

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 2**

**New York University  
Employer**

**and**

**Case No. 2-RC-23481**

**GSOC/UAW  
Petitioner**

**DECISION AND ORDER DISMISSING PETITION**

**I. Procedural History**

On May 3, 2010,<sup>1</sup> the Graduate Student Organizing Committee/United Auto Workers (“GCOC/UAW” or “Petitioner”) filed the instant petition seeking to represent certain graduate students. In response, New York University (“the Employer”) filed a motion to dismiss. On May 14, an Order to Show Cause was issued seeking responses as to whether the petition should be dismissed based on the Board’s decision in *Brown University*, 342 NLRB 483 (2004), herein “*Brown*.” On June 7, an Order Dismissing Petition was issued, consistent with the holding in *Brown* that graduate student assistants are not statutory employees.

On June 21, the Petitioner filed a request for review and argued that the Board should reconsider *Brown* because it was based on policy considerations extrinsic to the Act and thus not properly considered in determining whether graduate students are employees. In its opposition, the Employer claimed that no compelling reason required the Board to reconsider the status of graduate students as employees for the third time in ten years. Further, the Employer asserted that its reclassification of teaching assistants as adjuncts rendered *Brown* inapposite. Finally, the Employer maintained that students performing research on externally funded grants are not employees under *Brown* or the Board’s prior decision in *New York University*, 332 NLRB 1205 (2000), herein “*NYU*” and therefore, their status is well-settled and should not be reconsidered.

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<sup>1</sup> All dates are 2010, unless specified otherwise.

By order dated October 25, the Board reversed the dismissal of, and reinstated the petition and remanded the case for a full hearing and the issuance of a decision.<sup>2</sup> The Board was unwilling to find, in the absence of any evidence, that the graduate students who have been appointed as adjunct faculty are currently represented and that the instant petition is therefore inappropriate.

The Board determined that a full record was necessary to access the accuracy of the Employer's factual representations regarding the inclusion of graduate students in the adjunct faculty unit. Specifically, the Board requested evidence regarding the percentage of graduate students who are eligible for inclusion in the adjunct unit. With respect to the graduate students performing teaching duties as adjuncts who do not meet the eligibility requirements for the adjunct unit, the Board solicited the parties' positions regarding the employee status and unit placement of this group. Further, the Board determined that a full record was necessary to determine what portion of the graduate students who provide research assistance are funded by external grants and access whether, pursuant to the Board's decision in *NYU, supra*, at 1209, n. 10, they are not statutory employees regardless of the validity of *Brown*.<sup>3</sup> Finally, the Board found that there are compelling reasons for reconsideration of *Brown* and directed the parties to make any factual representations, contentions and arguments that they deemed relevant to a determination of whether graduate students are appropriately classified as employees under the Act.

Accordingly, under a petition filed under Section 9(c) of the National Labor Relations Act, as amended, ("the Act"), a hearing was held before hearing officers of the National Labor Relations Board.

### **The Instant Case**

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the Regional Director, Region 2.

On the entire record in this proceeding,<sup>4</sup> it is found that:

1. The hearing officers' rulings made at the hearing are free from prejudicial error and hereby are affirmed.

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<sup>2</sup> The Employer's motion to dismiss the petition made at the outset of this hearing and referred to me is hereby denied as unnecessary having been rendered moot by my decision herein. The Employer's motion to reopen the record for receipt of the additional summary is hereby granted and received into evidence as Employer Exhibit 121. Finally, the Employer's motion to dismiss at the completion of the Union's case is denied. In this regard I note that Petitioner did elicit testimony regarding the issues presented on remand.

<sup>3</sup> In *NYUI*, the GAs and RAs in the sciences funded by external grants had no expectations placed on them other than academic advancement, which involved research. They received stipends but they were not required to commit a set number of hours performing specific tasks for NYU. They were performing the same research for their dissertations. These GAs and RAs were excluded from the unit because they were not performing services for the Employer.

<sup>4</sup> Briefs filed by counsel to the Employer and the Petitioner have been carefully considered.

2. The parties stipulated, and I find, that the Employer, a not-for-profit corporation, with its campus located in New York, New York, is an institution of higher education. Annually, in the course and conduct of its operations, the Employer derives gross revenues in excess of \$1 million and purchases and receives goods and supplies valued in excess of \$50,000 at its New York facility, directly from suppliers located outside the State of New York.

Accordingly, I find that the Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction here.

3. At issue is the labor organization status of GSOC/UAW. The Employer contends that the petition should be dismissed because GSOC/UAW is not a labor organization within the meaning of the Act because it does not, and will not, deal with NYU or any other employer.

Section 2(5) of the Act provides the following definition of "labor organization":

Any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, lab or disputes, wages, rates of pay, hours of employment, or conditions of work.

The statutory definition of a "labor organization" has long been interpreted broadly. See, *Electromation, Inc.*, 309 NLRB 990, 993-94 (1992), enf'd. 35 F.3d 1148 (7<sup>th</sup> Cir. 1994). To fall within the definition of a "labor organization," the Board has held that employees must participate in the organization and it must exist for the purpose, in whole or in part, of dealing with employers on their behalf regarding their wages, hours of employment and other terms and conditions of employment. *Alto Plastic Mfg. Corp.*, 136 NLRB 850, 851-852 (1962).

At the hearing, UAW International regional director, Julie Kushner, testified that the International established the GSOC as the organizing committee of the graduate assistants at NYU. The committee is staffed by graduate students and UAW paid organizers. Under the International's constitution, bargaining unit employees must participate in contract negotiations. Here, the employees who participate in the GSOC potentially will also serve as the members of the negotiating committee. Further, the petition clearly states that GSOC is affiliated with the International, which indisputably exists to represent employees for the purpose of negotiating their wages, hours, and working conditions.

The Employer's reliance on *Sterling Processing Corp.*, 119 NLRB 1783 (1958), is misplaced. In that case, based on an agreement of two Internationals, the affiliated petitioning committee existed solely for organizational purposes and

was explicitly not empowered to deal with employers concerning labor disputes, wages, hours, grievances or conditions of employment. In contrast, the participants in the GSOC will likely become the bargaining committee in future negotiations, should Petitioner win the election. Regarding the Employer's concern that naming GSOC on the ballot is misleading, as long as the International is also named, potential voters will not be misled when casting their ballots. That the International may assign bargaining to an undisclosed local, is an internal Union matter outside the purview of the Board. *Gemex Corporation*, 120 NLRB 46 (1958).

Based on the evidence presented at the hearing, I find that the Petitioner is a labor organization within the meaning of the Act.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Sections 9(c) and 2(6) and (7) of the Act.

5. The Petitioner seeks to represent employees in the following unit:<sup>5</sup>

All graduate student employees of New York University who are receiving stipends from the University and who perform work for the University, including those classified as research assistants, graduate assistants and those performing teaching, administrative and other duties, excluding, graders and tutors, employees at the Sackler Institute, all other employees, and guards and supervisors, as defined by the Act.

As evidenced in the hearing and the briefs, the parties disagree as to the employee status of the graduate students and the scope of the unit.

The Employer contends that the petition should be dismissed on its face because graduate students are not statutory employees pursuant to the Board's decision in *Brown*. In the event that *Brown* is reversed, the Employer argues that petitioned-for unit is inappropriate because of the graduate students lack a community of interest. Rather, some of the specific classifications share a greater community of interest with non-student employees. As an example, the Employer's current policy regarding teaching assistants reflects a change in the financial aid package rendering virtually all of the graduate students who are appointed to teach eligible for inclusion in the adjunct faculty unit. The Employer argues that there is no factual or legal basis to require the removal of graduate students from an adjunct unit that has a six-year history of collective bargaining. To the extent that some graduate students are ineligible because they do not meet the minimum contact hours, the Employer contends that they should be treated like the non-student adjuncts that are considered casual employees.

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<sup>5</sup> The unit description was amended at hearing. See attached Charts A and B.

With respect to research assistants, the Employer contends that the Board, in *NYU*, found that research assistants are not providing services to the Employer because their research is inextricably linked to their doctoral programs. That rationale was extended in *Brown*. Accordingly, the graduate research assistants are not employees under any iteration of the law in this area and, therefore, not appropriately included in the petitioned-for unit.

As to graduate assistants, the Employer argues that the "hourly" graduate students share a community of interest with all other hourly paid employees, some of whom are undergraduates and some are non-student workers. In summary, the Employer argues that, even if graduate students are found to be employees, the petitioned-for unit is inappropriate because the classifications sought do not share a community of interest.

Contrary to the Employer, the Petitioner claims that *Brown* was wrongly decided and should be overruled. In that regard, Petitioner argues that *Brown's* categorical exclusion of graduate student employees is inconsistent with the language and intent of the Act. Moreover, the Petitioner contends that the parties' experience shows that collective bargaining is suitable to an academic environment. Through bargaining, the parties successfully addressed the concerns raised by the Board majority in *Brown*, including separation of terms and conditions of employment for academic matters, the mentor relationship and interference with academic freedom.

Regarding scope, the Petitioner asserts that the petitioned-for unit is appropriate because the graduate students have a separate and distinct community of interest. The Petitioner claims that the recent addition of certain graduate students in the adjunct unit affects only a small segment of the unit sought here because most teaching assistants do not meet the minimum contact eligibility requirement for inclusion in the adjunct unit. Further, irrespective of any prior positions or findings regarding research assistants, the Petitioner contends that the graduate research assistants in the instant case are providing a service to the Employer because externally funded programs are central to the Employer's operations. In sum, the Petitioner argues that the graduate students provide services to the Employer and share a unique community of interest.

The record demonstrates that the bulk of the petitioned-for unit consists of graduate student adjuncts, formerly, "teaching assistants." Despite the Employer's reclassification, the evidence indicates that the actual work performed by the graduate student adjuncts has not changed. Although the Board in *Brown* considered the fact that the services performed were part of the students' financial aid package, this factor alone was not determinative of employee status. Rather, the *Brown* decision is grounded in the notion that graduate assistantships are integral to a doctoral education and, therefore, the essence of the relationship between the student and the university is academic, not economic. Accordingly, the Employer's financial aid reform which guarantees stipends, but separates

earnings from teaching and research assistantships, is an insufficient basis upon which it can be concluded that graduate students are employees. The record demonstrates that the work performed by graduate assistants is either implicitly or directly in furtherance of their graduate program. It is indisputable that teaching and research are vital components of the doctorate program. Finally, with respect to the graduate research assistants performing work on externally funded grants, consistent with *Brown* and *NYU*, these students are not performing work for the Employer and, therefore, are not employees within the meaning of the Act.

