AFT.

While it appeared that this second New York University case would provide the forum for reversing *Brown*, the parties at NYU surprisingly agreed to a private election that led to the ultimate recognition of the graduate student union by the University. The NLRB representation petition was withdrawn and thus the Board did not have to decide the case.

However, in October 2015, the NLRB did grant a Request for Review in *The New School* case.<sup>16</sup> In this case, the Regional Director, following the dictates of *Brown*, had found that graduate students who work as teaching assistants or research assistants were still primarily students with no right to unionize under the NLRA. The matter is now before the full Board.

If the Board ultimately reverses *Brown*, as seems likely, the floodgates will be open for dozens of graduate student representation petitions. Thus far, the United Auto Workers have taken the lead in organizing such students in the public sector. The UAW is also the union that

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<sup>16</sup> Case 02-RC-143009

represents the graduate students at NYU, and, as of this writing, they are in active campaigns on several university campuses, including Harvard, in anticipation of the reversal of *Brown*.

### ***Pacific Lutheran University: Wither Goes the Faculty Manager?***

The second development of real consequence that will likely lead to more private sector organizing is the Board's revision of how it would analyze cases in which an administration proffers a *Yeshiva University* argument. In a landmark decision issued on December 16, 2014, the NLRB provided new guidance for how it will determine the question of managerial status for full time faculty members at private institutions.<sup>17</sup> In *Pacific Lutheran University*,<sup>18</sup> the Board was confronted with the questions of whether that institution's full time contingent faculty were managerial employees under *Yeshiva University*. This decision followed the Board's earlier call for briefs from the public on how it should deal with this question and in particular what factors the Board should examine in dealing with this fundamental issue.

Managerial employees are those individuals who "formulate and effectuate management policies by expressing and making operative the decisions of the employer." Such individuals "must exercise discretion within, or even independently of, established employer policy and must be aligned with management." To determine whether an employee is "aligned with management," the Court held that an employee "must represent management interests by taking or recommending discretionary actions that effectively control or implement employer policy." The relevant consideration is "effective recommendation or control rather than final authority." Applying these principles to the *Yeshiva* faculty, the Court found that they "substantially and pervasively operate the enterprise ... by deciding what courses will be offered, when they are scheduled and to whom they will be taught." In addition, they determine matriculation standards, decide what students are admitted, retained and graduated and, on occasion, "their views have determined the size of the student body, the tuition to be charged and the location of a school." In

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<sup>17</sup> In the same decision, it also provided a new test for determining whether or not it will assert jurisdiction over religious institutions of higher education.... The Board reexamined the standard it would apply for determining, in accordance with the Supreme Court's 1975 decision in *NLRB v. Catholic Bishop of Chicago*, when it would decline to assert jurisdiction over faculty members at self-identified religious colleges and universities. In *Catholic Bishop*, the Supreme Court had ruled that the Board could not assert jurisdiction over lay teachers at church-operated schools, because to do so would create "significant risk" that the First Amendment religious rights of the school would be infringed upon. The Court feared that the Board jurisdiction over such schools would "necessarily involve inquiry into the good faith of the position asserted by the clergy—administrators and its relationship to the school's religious mission." The Court had sought to avoid "entanglement with religious mission of the school in the setting of mandatory collective bargaining."

The Board's new standard enunciated in *Pacific Lutheran* is that jurisdiction will be asserted in these cases "unless the college or university demonstrates, as a threshold matter, that it holds itself out as providing a religious educational environment" **and** "that it holds out the petitioned-for faculty members as performing a specific role in creating or maintaining the school's religious educational environment."

<sup>18</sup> 361 NLRB No. 157,

short, the faculty “determines within each school, the product to be produced, the terms upon which it will be offered, and the customers who will be served.”

In *Pacific Lutheran*, the Board developed a new analytical framework for analyzing the managerial status of faculty under the *Yeshiva* decision. In approaching these cases, the Board said it would organize the review of faculty decision-making into five general areas, three primary and two secondary. The three primary areas where the faculty’s role will be examined are:

- Academic programs. For example, the university’s curricula, research, major, minor and certificate offerings, and the requirements to complete successfully those offerings.
- Enrollment management. The size, scope, and make-up of the university’s student body.
- Finances. The power to control or make effective recommendations regarding financial decisions, both income and expenditure. For example, what the school charges for tuition.

The other two areas of secondary importance are:

- Academic policy. For example, teaching/research methods, grading policy, academic integrity policy, syllabus policy, research policy, and course content policy.
- Personnel policy and decisions. Faculty control over personnel policy, including hiring, promotion, tenure, leave, and dismissal policies.

The Board then went on to hold that, within these areas, the institution must prove “actual control or effective recommendation” power by the faculty. Mere paper authority is insufficient. The Board stated that it will need “specific evidence or testimony regarding the nature and number of faculty decisions or recommendations in a particular decision-making area, and the subsequent review of those decisions or recommendations, if any, by the university administration prior to implementation, rather than mere conclusory assertions that decisions or recommendations are generally followed.” As to what constitutes “effective recommendations,” the Board stated the faculty’s recommendations “must almost always be followed by the administration,” to be deemed effective.

Finally, and importantly, the Board stated that an evaluation of whether the faculty actually exercises control or makes effective recommendations requires an inquiry into the nature of the employment relationship between the faculty in question and the institution. Commenting at length on the “corporatization” of higher education, and the connected use of contingent faculty, the Board noted that contingent faculty – such as full time non-tenure track lecturers – have

limited appointments that often depend on a single administrator, thus “producing the kind of hesitancy regarding controversy or offense in teaching and research that limits academic freedom.” Such faculty members tend not to be involved in governance at most institutions and the net result “of their unique, temporary relationship frequently is a diminution of the faculty voice.” The Board concluded that it would examine “whether the nature of the employment in issue prevents those affected from helping shape the academy as a whole at their individual institutions.” In the case of *Pacific Lutheran* itself, the Board had little trouble finding that the full time contingent faculty had very few attributes of managerial status and thus were deemed eligible to unionize under the Act.

The impact of this decision on academic unionization will be considerable. A university may have no difficulty establishing that its full time faculty effectively control traditional faculty domains such as curriculum and program development. However, it may be much more difficult to establish that the faculty really controls the institution’s finances, both income decisions and expenditures, such as setting the tuition rate or deciding where the budget priorities may lie. Even in institutions where faculty have a strong managerial presence, it is more likely than not that major financial decisions will still rest with the Trustees and/or the administration. If that financial factor does indeed have to be satisfied, many arguments for managerial status will undoubtedly fail.

There are other issues as well that institutions will have to confront in these cases.

- As noted, the Board gave no indication of whether an institution must establish faculty decision-making in *all three* of the so-called primary areas to show managerial status or whether something less will suffice. If all three must be satisfied, the bar has been set extremely high.
- The Board’s emphasis on the fact that “effective recommendation” means that faculty recommendations “must almost always be followed.”
- The fact that normal layers of administrative review of faculty recommendations prior to final enactment – even if perfunctory – may block a finding of managerial status.
- The clear indication that most full time contingent faculty will not be found to be managerial because of the tenuous nature of their appointment. The Board stopped just short of stating this as an irrefutable rule.

This latter point is particularly important in terms of the current state of union organizing and its focus on contingent faculty, since there are thousands of full time contingent faculty members across the United States. While their employment conditions are far better than the part-time adjuncts, and while they often have a large role in institutional governance, they do not

enjoy the protections of tenure and may see unionization as a way of improving their compensation, status and job security. The Board's decision could make it virtually impossible for any institution to make a convincing argument that such contingent faculty should be found to be managerial.

### **The New World of Adjunct Faculty Organizing**

In the early days of faculty unionization, no one was paying much attention to the growing body of adjunct faculty emerging on college and university campuses. While adjuncts had always played a role in the delivery of the curriculum, the folks who had perhaps taught a course or two on occasion because of their special expertise in a given area were being steadily overshadowed by a different type of adjunct faculty member, someone who did not have a full time job elsewhere and who was trying to make a living teaching part time, often teaching sections of courses that full time faculty were also teaching. As the curriculum itself expanded at many colleges, institutions needing faculty began to avoid hiring full time faculty, especially tenure-track faculty, and chose a more cost-effective way to meet their curriculum needs by hiring adjuncts to whom the administration was only committed for one course or one semester at a time. This gave administrations considerable flexibility to address future staffing needs. The growing pool of unemployed Ph.D.s also created a perfect market for the institutions to bring in qualified faculty at next to a pittance. Adjuncts were hired on semester contracts at best; paid small amounts of money on a per course basis; received no benefits; were not eligible for promotion; and had virtually no other connection to the institution beyond showing up to teach their courses. If administrators paid little attention to them, as long as they met their classes and there were no major complaints, their full time faculty colleagues paid even less attention. Often ignored or looked down upon as less qualified professionals by the tenure stream faculty, adjuncts became nomads in their own departments.