Although the record describing the recent treatment of graduate students as employees suggests that the relationship between the graduate students and the University is both academic and economic, I am bound by the conclusion in *Brown* that all graduate students are excluded from coverage of the Act. Accordingly, I am dismissing the petition.

### **III. BACKGROUND FACTS**

#### **A. Overview of the Employer's Current Operations**

The Employer is comprised of about twelve different schools, colleges and institutes, primarily located throughout New York City. The governing body is the Board of Trustees. The president, John Sexton, reports to the Board. The executive vice-president, Jacob Lew, and the provost, David McLaughlin, report to the president. The provost's office is responsible for the overall academic development of the divisions. Each school is administered by a dean, who supervises the department chairs within that school. The Employer has almost as many programs as departments, although programs do not have a departmental structure. While not conferring degrees, centers are very similar to programs.

Faculty appointments are made in departments. The Employer employs about 2,000 full-time faculty members, approximately 3,600 adjunct faculty members, and over 12,000 employees in total.

The student population varies each year. However, fair estimates are: 20,000 undergraduates; 16,000 graduate students in master's programs; and, 1,700 graduate students in doctoral programs.

Master's programs generally take two years to complete and some financial aid is available with wide variations depending on the area of study. Doctoral programs typically take between five to seven years to complete. The vast majority of doctoral students in the Graduate School of Arts and Sciences ("GSAS") are admitted as MacCracken Fellows, which provides a stipend, tuition remission and health benefits.

## **B. Bargaining History Prior to Filing of Instant Petition**

On November 15, 2000, the Board issued a Certification of Representative to the International Union, UAW, as the exclusive bargaining representative of graduate assistants employed by the Employer.

In 2001, the International and its Local 2110, Technical, Office and Professional Workers ("Local 2110"), entered into a collective-bargaining agreement with the Employer, effective September 1, 2001, through August 31, 2005. The recognition clause in the graduate assistant agreement defined the unit by classification and payroll code:

*Included:* All teaching assistants, graduate assistants, research assistants (including teaching fellows, research fellows, Metro Center tutors, and preceptors) who are classified under codes 101, 130, 131 (referred to collectively as graduate assistants) employed by NYU.

*Excluded:* All other employees, graders and tutors, graduate assistants at the Sackler Institute, candidates for the Master of Business Administration degree in the University's Stern School of Business, those research assistants funded by external grants in the Physics, Biology, Chemistry and the Center for Neuroscience (CNS Departments) and, guards and supervisors as defined by the Act.

In 2002, Adjuncts Come Together, ACT/UAW, AFL-CIO, ("Adjunct Union" or "Local 7902"), was certified as the exclusive bargaining agent for adjuncts. It appears from the record that the practice was that generally graduate students appointed as teaching assistants were covered by the graduate contract; otherwise, graduate students who taught classes and met the minimum contact eligibility requirement were included in the adjunct unit.

In May 2004, the Employer and Local 7902 entered into a collective bargaining agreement effective May 20, 2004, through August 31, 2010. To be eligible for inclusion in the unit, the adjunct must work minimum contact hours, which was formulated in the recognition clause as the following:

*Included:* All adjuncts or part-time faculty employed by the Employer who provide a total of forty contact hours of instruction in one or more courses during an academic year, or at least a total of 75 contact hours of individual instruction or tutoring during a semester, including faculty in positions designated under Code 112 and any equivalent successor code to which such faculty may be appointed in the future.

*Excluded:* All full-time faculty (tenured, tenured-track, and non-tenure track), all faculty in the School of Medicine, College of Dentistry, and School of Law, and all other employees including visiting professors,

visiting associate professors, visiting assistant professors, confidential employees, managerial employees, and guards and supervisors as defined in the Act.

Shortly thereafter, on July 13, 2004, the Board issued its decision in *Brown*, which held that graduate assistants are not statutory employees. Although *Brown* arguably released the Employer from its statutory duty to recognize and bargain with Local 2110, the parties continued to enforce the midterm contract.

On April 26, 2005, the provost, David McLaughlin, charged the Faculty Advisory Committee on Academic Affairs with providing advice to the Employer on whether to continue or withdraw recognition from Local 2110. In its final report, that committee judged there to be compelling reasons for preserving and improving the conditions in the Union contract that deal with stipend levels, health care coverage, sick leave, posting of positions, workloads, and grievance procedures. The committee also observed, however, that graduate students should be regarded, first and foremost, as students, apprentice researchers, and trainees of the faculty mentors, rather than as employees. Finally, the committee urged the Employer to commit to competitive and predictable financial aid, health insurance, and other support to enable students to concentrate on their academic work and flourish.

On May 2, 2005, the Employer's president, John Sexton and McLaughlin requested input from the Senate Academic Affairs Committee and Senate Executive Committee on whether the Employer should enter into collective bargaining with Local 2110, after the expiration of the existing contract on August 31, 2005. The committee was comprised of students, faculty, deans and administrators. In its final report, while a substantial majority of the committee suggested that the Employer cease to recognize Local 2110 when the contract expired, the committee unanimously recommended that the positive effects of unionization be maintained. This committee also stressed the importance of increased stipends, health care benefits and clarity of work expectations, but suggested that the grievance arbitration procedure be replaced with an internal structure to process student grievances concerning work.

On May 26, 2005, the Employer informed Local 2110 that, despite language in the expired contract, it believed that academic matters are within the sole province of the Employer, acting through its faculty. Thereafter, Local 2110 filed for arbitration over hiring decisions because the positions were not filled by bargaining unit graduate students. Notably, Local 2110 claimed that "teaching recitations" were exclusively bargaining unit work and, therefore, the work could not be assigned to adjuncts, or alternatively, that the graduate agreement had to be applied to whomever was placed in that position.

To avoid an adverse arbitral decision, the Employer proposed that all grievances under the renewal agreement be finally decided by the Provost, rather than an independent arbitrator. Local 2110 rejected the elimination of the arbitration clause as inconsistent with having a meaningful collectively bargained contract, and proposed meeting to further negotiate. In reply, the Employer stated that the Union's response signaled "the conclusion of any efforts – formal or informal – to reach an agreement that would be the basis for a new paradigm" in their relationship.<sup>6</sup>

On about August 2, 2005, the Employer proposed a final offer, which it subsequently implemented at the expiration of the contract, effective for the academic year 2005-2006. In accordance with the above-referenced committees' recommendations, the implemented terms included, among other things, an increase in annual stipends, full payment of health insurance premiums, the continuation of past practices that relate to assistantships and an interim grievance procedure with final decisions resting with the provost.

### **C. Reform of the MacCracken Financial Aid Program**

Beginning in the 2009-2010 academic year, GSAS adopted a new financial aid plan for doctoral students who are accepted as MacCracken fellows. Referred to as "FAR 4" (financial aid reform 4), the reform provided to graduate students five years of guaranteed funding and eliminated teaching or research as a condition of receiving financial aid. As set forth in the policy guidelines, "[u]nder FAR 4, departments are strongly encouraged to develop teaching programs and teaching opportunities to provide students with useful experiences for their fields and career goals."

The guidelines were written by the FAR 4 implementation team, including Associate Dean Roberta Popik, who testified that the overarching goal of the reform was to shorten the time to degree by reducing teaching obligations during the years that students were fully funded. Within the FAR 4 guidelines, departments are to have flexibility in managing their financial aid portfolio and are encouraged to create a "road map" or an ideal progression through the graduate program. Each department has considerable control regarding the design of the financial aid for their students in order to meet recruitment and retention goals. The record reflects that there are variations in the new aid process that fit the needs of the particular school.

FAR 4 allows departments to customize teaching opportunities to best support progress toward the degree and to mentor students as teachers. Teaching can take two possible forms: add-on teaching during fellowship semesters or two teaching semesters. "Add-on teaching" provides graduate students with supplementary support during fellowship semesters, while

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<sup>6</sup> Local 2110 did not disclaim interest in the graduate assistant unit. While voluntary bargaining quickly reached an impasse, it does not appear that the Employer formally withdrew recognition.

“teaching semesters” can be scheduled in the beginning, middle or the end of academic careers to optimally time fellowship support to the benefit of the student. Add-on teaching appointments would typically involve 42 to 63 contact hours per semester, while teaching semesters typically involve 84 to 126 contact hours per semester. Teaching semester contact hours will provide students with levels of support comparable to their fellowship stipends.

FAR 4 created the fellowship reserve program. Students who teach during their fellowship may place a portion of their stipends in a reserve for use in later years. This is a mechanism for students to extend their stipend with earnings from teaching positions so that the students may receive funding beyond their fifth year. As an example, if students teach four semesters during their MacCracken years, their earnings from teaching can be set aside in the fellowship reserve, in effect, extending their stipend for a sixth year.

Other types of work opportunities are available to graduates to supplement the fellowship. As stated in the guidelines:

“Students on fellowship are available to be appointed as adjunct instructors as part of their professional development. They may also be appointed as graders, or in hourly part-time positions. The decision about whether a student may accept an appointment while on fellowship is made by her or his department with the primary consideration being that the appointment will not adversely impact the student’s academic progress and indeed that it will be beneficial to a student’s professional development.”

The Employer’s policy regarding employment requires that, if in addition to a teaching assignment or other on-campus appointment, the student wants to work off-campus, GSAS approval is required.

Currently, MacCracken fellows receive a stipend of about \$23,000 per year, full tuition remission, including a waiver of registration service fees, and fully-paid student health insurance coverage. In summary, the FAR 4 reform provides that students on fellowship also may be appointed as adjunct instructors, research assistants, graders, or in hourly part-time positions, not to exceed 20 hours per week. Application for these positions is volitional and the money earned can be managed as part of the students’ funding package by using the fellowship reserve program. Appointments to any of these positions are guided by the department’s needs and the student’s academic progress.<sup>7</sup>

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<sup>7</sup> In contrast, doctoral student, Rachel O’Connell testified that when she was admitted in 2004, her MacCracken stipend was \$18,000 per academic year and she was required to teach six semesters as a condition of funding.