Originally, faculty unions paid little attention to them either. Focused more on the advancement of full time faculty (at least in the public sector), and seeing adjuncts as a diverse and scattered group of faculty who were paid little (and thus would scarcely increase the organization's revenues), the educational unions would spend little time with them, except in rare cases.<sup>19</sup> They probably seemed more trouble to represent than they were worth.

But as we turned into the new century, the Service Employees International Union reversed all that. The SEIU, already focused on representing the economic underclass in other industries, saw the adjuncts as the lowest economic rung on the academic labor ladder. The Union

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<sup>19</sup> For example, adjunct faculty units did exist as early as the 1980s in the University of Maine system and at the University of San Francisco, but not many more.

embarked on a national campaign targeting adjunct faculty in particular. In what it termed its “metro strategy,” the SEIU started with a focus on organizing as many adjuncts in a single metropolitan area as possible, for it was in these metro areas where adjuncts would often work at multiple institutions, driving from one part of town to the other to string together a living. The Union first focused on Washington, D.C., where it organized George Washington University in 2005. Over the next decade, they successfully organized adjunct faculty units at Georgetown University, American University, Howard University and Montgomery College. They then went to the Boston area and held a day long organizational meeting at the Kennedy Library in April 2013 to which it invited all adjunct faculty in the Boston area. Many came, listened to the speakers and each other, and then went back to their campuses to begin organizing. Over the next two years, the SEIU successfully organized the part-time lecturers at the School of Arts and Sciences at Tufts University as well as the adjunct faculty at Boston University, Northeastern University, Lesley University, Bentley University and Brandeis University. Elsewhere in New England during this time, the SEIU moved north and organized the adjuncts at Plymouth State University (part of the University System of New Hampshire), and the private institutions Champlain College, Saint Michael’s College and Burlington College in Vermont. They expanded westward out of New England and organized faculty at the College of St. Rose in Albany, NY, Washington University in St. Louis, the University of Chicago, Loyola University and many other colleges as well.

As a result of the SEIU’s efforts (as well as other unions who have now become active<sup>20</sup>) more and more adjunct units will likely be organized in the years ahead. This is where private college and university administrations will likely face their first tests in dealing with academic collective bargaining.

Can we see any trends yet as a result of all this adjunct union activity? While it is far too early to analyze what adjunct faculty members have really gained from this movement, we now have a sufficient sample size of both union campaigns and new adjunct faculty collective bargaining agreements in place to at least make some preliminary generalizations about the movement so far. Here are some immediate takeaways.

### **Union Successes Are a Direct Result of the Failure of Administrations to Pay Adequate Attention to the Needs of Their Part-Time Faculty**

The old axiom that management deserves the union it gets could not be more apt here. One can scarcely think of a more tempting target for unions than the adjunct faculty group. Virtually all of the classic indicators for making unionization ripe exist. The group as a whole is paid

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<sup>20</sup> For example, the United Steelworkers organized a unit of adjunct faculty at Point Park University in 2014, and the United Auto Workers organized a unit of part-time faculty at Barnard College in New York in 2015.

extremely little. They have no benefits in most cases. When measured against what full time faculty get paid on a per course basis, unions will claim that adjuncts are not given “equal pay for equal work.”<sup>21</sup>

They are often disrespected, although more by omission than commission. They are often not allowed into department meetings, not allowed to vote on any critical faculty issues and barely kept informed on department happenings. They seldom have their own office and at best might be able to share office space with other adjuncts. They often have no email or private phones or a place in the catalog or department website. They are beset upon not only by chairs and deans who serve as their formal supervisors, but by full time faculty as well with whom they coexist in the department. They are deemed movable pieces that can be plugged in and taken out of the classroom with little or no notice. They can have assigned courses cancelled at the very last minute with at best a token cancellation fee and in many cases, not even that. Except for the fact that courses are offered on a semester-long basis, they could be viewed as day laborers.

With some exceptions, administrations have insufficiently addressed the needs of such faculty, and, as a result, the sense of alienation that adjuncts feel from the rest of the academic community is palpable. It is hardly surprising that a union – any union – can offer adjuncts not only the proverbial seat at the table, but a measure of respect that many of them feel they sorely lack.

### **Union Elections Are Driven By a Subset of Adjunct Faculty Rather Than All Such Adjuncts**

Everyone would agree that adjunct faculty themselves are an extremely diverse group. They run the gamut from the lawyer who teaches a course on legal writing at the law school as a contribution to the profession to the English Ph.D who cannot find a full time job and has chosen to earn a living teaching writing composition courses wherever s/he can find them. Not surprisingly, when it comes to the movers on a union organizing campaign, it is the latter group that drives the process. Those are the adjuncts who actively seek union representation. Those are the adjuncts trying to make a full time living out of working part time. Those are the ones who appear on union bargaining teams. Many other adjuncts with full time jobs and additional revenue sources elsewhere will care very little about their own working conditions or compensation and will sit on the sidelines. Thus, the bargaining units, while fully broad enough to embrace all adjuncts, are often misleading. The movement and the negotiations are really driven by a much smaller subset of “career” adjuncts.

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<sup>21</sup> At the bargaining table, this becomes a hotly debated issue. See comments later.

## Adjunct Faculty Union Elections in General Have Smaller Voter Turnouts

To some degree, this split in the type of adjunct faculty members on college campuses becomes quite evident when analyzing election returns in adjunct union elections. Thus, many of the major adjunct elections have yielded voter turnouts only in the 60-65% range, with hundreds of adjuncts simply not interested enough to cast a ballot. Table 1 includes some recent examples from NLRB-conducted elections.

Table 1

### *Recent NLRB-Conducted Elections*

Institution	Election Date	Eligible Voters	Results	% Turnout
Brandeis University	Dec. 29, 2015	299	SEIU wins 120:28	49
Barnard College	Oct. 2, 2015	207	UAW wins 114:11	60
Boston University	Feb. 4, 2015	799	SEIU wins 319:158	60
Washington University St. Louis	Jan. 6, 2015	400	SEIU wins 132:111	62
Champlain College	Nov. 24, 2014	222	SEIU wins 118:30	66
Burlington College	Nov. 24, 2014	46	SEIU wins 23:4	59
Lesley University	Feb. 24, 2014	701	SEIU wins 359:67	60
Tufts School of Arts and Sciences (only)	Sept. 25, 2013	285	SEIU wins 128:57	64
American University	Feb. 16, 2012	1,672	SEIU wins 379:284	40

While no one has yet analyzed who the adjuncts may be who choose not to vote, it is not an unreasonable inference to assert that the adjuncts with full time work or other occupations or interests are largely not voting in these elections. Thus, while unions are winning these broad-based elections, they come to the bargaining table representing a subset of the adjunct faculty in the unit. Of course, this has no consequence as to the legal obligations of the administration to negotiate with the union, but it does create a different dynamic than one ordinarily sees in the wake of a union victory.

## **Some Bargaining Goals of Adjunct Unions Are Similar to What Other Employee Groups Seek, Other Bargaining Goals are Markedly Different**

Undoubtedly, collective bargaining in the world of adjuncts bears a striking similarity to negotiations in other industries in many respects. Thus, one finds the usual provisions on grievance and arbitration, non-discrimination, union security clauses, personnel files, union rights, and management rights. However, in several key areas, adjunct bargaining is like no other form of negotiations.

**Respect issues.** Compared to other negotiations with which I have been involved, negotiations with adjunct faculty unions is layered with a general perception among the adjuncts that they receive no respect for the work they do. As noted, the alienation that adjuncts feel compared to their full time colleagues is very real and beyond dispute, and, as a result, many of the proposals from adjunct unions will focus on items that scarcely come up in full time faculty negotiations. These include such items as recognition on department web sites; access to department services, such as secretarial services and copying machines; email accounts; campus phones with voice mail capacity; clear statements that the academic freedom policies of the institution apply to them as well; discounted tickets for events; access to the library between semesters; parking privileges; and, of course, office space. Sometimes the very title “adjunct faculty member” will be debated, as many adjunct union locals consider the title itself to be disrespectful and search for more professional titles, such as “teaching lecturers” or “teaching assistant professors” or “affiliated faculty” or other such variations. In addition to the major proposals on compensation and job security, these smaller items are very important, since they acknowledge the adjunct faculty member as a real member of the academic community. Administrations worried about future organizing campaigns on their campuses would do well to pay special attention to many of these relatively modest demands, as accommodating many of them will be a real sign of respect.