#### **D. Local 7902's Response to Changes in MacCracken Program**

In early September of 2009, president of Local 7902, Joel Schlemowitz, learned that graduate students previously covered by the graduate assistant agreement were now classified as adjunct faculty and that the Employer considered them to be covered by the adjunct contract. Whereupon, by mass e-mail, a website posting and a leafleting campaign, Local 7902 stated that Local 2110 was the Union for all graduate students, not the adjunct Union. An excerpt of the leaflet reads:

“GSOC/UAW and ACT-UAW believe that graduate employees – not the NYU administration – deserve the right to determine who represents them. The majority of NYU graduate employees have consistently chosen GSOC/UAW to represent them in collective bargaining. ACT-UAW respects graduate employees’ right to self-determination and their choice to join together as graduate employees with common interest to negotiate the best possible contract for ALL of the work graduate employees perform. ACT-UAW stands in solidarity with GSOC/UAW for their right to collectively bargain with NYU. ACT-UAW will NOT collect dues or fees at this time from NYU graduate employees who have been unilaterally reclassified by NYU as adjunct faculty.”

In the fall of 2009, shortly after the infusion of graduate students into the adjunct bargaining unit, Catherine Trafton, UAW associate general counsel, requested a meeting and subsequently met with Employer counsel, Terrance Nolan, on campus. The Employer’s director of adjunct relations also may have been present. Nolan testified that at the meeting: “[Trafton] had – there were some questions and perhaps even objections to FAR 4. And we explained that graduate students would be compensated separately as adjuncts and that graduate students had been adjuncts in the unit since the unit’s inception.” Although Nolan could not more specifically recall what was said at this meeting, he testified that Trafton did not use the phrase “separate community of interest.”<sup>8</sup>

By e-mail dated June 15, 2010, (after the instant petition was filed), Schlemowitz informed Nolan that the inclusion of the additional graduate students on the list of adjuncts eligible for inclusion in the bargaining unit was an error, and requested a list of graduate students who had previously been classified as adjuncts through the years. Nolan replied that the Employer has provided the Union with lists of everyone that it included in the bargaining unit every year, and therefore, it was not obligated to provide the information again. Nonetheless, the Employer eventually provided Local 7902 with a spreadsheet listing the adjuncts that were also NYU graduate students and the courses that they taught.

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<sup>8</sup> No one took notes during the meeting. Trafton did not testify in the instant hearing.

Shortly thereafter, the Employer and Local 7902 extended the adjunct agreement from its termination date on August 31, 2010, to January 31, 2011. Nolan testified that, other than asking that the graduate students be identified, Local 7902 did not raise any issue regarding their inclusion in the unit at the negotiations.<sup>9</sup> According to Schlemowitz, Local 7902's policy was not to accept fees or collect dues from any graduate students that would have been covered by the graduate assistant agreement. No documentary evidence was submitted regarding actual dues receipts.

#### **IV. FACTS REGARDING PETITIONED-FOR UNIT ON REMAND**

The majority of the graduate students performing work in the classifications included in petitioned-for unit are enrolled in the Graduate School of Arts and Science ("GSAS"), the Steinhardt School of Culture, Education and Human Development ("Steinhardt"),<sup>10</sup> and, the Courant Institute of Mathematical Sciences ("Courant"). Accordingly, the record evidence focuses on the work performed in these divisions.

##### **A. The Composition of the Historical Adjunct Unit**

The voter eligibility list compiled in 2002 for the election in the adjunct unit shows that about 2,604 adjuncts were eligible voters. Of the total eligible voters, about 270 were graduate students. Accordingly, slightly more than 10% of the adjunct unit included graduate students at its inception.

The Employer's records<sup>11</sup> show that the number of non-graduate student adjuncts who met the eligibility requirement for inclusion in the adjunct unit ("outside adjuncts") remained almost constant for the academic years from 2004 through 2008. On average, the Employer hired 2,482 outside adjuncts during this period. In academic year 2009-2010, the number of outside adjuncts hired increased to 2,632. Accordingly, with the implementation of FAR 4, the Employer hired about 150 additional outside adjuncts.

Similarly, the Employer's records show that the number of graduate students who met the eligibility requirement for inclusion in the adjunct unit

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<sup>9</sup> In its brief, the Employer indicated that the parties reached a successor agreement on March 31, 2011, however, the renewal contract was not offered in evidence.

<sup>10</sup> The financial aid available at Steinhardt is independent of GSAS. Beginning in academic year 2010-2011, Steinhardt reformed its financial aid package, which is referred to as FAR 3. Like FAR 4, the purpose of the reform was to provide a consistent and predictable funding package that does not require work as a condition of funding. Teaching is paid at the adjunct rate and graders are paid an hourly rate, over and above the stipends. Health insurance is not included in the Steinhardt financial aid package.

<sup>11</sup> Several lists extracted from the Employer's payroll system were admitted in evidence. Counting the precise number of graduates is complicated by the limitation in the petitioned-for unit to those graduate students on stipends, particularly with respect to former graduate assistants. Fractional Adjunct/RA appointments were not cross-referenced with adjunct lists. Accordingly, the numbers herein are approximate, but the basic proportionality between classifications is instructive for accretion and community of interest analyses.

("graduate adjuncts") remained almost constant for the academic years from 2004 through 2008. On average, the Employer hired 272 graduate adjuncts during this period. In academic year 2009-2010, with the implementation of FAR 4, the number of graduate adjuncts included in the adjunct unit grew to 871.

Based on the above, pre-FAR 4, about 11% of the adjunct unit was comprised of graduate students; post-FAR 4, about 33% of the adjunct unit was comprised of graduate students.<sup>12</sup>

Acting Dean of the Faculty of Arts and Science Paul Benhabib explained that, historically, a small segment of the graduate population, usually those in their sixth and seventh years, were appointed as the instructor of record of the class they taught and were paid as adjuncts.<sup>13</sup> As an example, in the English department, graduate students who had experience as recitation leaders for at least two semesters could possibly be appointed to teach a course for which they are fully responsible, such as, the summer session versions of the intermediate departmental courses offered in the undergraduate major. In further corroboration, Associate Director of the Morris Academic Plan (MAP) Vincent Renzi, testified that, before the financial aid reform, graduate students were occasionally appointed as adjuncts if they were beyond their seventh year in the program, or if they were enrolled in a quasi-GSAS program, such as, performance studies or the Institute of Fine Arts. Accordingly, the evidence indicates that prior to 2009, graduate students were classified as adjuncts and placed in the adjunct unit only if they were appointed as the course "instructor of record", and were responsible for the course, just like an outside adjunct.

The most current documentary evidence for the fall 2010 shows that the Employer hired 134 graduate students and 134 outside adjuncts to teach credit courses at CAS (College of Arts and Sciences). Assuming the number of course offerings in the spring 2010 were roughly the same as in the fall, the total graduate adjuncts teaching credit courses for the current academic year would be about 268, which is close to the historical average of 272, as set forth above. With respect the non-credit courses, in fall 2010, the Employer hired 734 graduate student adjuncts and 66 outside adjuncts, which also is consistent with the typical number of the TAs responsible for recitation and laboratory sections in the past. The outside adjuncts may be NYU students enrolled in masters' degree programs or the law school, or they may be graduate students at other institutions, or non-students.

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<sup>12</sup> See attached Charts C and D.

<sup>13</sup> The record is somewhat inconclusive in this regard. PhD student, Daniel Schwartz, testified that in his sixth year, he taught in the Gallatin writing program and was paid \$9,000 per semester, well above the adjunct rate. PhD student, Rachel O'Connell, testified that it was customary for students to TA in their sixth and seventh years and get paid at the same rate as the MacCracken stipend. PhD student, Patrick Gallagher, testified that there was a past practice that students who went beyond their original support package continued to TA at their stipend funding level. It is not clear, however, that these students were appointed as the instructor of record.

On a departmental level, History Professor, Molly Nolan, testified that in 2010, about six or seven adjuncts were hired as the instructor of record and none of them were graduate students. The recitation sections were all taught by NYU graduate students. In the Department of Social and Cultural Analysis, Professor Andrew Ross testified that the only graduate student who was appointed an instructor of record was a post-doc student who taught an undergraduate course offered through the Morris Academic Plan (MAP).

In summary, although the historical adjunct unit included some graduate students, they were teaching credit courses and comprised a small slice of a large adjunct unit.<sup>14</sup> Presently, the adjunct unit includes graduate students teaching credit and non-credit courses, so that graduate students now comprise about 30% of the adjunct unit.<sup>15</sup> Finally, about 115 graduate students who were appointed as adjuncts in 2009, did not meet the minimum contact hours, and therefore, were not covered by the adjunct contract.

### **B. The Application of the Adjunct Agreement to Graduate Adjuncts**

The record evidence regarding whether the adjunct contract is currently applied to the former teaching assistants is less clear. Although the appointment letters reference the adjunct agreement and inform students of their obligation to pay union dues, it does not appear that the union-security clause has been enforced. No evidence was adduced regarding dues receipts.

With respect to wages, Nolan testified that currently, all adjuncts – graduate students and outside adjuncts - are paid in accordance with the adjunct agreement, regardless of whether they meet the minimum contact hours.

Regarding the annuity plan, the documents indicate that all adjuncts, irrespective of contact hours, are permitted to participate in the Employer's supplemental retirement plan; however, the Employer does not make matching contributions on their behalf. It appears that about seven graduate student adjuncts participated in this category of annuity plan throughout the period from 2004 to 2010.

In order to qualify for Employer matching contributions, the adjunct must have taught for three consecutive academic years. Former TAs, now classified as adjuncts, have not been not credited with their prior service as TAs toward the qualification period. Thus, only graduate students who were classified as adjuncts prior to FAR 4, and were bargaining unit eligible in the adjunct unit, are participating in the plan with matching funds from the Employer. Specifically, the

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<sup>14</sup> As a corollary, the historical graduate unit was mostly comprised of graduate students teaching non-credit courses and this group constitutes about half of the petitioned-for unit.

<sup>15</sup> See attached Chart D. Attached Chart E shows that about 459 graduate student adjuncts on stipends that are currently included in the adjunct unit (about 21% of that unit), are sought for inclusion in the petitioned-for unit.

documentary evidence indicates that in 2008, 40 graduate student adjuncts participated in the plan. In 2009, 41 graduate student adjuncts participated in the plan, and in 2010, 36 graduate student adjuncts participated in the plan. This represents roughly 7% of the graduate students who historically have been included in the adjunct unit.

Adjuncts must meet a specified minimum number of contact hours and a one-year qualification period, in order to apply for health insurance coverage. This group also may participate in an HMO which is available to the full-time faculty. Depending on the minimum contact hours, the Employer makes different percentage contributions toward the premium for the health benefits. Adjuncts that do not meet the eligibility requirements, may apply for coverage through the HIP Insurance Plan; however, the Employer does not contribute toward the premium. No evidence was adduced regarding which of these plans the graduate student adjuncts are participating in, if any. As stated above, MacCracken fellows receive fully paid benefits in the comprehensive student plan as part of their funding. Accordingly, the record does not disclose whether the former TAs are participating in the health benefit plan offered pursuant to the adjunct agreement.

### **C. Graduate Adjuncts Perform the Same Work as Former TAs**

Benhabib confirmed that the duties of the former TAs were substantially the same as the duties being performed today by most of the graduate student adjuncts. That is, students are primarily section leaders teaching non-credit, recitation sessions to small groups of undergraduates taking introductory courses. The recitations sessions supplement the large lectures taught by faculty for credit-bearing courses.

Benhabib clarified that in the current arrangement there are some areas of teaching that were previously done by graduate students, such as TAs, that are no longer performed by graduate students, by any title. For example, in language instruction, the lectures and recitations are now taught by full-time faculty only. Also, the number of graduate students teaching expository writing has been reduced to almost nothing.<sup>16</sup>

The testimony of two graduate students corroborated Benhabib's assessment that the work is the same. Rachel O'Connell, a doctoral student, has worked as a TA in the English department since about 2005. She testified that while the manner in which she is paid has changed, the duties that she performs are the same. Another doctoral student, Patrick Gallagher, was admitted to the comparative literature department in 2006. He has worked as a TA in various departments in 2008, 2009 and 2010. Both witnesses described

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<sup>16</sup> Associate Dean at the Gallatin School, Linda Reiss, testified that the expository writing program for freshman requires a large number of adjuncts as instructors of record because the seminar classes are small. She testified that Gallatin historically does not hire teaching assistants.

the duties and responsibilities of the TAs in virtually identical terms, even though the departments, courses and professors varied. Specifically, TAs are required to attend two weekly lectures conducted by the professor, lead two weekly recitation sections which consist of about 20 students, conduct the grading under the supervision of the faculty instructor and other administrative duties, such as, holding office hours or writing letters of recommendation. TAs sometimes participate in the creation of the course assignments and they may conduct a lecture for the combined class during the semester.

#### **D. Teaching Is Integral to the Doctoral Programs**

The record demonstrates that teaching is no longer required as a condition of receiving financial aid. However, teaching remains an integral component of graduate education. In that regard, the departmental flexibility imbedded in the FAR 4 guidelines is evidenced by the following excerpt from the current handbook for graduate students in the history department:

“The ‘Road Map’ outlines a pattern of teaching that fits with the stages of academic work and provides a sequence of teaching experiences structured to provide increasing opportunity and responsibility – beginning with grading papers and culminating with a Workshop course organized by a syllabus developed by the student in consultation with a faculty member.”

Similarly, the PhD handbook for the English department provides that:

“While teaching is not required as a condition of the Graduate School’s MacCracken Award, the English Department still sees teaching as crucial to the professional development of its doctoral candidates. We therefore expect that our PhD students will teach for four semesters starting after the second year of study, typically scheduled across the third through fifth years.”

Again, the handbook for the department of comparative literature graduate program provides that:

“The Department believes that teaching is an important part of graduate training, and considers it fundamental that students teach for one year as they progress toward their degree. Graduate student teachers at NYU are generally considered Adjuncts. An Adjunct teaching load approximately equivalent in salary to the MacCracken fellowships consists of four recitations per semester. Students holding MacCracken fellowships may interrupt their MacCracken awards in order to teach (effectively postponing by a year the MacCracken stipend). In this case – which the department considered optimal --- a student will opt to teach during his or her 6<sup>th</sup> and 7<sup>th</sup> semesters.”

The faculty reinforced that professional norms require teaching as part of the graduate students' professional training. Professor of History, Molly Nolan, testified that the department advises students on how to ideally move through an array of teaching experiences which are necessary to be a viable candidate on the job market. Nolan explained that the history department relies on graduate students to serve as section teachers and as graders for undergraduate courses offered in a large lecture format.

Department of Social and Cultural Analysis, Professor Andrew Ross, testified that without teaching, the doctorate is all but worthless. He also described a departmental expectation that graduates will teach the recitation sections. Nothing changed with respect to these expectations after the implementation of FAR 4. Like the English department, his department's website lists faculty and adjuncts; however, the list does not include graduate students appointed as adjuncts. According to Ross, graduate students are not listed along with faculty because "[w]e don't consider them to be adjuncts. They're not treated as adjuncts, they're not perceived as adjuncts, they're not referred to as adjuncts."

#### **E. Graduate Students Do Not Share a Community of Interest with Adjuncts**

Most of the graduate students classified as adjuncts are appointed to teach non-credit, recitation or laboratory sections of a class taught by a full-time professor. A large concentration of courses in the lecture/recitation format is offered in the Morse Academic Plan (MAP) for undergraduates. Rarely are adjunct faculty appointed as MAP teachers because the point of the curriculum is to ensure that undergraduates are encountering the regular faculty in their coursework.

Associate Director of MAP, Vincent Renzi, testified that the courses are conceived as a team effort. To that end, the faculty meets weekly with the recitation leaders who are recruited from within the faculty's department. Generally, the director of graduate studies, the graduate administrator and the director of undergraduate studies try to coordinate the graduate students' requests for teaching with the courses that will be available.<sup>17</sup> While Terrance Nolan testified that he was not aware of any distinctions in the manner in which adjuncts are appointed, the record is clear that graduates are recruited or referred based on their area of study or the faculty lecturer's preference to work

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<sup>17</sup> A PhD student in the comparative literature department, Patrick Gallagher, testified that the nature of his studies make it difficult for the department to place fellows in appropriate teaching positions. Some placements may not deal directly with the fellow's specific period or area of research. This seems to be the exception, not the rule.

with certain graduates. Accordingly, the selection and purpose for hiring students is different than the Employer's need for adjuncts.<sup>18</sup>

Further, Professor Nolan explained that graduate students are an integral part of the history department. Graduates take courses for three years and work closely with faculty who serve on their dissertation committees. Graduates are part of the intellectual life of the department and regularly attend departmental colloquia and workshops. In contrast, adjuncts are more autonomous and their contact with regular faculty is infrequent, at best.

Ross characterized the adjuncts in his department as "add-ons" in that they teach their course without any interaction with the regular full-time faculty. Adjuncts play no role in the social, political and cultural life of the department. In contrast, graduate students play an integral role to life of the department. As an example, the department's bylaws provide that graduate student representatives are part of the search committee process for faculty hiring. Although they are not permitted to vote on the ultimate appointment, graduates do vote on the recommendation of the search committee. Similarly, within the American Studies department, graduate students have a committee that is involved with almost every decision within the graduate program: decisions about curriculum, programming, and mission of the program.

Finally, graduate students are involved putting together special programs, conferences, and events. Their attendance at symposia and lectures is expected; whereas, adjuncts are very rarely seen at these events.

Based on all of the above, graduate students share a separate community of interest based on the nature of the work and the level of responsibility that they have for the course. Further, the students share educational goals and institutional concerns. Adjuncts work on a distinct and separate track, as evidenced by the selection and hiring process, course autonomy and minimal departmental participation.

#### **F. Graduate Hourly Workers**

In 2008, the Employer hired 222 graduate assistants, primarily in two divisions: Faculty of Arts and Sciences ("FAS") and the Silver School of Social Work ("Silver"). Associate Dean Roberta Popik testified that in the FAS division, about half of the graduate assistantships were master's students and half were doctoral students.

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<sup>18</sup> Gallatin, the undergraduate, interdisciplinary arts program, is an outlier in this regard. The documentary evidence shows that there were six students appointed in Gallatin as adjuncts for fall semester 2010. While Reiss testified that Gallatin hires without regard to student status, it is also clear that Gallatin hires instructors of record, not TAs for recitations.

As part of the financial aid reform, the Administration evaluated the work that the graduate assistants and the research assistants in the social sciences were performing to access whether this work should be funded as financial aid. Popik stressed that the departments did not lose funding. Instead, by converting GAs and some RAs to “hourly workers,” the departments reserved more financial aid funding which could be used to support more students. With respect to RAs, the Administration determined that two-thirds of the work was really administrative, rather than substantive research. According to Popik, students appointed to do research for a professor on an hourly basis are performing a different level of work than students appointed as research assistants. The hourly employees perform administrative and clerical functions; whereas, the research assistant title is reserved for more advanced students who are making independent judgments and typically, the research is related to their dissertation topic.

Hourly paid positions are coded in the payroll as either “118” (students employed through the federal work-study program, or “119” (students employed as hourly employees). More specifically, the types of jobs performed by hourly workers are: clerical administrative (filing, reception, storage); event planners (seminars, workshops, recruitment programs); and faculty research (transcribing, translating, proofreading, checking bibliography, and filing manuscripts).

In 2009, after the implementation of FAR 4, the Employer hired 104 graduate assistants, primarily at Steinhart. In 2010, after Steinhart implemented its own financial aid reforms entitled FAR 3, the total number of graduate assistants dwindled to seventeen, and they were sprinkled throughout the School of Nursing, Gallatin, the Wagner School/Public Service, Silver, and the Administrative Division. Essentially, the graduate assistant classification no longer exists; however, the work is performed by hourly employees. The students work in either academic departments or administrative areas doing various jobs, such as, front desk reception, filing, faxing, inputting database information. Student employment is also available in the library and the athletic facilities.

The records indicate that about 207 graduate students on stipends are currently paid as hourly employees. This represents about 14% of the petitioned-for unit. As a proportion of all hourly workers, the graduate students on stipends comprise a scant .02% of an hourly worker unit.<sup>19</sup> The record did not fully explore the typical duration or expectation of reappointment to an hourly position for doctoral students. The stipend amounts vary and the hours worked can be quite minimal. The hiring department determines the pay which ranges from \$7.50 to \$20 per hour.

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<sup>19</sup> See attached Chart F.

## **G. Adjuncts and Research Assistants in the Science Departments**

Benhabib testified that research is one of the Employer's main priorities and that the benefits of research to the school are the same now as in 1999-2000, the period when the first graduate student petition was decided. The recognition of the faculty member for producing and publishing research enhances the prestige of the University, engenders more funding and attracts more students.<sup>20</sup>

Martha Dunne, associate vice-provost for research compliance and administration, oversees the Office of Sponsored Programs ("OSP"). The mission of the OSP is to assist faculty, post-docs and graduate students in obtaining funds for research, training and related activities.