**Salaries: the parity argument.** Salary discussions with adjunct unions are almost entirely different from such discussions with full time faculty. First of all, to the extent bargaining with full time faculty often involves heated debates about how the faculty are paid *vis a vis* “institutional comparators” or how they stand *vis a vis* the AAUP’s annual salary reports or in general how they stand compared to the market, very little of this occurs with adjunct bargaining. For the adjuncts, the market has been their enemy, intentionally manipulated, they would contend, by institutions who are mutually interested in keeping adjunct course rates as low as possible. Consequently, they have no interest in listening to the arguments that their \$3000 per course is right in line with what other area colleges are paying their adjuncts.

Instead of looking at external markets, the adjunct unions will often focus on internal comparisons. In particular, they will contend that there should be some consistent value assigned to teaching a particular course. For example, an adjunct faculty member and a full time faculty member may both be teaching sections of English Composition. The adjunct is paid \$3000. A full time faculty member with an eight course load per year which includes that English Composition course may earn \$80,000. The adjunct union will argue that the full timer is really being paid \$10,000 to teach that same course. For the adjunct union, this is unequal pay for equal work. Thus, in their compensation proposals, the adjunct union will often try to bridge this internal gap in pay and make it the focus of their salary demands.

The counter argument, of course, is that two groups are not in an equivalent state that demands parity. The work of the full time faculty member includes many other functions and responsibilities with which the adjunct is not burdened, or in many cases, not qualified to do. These include formal academic advising work; long hours spent on service activities, including department and college-wide meetings and committees; development of the curriculum; and, for the tenure stream faculty, enormous and required efforts in research and scholarship.

While recognizing those distinctions, the adjunct union will try to assign percentage value to those functions. For example, if a full time non-tenure track lecturer spends 80% of their time teaching and 20% on service, then, in the above example of the \$80,000 faculty member, s/he is really being paid \$64,000 to teach eight courses—or \$8000 per course. Still far more than the \$3000 adjunct. For a tenured faculty member, perhaps the split is 50-30-20 of teaching, research and service – in which case the value of the teaching is \$40,000, or \$5000 per course.

One can accept this argument only if full time faculty work responsibilities can be neatly divided into perfect percentages and are not understood as an integrated whole. There is a holistic perspective when it comes to looking at the work of a full time faculty member compared to an adjunct. Indeed, this perspective is evident at the very inception of employment. Unlike the hiring of adjuncts, often done at the last minute by a department chair, an institution that is hiring a new full time tenure track faculty member goes through an exhaustive national search. Sorts through hundreds of resumes. Conducts extensive interviews. Utilizes other faculty to serve on formally constituted search committees. Ultimately, the college or university looks for a faculty member that can enhance the reputation of the institution in terms of research and scholarship as well as one that can be an effective “manager” and collegial partner with other faculty in terms of participating in the important governance functions on campus.

Further, the research and scholarship activities are not always easily separated from the teaching function; they are often intertwined. That is part of the essence of full time tenure track faculty member and what s/he will contribute to the students, his or her colleagues and the

institution. It is far too simplistic to just splice away one portion of those functions, assign a monetary value to it and automatically apply that value to individuals who, regardless of their excellence in the classroom, are not recruited nationally, have no governance responsibilities, and, except for maintaining some currency in their field, do not have to labor with research or scholarship activities.

**Salaries: the living wage argument.** Adjunct unions, especially the SEIU, have gained publicity by claiming that adjunct faculty cannot earn a “living wage” teaching. Even if someone cobbles together eight courses a year to teach from more than one institution, s/he may only be making around \$25,000 total. Hardly enough to live on.<sup>22</sup>

But the sharp retort to this is that these are fundamentally part-time positions, something conveniently overlooked by many adjunct unions. This is not to show any disrespect to the adjuncts and the work that they do; rather, it is a simple economic reality. It is one thing to advocate for living wage arguments for lowly paid *full time* workers, such as custodians, who often have nowhere else to go and lacking the skill set to move upward. It is quite another to contend that a Ph.D or Masters level professional with a range of employment options who *chooses* to work part time by teaching a few courses at the college level should receive a “living wage.” While adjuncts will contend that they cannot secure full time teaching positions, there does come the harsh reality that if one is in a certain employment sector and full time work is not a viable option, then a professional may have to consider other life choices. It is not an institutional responsibility to turn part-time compensation into a full time salary.