The vast majority of research applications are submitted through the Employer on behalf of the faculty. The Employer is accountable for all of the promises that are implicit in that application. OSP ensures that the applications are submitted according to the regulations of the funding agency and in compliance with the Employer's policies. Clearance is needed from the chair or the dean prior to the submission of any formal application. OSP transmits the paperwork.

The description of the research or the narrative section of the proposal is submitted by the principal investigator ("PI"). The PI develops the budget in consultation with the OSP. Grants require a description of the personnel on the project in some form. All personnel costs are charged to the grant with the exception of administrative and clerical salaries which may only be charged to certain research grants according to cost principles. The PI salary and the full amount of the RA salary can be charged to the grant. Most sponsored programs provide for graduate students to work on the funded research and the Employer typically receives a salary and tuition remission for the graduate RA. The RA's salary is determined by each department. A portion of the grant is retained by the University for facilities and administrative costs.

The two major sources of external funding are: the National Institute of Health (NIH) or the National Science Foundation (NSF). The Federal government gives the Employer authority to re-budget from major cost categories into others as the science demands. For example, if an unanticipated piece of equipment is necessary, the Employer can shift funding from personnel costs.

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<sup>20</sup> In *NYU I*, the Employer asserted that RAs perform services for the University in that they help the Employer fulfill its obligations under the research grant. Further, the RAs' research contributes to the publications that increase the faculty member's stature and reputation which attracts more funding and in turn, attracts more students and NYU's reputation as a research university. The Board, in agreement with the RD, found that the RAs funded under external grants were not providing services to the Employer under its control in exchange for compensation, and therefore, these RAs were excluded from the unit. *See*, f. 10 in the Board's decision and f.50 in the underlying DDE.

The Employer is responsible for assuring that the funds are expended consistent with the grant application.

OSP has a role in securing patent protection for the results of research. The Employer owns the patent and the royalties are divided by a formula under its intellectual property policy.

Dunne testified that in the past twelve years, there have been no significant changes with respect to the Employer's processes for applying for or administering research grants. The role of OSP is the same and the primary funding sources are the same. The Employer's guidelines and policies for experiments, and the patent rights are all the same. The only change is that the amount of funding has increased to about \$134 million annually.

The records show that in 2008, 522 graduates served as research assistants at Courant Institute of Math Sciences ("Courant") and the Faculty of Arts and Sciences ("FAS").<sup>21</sup> In 2010, the number shrunk to 300 research assistants in these divisions. This decline is consistent with Popik's testimony that about two-thirds of the research assistants in the social sciences were re-classified as hourly employees. Of the graduate students currently classified as RAs, about half of them are externally funded.

The responsibilities of the research assistants under externally funded grants are the same as those of the students performing research on projects who are funded more directly through the school. Irrespective of funding, the student pursues research in consultation with his or her thesis advisor/professor. Because the research itself is intertwined with the subject matter of the student's dissertation, it is often difficult to tease apart the hours worked as RA from the hours spent advancing the dissertation. However, as set forth in the FAR 4 policy guidelines:

"Research assistantships are potentially available in all disciplines but are most common in the sciences and some social sciences. The research assistantship is considered the central and most valuable aspect of doctoral training in many science departments. As such, multi-year guarantees in all the sciences include a combination of fellowships and research assistantships. The latter support the living expenses of students and are made with the expectation of students providing up to twenty hours per week engaged in a research project as directed by a faculty member."

Graduate students appointed as fully-supported research assistants on an external grant may not receive extra compensation from NYU for teaching or

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<sup>21</sup> The Petitioner does not seek the RAs working at the Sackler Institute. Sackler is the research arm of the School of Medicine which is separately funded and administered independently of GSAS.

other work. Like graduate adjuncts, research assistantships are limited to no more than 20 hours per week, as per graduate school policy.

#### **H. Work Performed by Adjuncts and RAs in Sciences**

The Courant Institute encompasses the department of mathematics, computer science and most of the sponsored research. In addition to tenured and non-tenure track faculty, Courant hires instructors for three-year, non-tenure track appointments; clinical faculty, which are non-tenure appointments for a non-specific term; visiting assistant professors; and adjuncts. The single, largest category of adjuncts is Wall Street professionals who hired to teach finance in the masters program.

Some adjuncts are fourth and fifth year doctoral students conducting a small number of recitation classes and other course related tasks. Again, large lectures offered in MAP are supplemented with problem sessions guided by recitation instructors. Also, upper level undergraduate math classes have recitation sessions due to the difficulty of the material, which are taught by advanced graduate students. Finally, advanced graduate students could be the instructor of record of a course offered during a summer semester. As such, the graduate student is giving lectures, setting exams and overall controlling the entire progress of the class. Like to former TAs in the humanities, recitation leaders have a more limited role, a lower level of responsibility and fewer hours per week than an instructor of record. The grader is usually a separate position which is sometimes appointed to Master's students and undergraduates.

Graduate students at Courant are paid as recitation leaders or instructors of record separately from their MacCracken fellowship. Further, doctoral students can extend their fellowship support through appointments to research assistantships. In the math department, the typical practice is for a student to receive a fractional research appointment and a fractional GSAS fellowship in each semester. Whether the student's support is drawn from a research grant or a fellowship does not impact on the nature of the work. The significance is that when a student is working in an area where grant support is available, the math department tries to reserve the GSAS funds for students doing research in areas that are not externally funded.

Professor of mathematics, Robert Kohn, testified that the normal progression through the math program requires the passing of a written comprehensive examination during the student's first year. At that stage, the student is assigned a preliminary advisor. Second year students are still doing coursework, but by that point they have usually chosen an advisor with whom they are preparing the foundation of their research. The students also take oral exams which have a general part associated with the coursework and a special part that is associated with the anticipated research area. This system helps ensure that students quickly get into preparation for research and are affiliated

with a potential thesis advisor. After students pass the oral exams, they normally concentrate more heavily on thesis research which is typically finished in the fourth or fifth year. Kohn described the relationship between students and advisors as a partnership. He asserted that when students have selected a research topic for their dissertations and are appointed as research assistants, there is no distinction between the activities that the students undertake as RAs and the activities being undertaken simply as students. Further, students can register for credits while conducting research, as if they were taking a course. In that case, the thesis advisor would be the instructor of record.

Assistant director for computer science at the Courant Institute, Rosemary Amico, testified that RAs are almost always conducting research which is very closely related to the student's doctoral program. The selection process for research assistantships is informal. Generally, the professor asks the student to join the research project as an RA. Amico also testified that students are normally appointed as recitation section leaders. She could recall only one outside adjunct hired as a section leader.

Professor and Chair of the Department of Physics, David Grier, testified that his department currently has 35 faculty members and one clinical faculty member. There also are about 35 post-docs, 73 graduate students, one student enrolled in the masters program and about 90 undergraduates. Like the math department, graduate students have three principle forms of financial aid in the physics department: MacCracken fellowships, externally funded research assistantships, and honorific fellowships which are funded by endowments.

The progression to degree takes slightly more than five years. In the first two years, there is a fairly heavy course load of basic requirements. By the end of the second year, it's anticipated that the graduate students will have made a firm commitment with a faculty advisor who is going to be their thesis advisor or mentor. From the second year onward, it's anticipated that the graduate student will spend most of his or her time engaged in research directed toward their dissertation.

Grier stated that about 18 graduate students are currently serving as RAs in his department and the majority of second year graduate students taught as adjuncts. He also testified that it is common for graduate students to serve both as recitation instructors and fractional RAs at some point in their career. However, students appointed to full-time externally funded research assistantships are not permitted to teach because all twenty hours are devoted to their research. The normal RA appointment is for one term; however, an appointment can extend through the academic year and can include support over the summer.

With respect to teaching, the major criterion for appointing adjuncts is the expertise in the field of physics, resulting in a fairly small pool of candidates.

Grier has hired adjunct instructors who have BAs, present graduates, and former graduate students. All of the lectures are taught by either tenured faculty or by the clinical faculty member. Adjuncts act as recitation leaders, lab instructors or graders. In all three categories, the idea is for the adjunct to play a supporting role in helping students learn the material.

The recitations are an opportunity to review problem sets. Generally, there are two main lectures and one recitation per week. The recitation leaders are expected to provide one office hour per recitation section per week. They are not expected to attend the lectures. They are expected to grade problem sets and exams for the sections in which they are the leader. Lab leaders are also expected to help with grading exams. The common practice is for all exams and assignments to be developed by the faculty members themselves and then administered by the recitation leaders.

The Department of Physics is responsible for running seven courses per year in the natural science sequence at MAP. These courses have laboratory sections, not recitations. While the department has hired both students and non-students as lab instructors, it appears that the slots are usually filled by graduate students.<sup>22</sup> The laboratory section starts with a brief overview of the physical principles that are being explored in the lab and then a discussion of the equipment to familiarize students with the safe and proper operation of the equipment. The laboratory instructor is expected to move through the lab from work group to work group, making sure that students are progressing through the experiment. The lab instructor is expected to collect the student's formal lab reports.

## V. OPINIONS OF EXPERTS

Professor of Labor Studies at Rutgers University Paula Voos testified regarding the preliminary results of an unpublished study in which she was involved regarding the impact of representation of graduate student employees on the faculty/student relationship and on academic freedom. The preliminary results have neither been fully analyzed nor subjected to the peer-review process.

The data was collected from surveys of doctoral students for the academic year 2009-2010. The surveys were distributed to five disciplines that employ a large number of teaching assistants and research assistants. The study sampled eight large, public research universities, half of which were unionized the other half were non-union. The universities were paired by size, region and the amount of research and development expenditure. Approximately 798 students anonymously completed the survey.

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<sup>22</sup> Lab instructors were included in the historical graduate student unit. While not directly addressed in the record, this analysis assumes that they are treated as and counted in the present group of graduate adjuncts.

The preliminary conclusions of the study are that there is no evidence that the student/teacher relationship is worse or damaged in the context of graduate student representation. On the issue of academic freedom, the study indicated that there was no statistically significant difference in the union versus non-union settings.

The only other empirical research on the topic of graduate student collective bargaining introduced in evidence was a study conducted by Gordon Hewitt, a graduate student at Tufts University, published in 2000, in the *Journal of Collective Negotiations*. Hewitt selected five institutions and surveyed the faculty. He concluded that on a business level, faculty are concerned with procedural and financial limitations imposed on them by the agreement. On an educational level, the collective-bargaining agreement does not play a role in defining faculty's relationships with graduate students.