**Salaries: no merit pay.** To their credit, some educational unions, particularly the AAUP, have agreed that a portion of a full time faculty member’s pay should be determined by a merit system. Parties at the table will argue over how much to allocate to merit versus across the board raises. But, many full time faculty contracts will have a portion of the annually negotiated salary increases go into varying individual distributions based on merit and performance.

Not so with adjunct faculty unions. There are very few discussions of merit pay for adjuncts for two sensible reasons. First, the pay is relatively speaking low enough that whatever money is available should arguably be applied on an across the board basis. Second, administrations are simply not set up for merit reviews. Administrations, despite their discussion of excellence in the classroom, have largely done an inadequate job of assessing the quality of adjunct faculty (see discussion below on Evaluations). While statistical comparisons might be possible with regard to student course evaluations, decisions based solely on such evaluations are

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<sup>22</sup> Indeed, the U.S Census defined the 2014 poverty level for a family of four at \$24,008. See <https://www.census.gov/hhes/www/poverty/data/threshld/index.html>

often questionable, particularly where the universe of information on a part-time faculty member is quite contained. Thus, department chairs and deans are often not in the best position to assess who should get a 3% raise versus a 1% raise based on quality of performance.<sup>23</sup>

**Job security issues.** The job security provisions of adjunct contracts are the most important parts of the agreement. Here there are a variety of considerations and all of these are being debated and resolved with varying results in the adjunct contracts in place thus far:

- Length of appointment. Semester? Annual? Multi-year?
- Will there be a guaranteed number of courses for the more senior adjunct?
- Will there be a right to teach the same course or courses?
- What protections, if any, will there be from non-reappointments based on performance? Based on curriculum need or financial considerations?
- Just cause protections from outright discharges in mid-appointment?
- Caps on the number of courses an adjunct can teach, particularly in light of the Affordable Care Act?
- Criteria to be used in assignments, including seniority, performance, teaching experience, credentials and sub-specialties, availability?
- Cancellation fees?

The tension in discussing many of these areas turns on the desirability of the adjunct to regularize her/his appointment and create reasonable predictability as to anticipated income balanced against the necessity for the institution to maintain its flexibility in its teaching staffing needs, taking into account curriculum needs, quality of instructors, varying enrollment and money.

The gold standard for an adjunct union would be something akin to regular part-time employment after a reasonable probation period under which the adjunct would have a formal FTE and could only be let go for cause, or perhaps retrenchment situations. This is a bridge too far for most administrations and does not yet exist in adjunct collective bargaining agreements. Institutions want the benefit of periodic decision-making through contract reappointment in

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<sup>23</sup> Having said this, some contracts do have provisions for recognizing superior teaching by an adjunct. For example, the contract between Keene State College (University System of New Hampshire ) and the NEA provide for a pool of \$10,000 for “exceptional teaching performance” for up to 10 adjunct faculty per year. See <https://www.keene.edu/administration/academic-affairs/assets/documents/kscea-contract/download/> Similarly, the Vermont State Colleges’ contract with the AFT provides for an Excellence in Teaching award on each campus for an adjunct faculty member. See [http://www.vsc.edu/faculty-and-staff/VSC\\_Bargaining\\_Units/VSC%20Part%20Time%20Faculty%20Contract%202010-2014.pdf](http://www.vsc.edu/faculty-and-staff/VSC_Bargaining_Units/VSC%20Part%20Time%20Faculty%20Contract%202010-2014.pdf)

which they can assess both the quality of the individual adjunct's work and the current curriculum and financial needs.

**Open positions.** Not all adjunct faculty want full time jobs. Many are quite content to work part time because it fits their lifestyle, their family economic situation or, in many cases, because they work full time elsewhere. But for those adjuncts who are still waiting in hope that a full time position will open up, they will try to attain at the table as much preference as they can in applying for those positions. For example, adjunct unions have proposed absolute preference for adjuncts whenever a full time position (especially a full time non-tenure track lecturer position) opens up. Or they have sought preference for adjuncts "when all factors are equal." In other cases, failing those objectives, they have at least sought guaranteed interviews (which now exist in a number of adjunct collective bargaining agreements) and/or good faith consideration.

In my experience, despite arguments to the contrary, institutions do indeed often hire full time lecturers from their adjunct faculty pool. But not always, and I have had more than one adjunct faculty member tell me across the table that there is a built-in bias by full time faculty from hiring from the adjunct pool.

**Evaluations.** From an administration point of view, an Evaluation Article can be one true gain from collective bargaining. The reality has been that most institutions do not do a good job in assessing the quality of their adjuncts. The short answer as to why is that there are simply too many adjuncts and too few supervisors. It is difficult to expect a chair to find the time to do a comprehensive evaluation on every adjunct in the department, especially with the press of other evaluation work of full time faculty. It is easiest to scan the student evaluations, weed out those adjuncts that are simply not doing well based on those student evaluations and let them go. Very few places have comprehensive evaluations that take into account classroom observations, peer evaluations, self-evaluations, reviews of syllabi and teaching materials and other items.

This creates a problem for the administration in coming to the bargaining table. In the face of union arguments to simply go by seniority in key personnel decisions, the administration, arguing for putting the best person in the classroom, often does not have the evaluative information available to make such judgments. The solution in most cases is to use the collective bargaining process to create a comprehensive evaluation process that can be used going forward. Such provisions are already appearing in some of the new adjunct collective bargaining agreements.

This itself creates a dilemma for the adjuncts. While they have rightly claimed that they have often worked in the shadows without a measure of respect, it is also true that working in the shadows has shielded them from scrutiny. In the bright daylight of full evaluations, many

adjuncts will fall short of the excellence in performance that now administrations will rightly demand as a trade off for new job security rights.

**Governance and the third party at the table.** Closely related to their arguments on lack of respect, adjunct unions will often bemoan their lack of involvement in the governance of the institution. Adjuncts will comment on how they are not allowed to serve on institutional committees or governance bodies like the faculty senate. Or how, on a local level, they are neither invited to department meetings nor kept up to date on what has occurred at such meetings. More than in any other area of discussion, the adjunct faculty union is largely complaining, not about administration, but about their full time faculty colleagues who have shut them out of the governance structure altogether. This is another reason why adjunct faculty bargaining is so different: the complaints are not all directed towards administrators but often at the full time faculty who work side by side with the adjuncts.

Approaching this question then presents different challenges, since under the NLRA, there are compelling arguments that faculty governance in general is not a mandatory subject of bargaining. How an institution organizes itself from a management point of view is not something that falls under the traditional headings of wages, hours and working conditions. Further, to the extent the shared governance structure deals with items such as curriculum issues, student admissions and academic standards; selection of administrators, etc. such items themselves are not mandatory subjects of bargaining.<sup>24</sup> To what degree faculty serve on governance committees and vote on such matters at the university, college or department level should not be part of a collective bargaining agreement. Instead, those essential matters should be left, as they always have been, to the faculty themselves. Thus, in addition to the administration team stating that the topics are not bargainable, it can also point out that the actual decisions as to who is eligible to serve on the faculty senate, or who is entitled to vote on new curriculum initiatives is actually a decision for the faculty, and not the administration.

### **Concluding Thoughts**

There seems little doubt that many private colleges and universities will be at academic bargaining tables very soon for the first time in their institutional history for the reasons cited here. This exciting era of academic unionization is bringing new parties to the bargaining table, with new issues and new ideas. To a large degree, it is safe to say that the emergence of

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<sup>24</sup> The fact that a number of contracts might have governance articles or sections may be due to varying state laws in the public sector as to the scope of bargaining and/or because an administration has voluntarily decided to add such sections. The fact that a number of contracts might have governance articles or sections may be due to varying state laws in the public sector as to the scope of bargaining and/or because an administration has voluntarily decided to add such sections.

contingent faculty unionization and graduate student unionization, especially in the private sector, will spotlight as never before on the very nature of how colleges and universities deliver their curriculum to their students and how those institutions choose to deal with working conditions of these newly unionized groups.