Professor of Labor Economics at Princeton University, Henry Farber, testified that with respect to Voos' research, the evidence is too imprecise to draw conclusions. He questioned the methodology of the study, noting that the schools were not selected on a random basis and the preliminary analysis did not control for student demographics.

More broadly, Farber argued that the problem with both of these studies is that the inquiry fails to consider that students unionize for a reason. It is possible that a university became union because the students worked very hard to get a union, or the climate at the institution was right for a union. In other words, the attitudes of the students and faculty are materially based. Comparing the different institutions – one unionized, another non-union - is largely uninformative about what would happen if a non-union university became unionized. While he characterized the existing research as "an interesting descriptive tool," he argued that it was not predictive.

To that point, as mentioned above, the Employer conducted a survey of its directors of graduate studies and those results were alluded to in the final report of the senate academic affairs committee and senate executive committee. Neither the raw data nor a professional analysis was offered in evidence, and therefore, drawing reliable conclusions is not possible. Nonetheless, the final report cited typical views of the respondents. With respect to the impact on teaching, the report stated: "Absolutely positive. Fair and understood rules, obligations, and responsibilities have only enhanced [teaching] relations." With respect to the impact on the quality of the relationship between faculty and graduate students, the report states: "The union contract has definitely diminished areas of friction around these relationships – there's a greater professional clarity." To the contrary, another respondent stated: "By forcing us to be more legalistic, the relationship has been hurt; as far as I can tell, this legalism has brought no benefits, only costs." The report also noted that several respondents stated that the contract had no effect on academic or administrative

matters. While the positive results appear to be mixed, the directors considered the time-consuming and heavy filing of grievances as the most serious disadvantage of the contract.

## VI. ANALYSIS

The Board, in *Brown*, held that graduate students who are admitted into, not hired by, a university, and for whom supervised teaching or research is an integral component of their academic development, are not treated as employees for purposes of collective bargaining under Section 2(3) of the Act. Premised on a university setting as it existed thirty years ago, the Board majority in *Brown* concluded that graduate student assistants who perform services at a university in connection with their studies, have a predominately academic, rather than economic relationship with their school. On that basis, the Board held that graduate students are not employees within the intendment of the Act.

The Employer's argument that the graduate students are employees because their services are not required as part of their financial aid package, appears to be a too narrow view of the case law. The Board majority in *Brown* reasoned that, even assuming that graduate assistants are employees at common law, it does not follow that they are employees within the meaning of the Act. The majority noted that by analogy, managerial employees may perform services for, and be under the control of, an employer, and yet, the Supreme Court has held that they are not statutory employees. Thus, in *Brown*, graduate students were excluded from coverage of the Act on policy grounds.

Nonetheless, by separating the services performed from receipt of financial aid, the instant record clearly shows that these graduate assistants are performing services under the control and direction of this Employer, for which they are compensated. It is also clear on the record that these services remain an integral component of graduate education, in both the humanities and the sciences, irrespective of the funding source. Thus, the recent post-FAR 4 experience suggests that, in practice, the graduates have a dual relationship with the Employer, which does not necessarily preclude a finding of employee status.

With respect to the argument that a direction of election is appropriate because the Employer concedes the employee status of the graduates, the issue to be considered would then be the scope of an appropriate unit. The community of interest for those in the petitioned-for unit rests on their identity as students. Accordingly, the decision in *Brown* is controlling.

In the event the Board reconsiders the employee status of graduate students, it appears on this record that a unit including all graduate students would be appropriate.<sup>23</sup> The record demonstrates that all of the graduate students share

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<sup>23</sup> Included in the petitioned-for unit are those graduate student adjuncts teaching non-credit courses; the RAs in all disciplines; hourly graduate students with the job title "research assistant;" and, hourly

a community of interest, because their work involves a unique relationship with the full-time faculty. Whether through teaching or research, the graduate students are performing services for pay which also are in furtherance their studies. That the Employer pays for these services pursuant to its financial aid budget, instructional budget, operational budget, or through federal grants, is irrelevant to an analysis of employee status or community of interest. The research assistants in the hard sciences are indistinguishable from the RAs in the humanities and social sciences, in that they provide a maximum of twenty hours per week of services on projects that closely related to their thesis and they work under the mentorship of their faculty advisor.

The former teaching assistants do not share an overwhelming community of interest with the adjunct faculty who are not mentored in their teaching skills. Further, adjuncts are not constrained by a maximum total of hours they are permitted to work for the Employer, nor are they required to obtain the Employer's prior approval for work outside the Employer's purview. To the extent that the former teaching assistants can be said have accreted into the adjuncts unit, the record demonstrates that the adjuncts unit has historically excluded them. Further, it does not appear that the parties mutually intended or agreed to the consolidation of the units. Similarly, the graduate assistants are distinct from the pool of hourly employees dispersed throughout the Employer's expansive facilities, due to the vastly different skill set and qualifications the graduates bring to the departmental work.

Based on the record in this case and as I stated above, in accordance with *Brown*, I hereby am dismissing the petition.

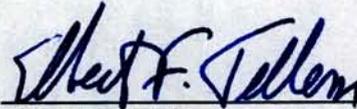
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employees whose job title demonstrates that they are providing assistance to a specific faculty member. Unit membership based on receipt of a stipend is too attenuated, especially in light of the fellowship reserve program. Some fifth and sixth year graduates who are instructors of record may still be getting a "stipend" under the new system and yet, this the group of graduate students historically included in the adjunct unit.

## RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EST on June 30, 2011.<sup>24</sup>

Signed at New York, New York,  
June 16, 2011



Elbert F. Tellem  
Acting Regional Director, Region 2  
National Labor Relations Board  
26 Federal Plaza, Room 3614  
New York, New York 10278

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<sup>24</sup> Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14<sup>th</sup> Street, NW, Washington, D.C. 20570-0001. This request must be received by the Board in Washington by no later than **June 30, 2011**. The National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with its offices. If a party wishes to file one of the documents which may now be filed electronically, please refer to the Attachment supplied with this Decision for guidance in doing so. Guidance for E-filing can also be found on the National Labor Relations Board web site at [www.nlr.gov](http://www.nlr.gov). On the home page of the web site, select the **E-Gov** tab and click on **E-Filing**. Then select the NLRB office for which you wish to E-File your documents. Detailed E-filing instructions explaining how to file the documents electronically will be displayed.

Graduate Adjuncts BUE	871
Graduate Adjuncts NOT	115
Graduate Assistants	1353
Graduate Assistants on	207
Research Assistants	150
Research Assistants Ext	150

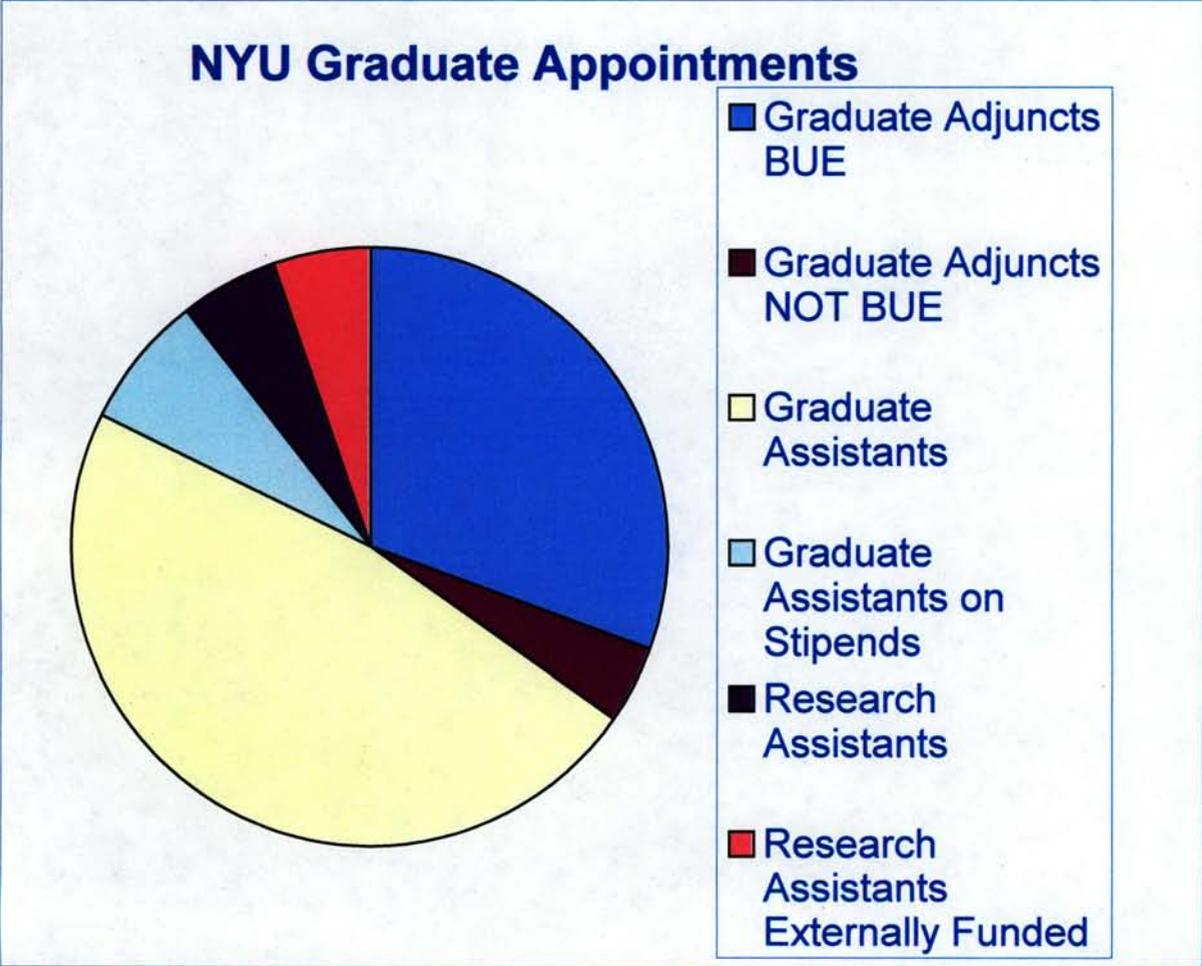


CHART A

Graduate Adjuncts BUE	871
Graduate Adjuncts NOT	115
Graduate Assistants	1353
Graduate Assistants on	207
Research Assistants	150
Research Assistants Ext	150

### NYU Graduates

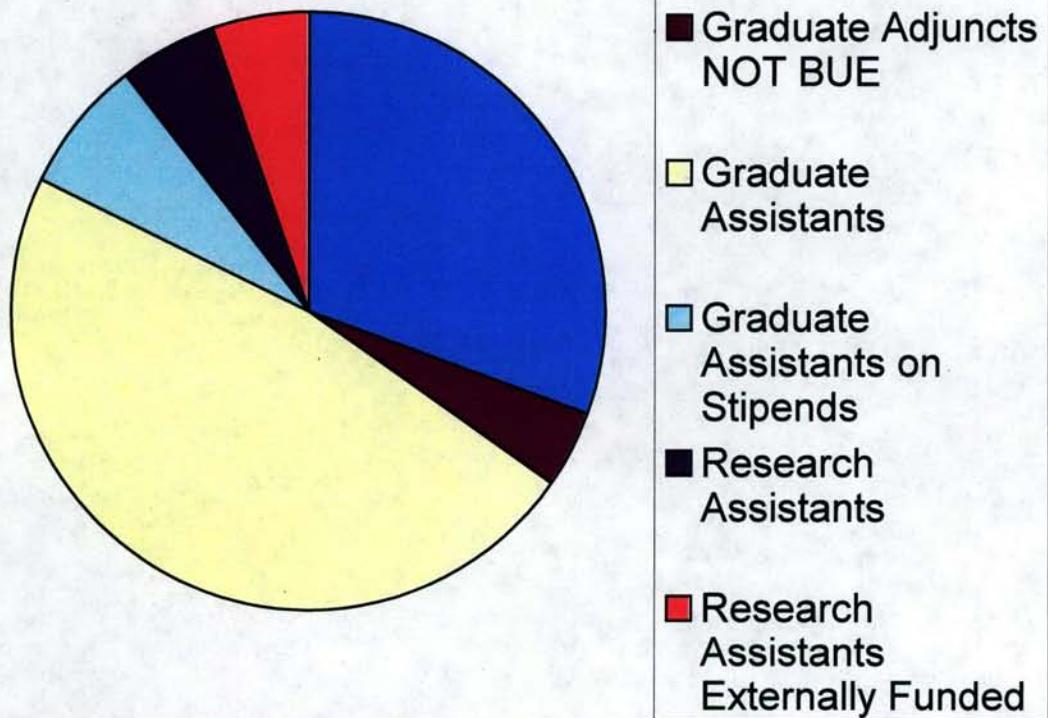


CHART B

Graduate Adjuncts 272  
Adjuncts 2482

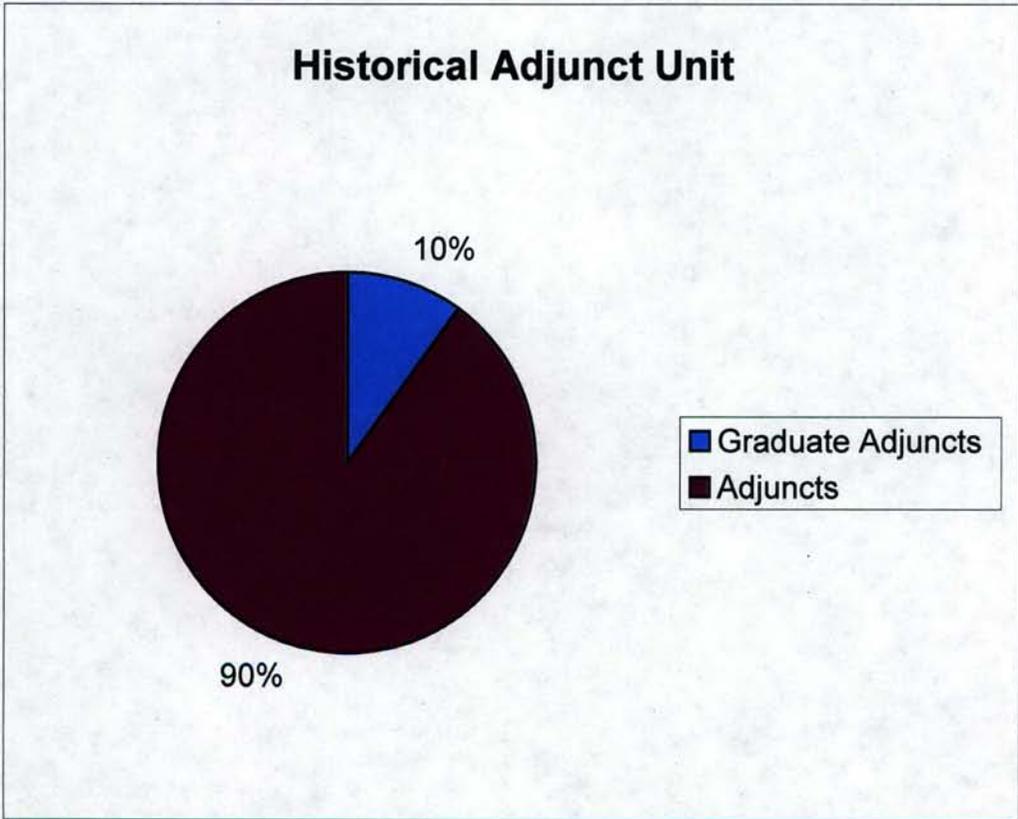


CHART C

Adjunct Unit 1761  
Adjunct 871  
Graduate Adj

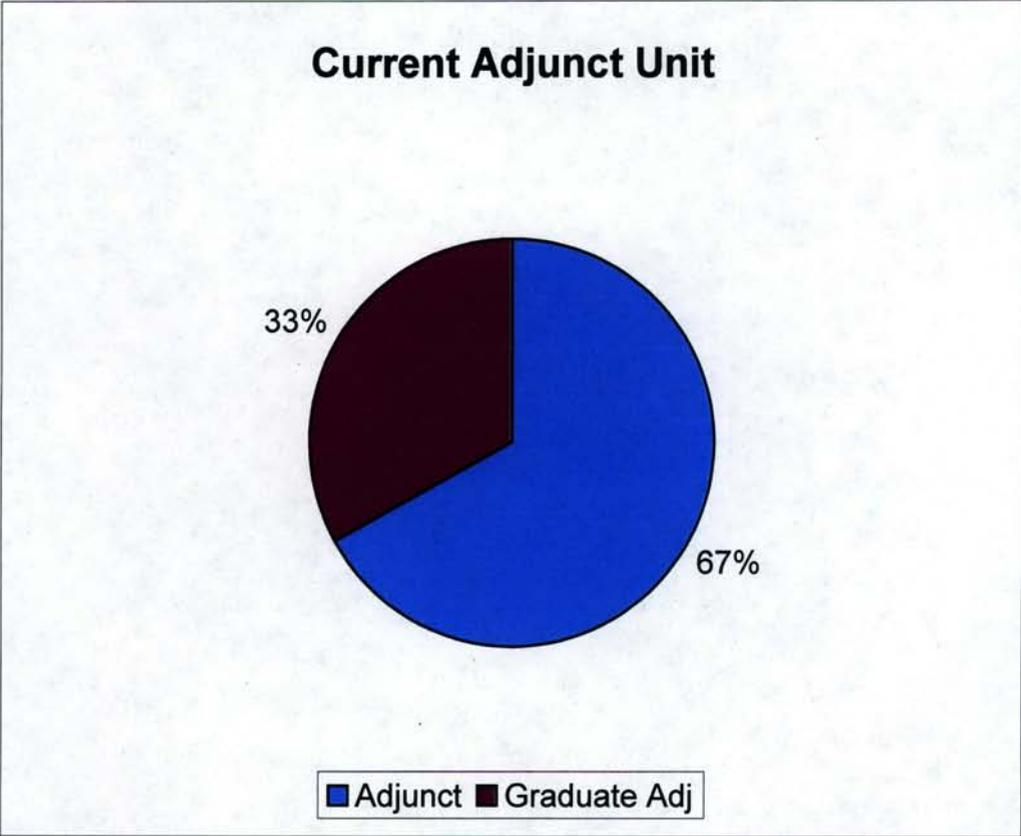
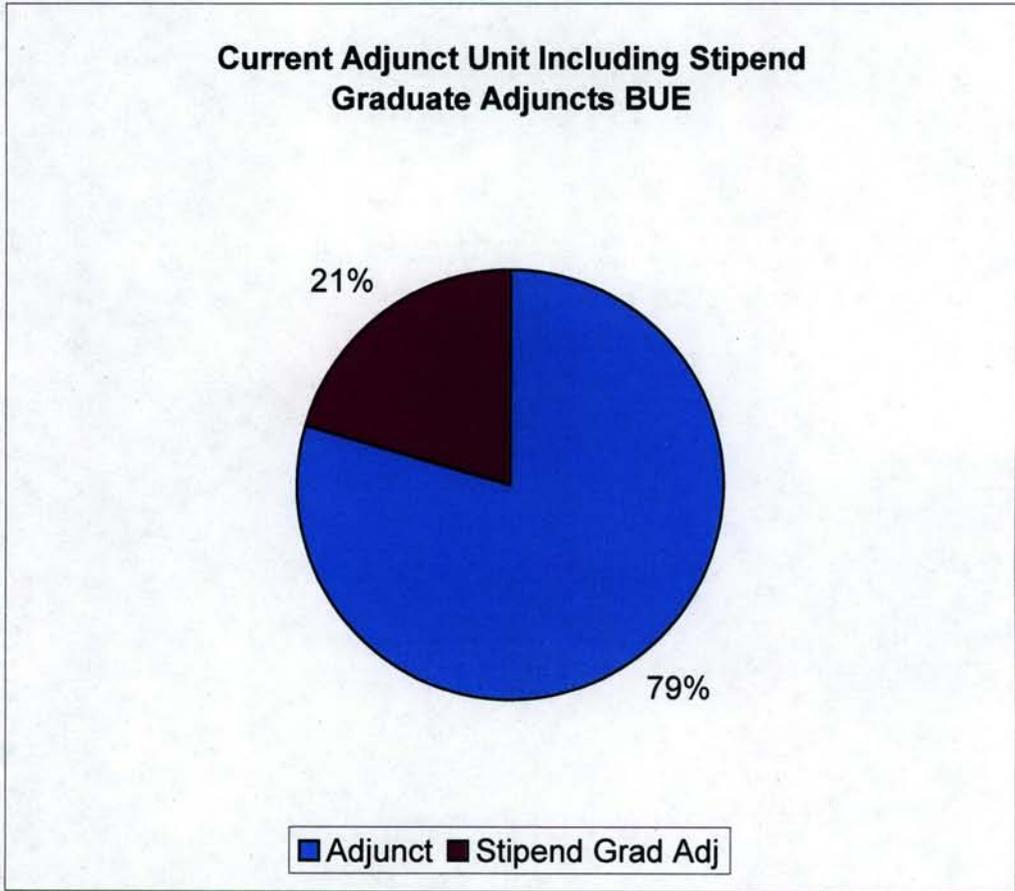


CHART D

Adjunct	1761
Stipend Grad Adj	459



**CHART E**

Adjunct	67
Graduate Adjuncts	11
Graduate Adjuncts on Stipends	22

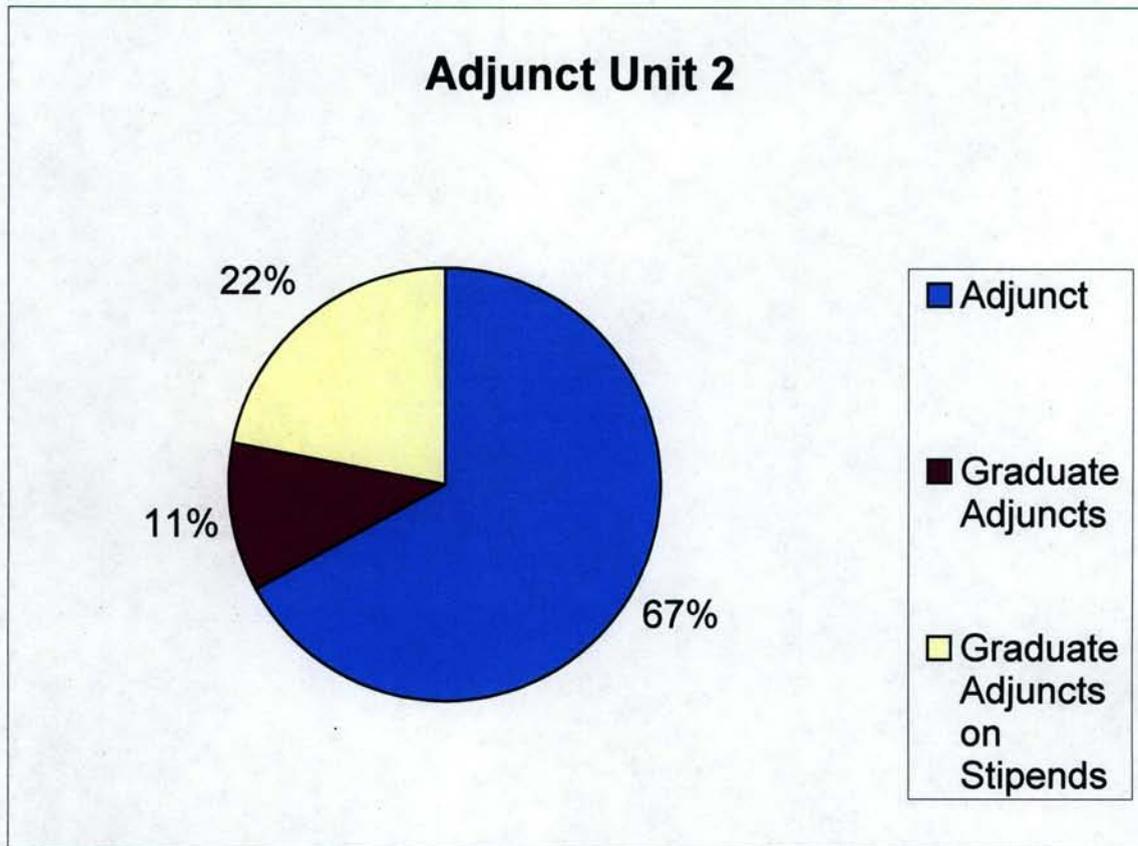
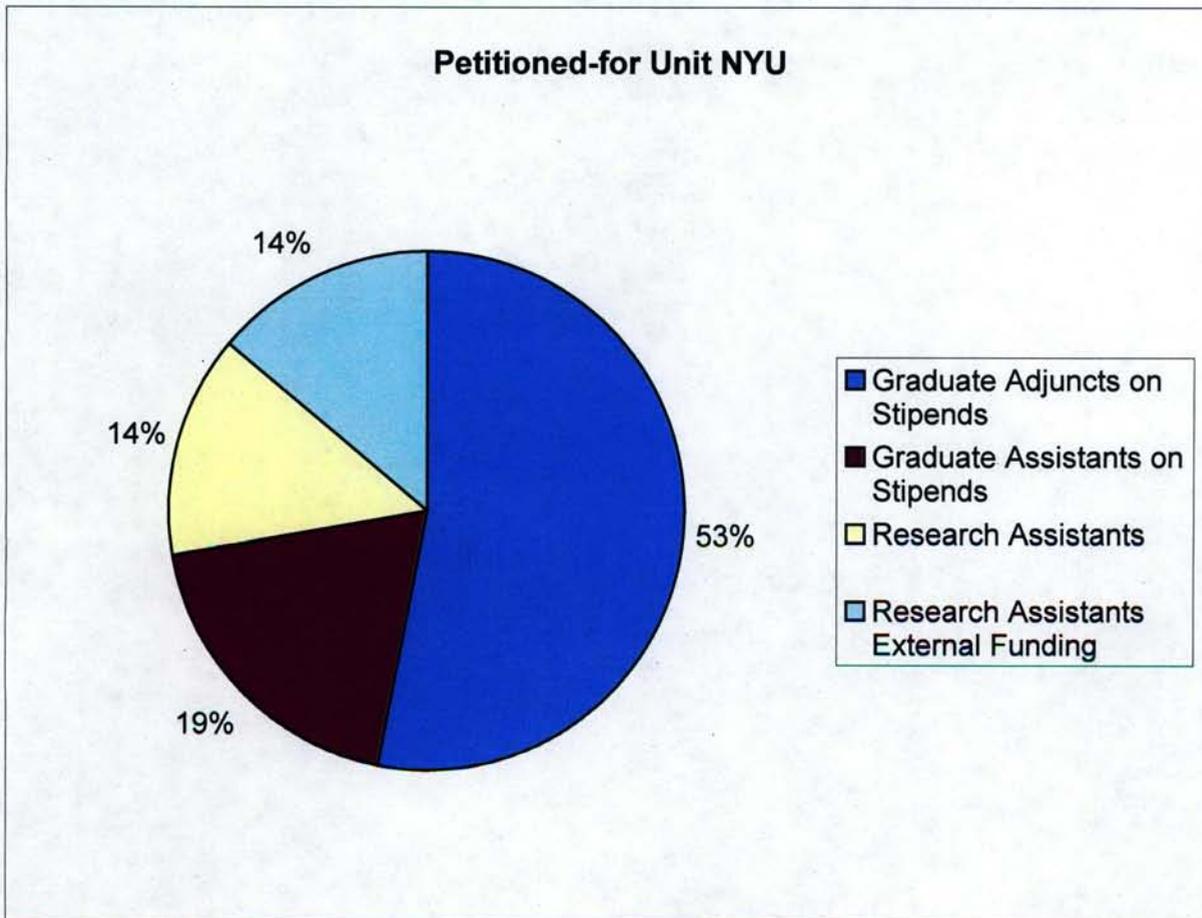


CHART F

Graduate Adjuncts	574
Graduate Assistant	207
Research Assistant	150
Research Assistant	150



**CHART G**

Under Grad	1560
Graduate	207
Other Hourly	6233

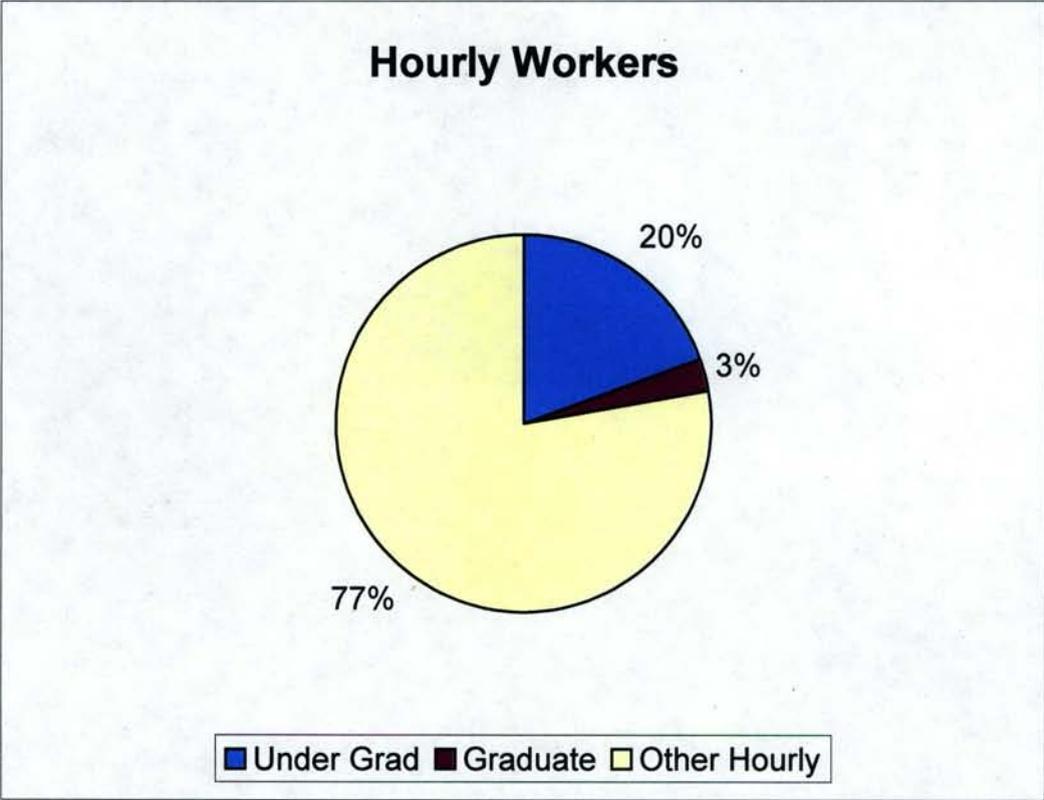


CHART H