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November 29, 2016

VIA E-MAIL and E-FILING -- URGENT

Gary Shinnars
Executive Secretary
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570
gary.shinnars@nrlb.gov

**Re: Duke University, Case No. 10-RC-187957
Special Appeal from Acting Regional Director's Acceptance of Offer of Proof**

Dear Mr. Shinnars:

This letter is concerning Duke University ("Duke"), Case No. 10-RC-187957, which arose from the Service Employees International Union's ("SEIU") petition to represent a unit of PhD student employees providing research and instructional services at Duke University. Duke opposed SEIU's representation petition in part alleging that Duke University student employees are not employees under *Columbia University*, 364 NLRB No. 90 (2016).

Upon commencing the hearing on November 28, 2016, the Acting Regional Director requested that Duke submit an Offer of Proof in support of its position that Duke graduate student employees are distinguishable from those in *Columbia University*. See Attachment A, Duke University's Offer of Proof. Today, the Acting Regional Director accepted the Offer in its entirety, allowing Duke to present evidence on every one of the 28 points asserted.

Under Section 102.66 of the Board's Rules and Regulations, the Regional Director can solicit an offer of proof on issues to be litigated. However, if the offer of proof is deemed insufficient, then evidence on those issues shall not be received. *Id.* The offer of proof essentially provides a method for a party to proffer the evidence it has in support of its position, which permits the Regional Director to determine if a hearing is necessary. See Section 11226 of NLRB Casehandling Manual Part Two, Representation Proceedings, Sept. 2014.

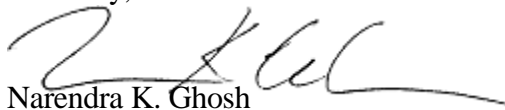
Here, the Acting Regional Director incorrectly accepted Duke's Offer of Proof for the reasons set forth in the attached brief. See Attachment B, SEIU's Response to Duke University's Offer of Proof. The facts asserted in Duke's Offer were either completely irrelevant to the issue of employee status, or were addressed and outright rejected in *Columbia University*. The Acting Regional Director should have rejected the Offer as insufficient.

Board law requires that “in order to effectuate the purposes of the Act through expeditiously providing for a representation election, the Board should seek to narrow the issues and limit its investigation to areas in dispute.” *Bennett*, 313 NLRB No. 254, at 1363 (1994). To that end, the Board has rejected offers of proof which attempt to re-litigate matters, or introduce facts insufficient as a matter of law. See *S.D. Warren Company*, 150 NLRB No.032, at 292-93 (1964) (rejecting offer of proof where issues were previously litigated); *Sheridan Peter Pan Studios*, 173 NLRB No.11, at 53 (1968) (rejecting offer of proof which attempted to relitigate issues related to previous representation case); *The Gunton Company*, 227 NLRB No.274, at 1876 (1977) (rejecting offer of proof which attempted to relitigate issues which were or could have been litigated in a prior representation proceeding); *Washington Stair and Iron Works*, 285 NLRB No.70, at 570 (1987) (denying offer of proof that attempted to retry the validity of a collective bargaining agreement); see also *Crozer Chester Medical Center*, Case 04-RC-152289 (2015) (rejecting offer of proof where facts were insufficient as a matter of law to sustain the employer’s position).

Under settled Board law, Duke’s Offer of Proof is completely insufficient to establish that Duke’s PhD students are not employees. In accepting the Offer, the Acting Regional Director acted arbitrarily and abused his discretion. As a result, the parties are forced to engage in a multi-day hearing to relitigate settled law. The Acting Regional Director’s decision also sets precedent permitting employers to relitigate *Columbia University* in every case involving graduate student employees.

Therefore, SEIU respectfully requests that the Board reverse the Acting Regional Director’s decision and reject the receipt of evidence on all issues asserted in the Offer of Proof under 29 C.F.R. § 102.66. In the alternative, SEIU respectfully requests that the Board limit acceptance of the Offer of Proof to only those facts that it believes could distinguish this case from *Columbia University*.

Sincerely,



Narendra K. Ghosh

cc: Scott Thompson, Acting Regional Director
Jenny Dunn, Hearing Officer
Peter D. Conrad
Paul Salvatore
Steven Porzio
Zachary D. Fasman

Attachment A

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10**

DUKE UNIVERSITY

and

**SERVICE EMPLOYEES INTERNATIONAL
UNION (SEIU)**

Case No. 10-RC-187957

DUKE UNIVERSITY OFFER OF PROOF

Pursuant to Section 102.66 of the National Labor Relations Board's Rules and Regulations, 29 C.F.R. § 102.66, Duke University ("Duke" or the "University"), by its attorneys Proskauer Rose LLP, submits the following Offer of Proof in support of its position that the PhD Students who are the subject of the above-captioned representation petition filed by the Service Employees International Union (SEIU) (i) are distinguishable from the graduate students under examination in the Board's recent decision in *Columbia University*, 364 NLRB No. 90 (2016), and are students, not "employees" within the meaning of § 2(3) of the National Labor Relations Act; and (ii) that the petition fails to raise a "question concerning representation" of employees and, therefore, should be dismissed.

The PhD students at Duke are distinguishable from the students in *Columbia* in the following material respects, among others: (1) *Columbia* sets forth a two-pronged test for common law employee status; "the payment of compensation, in conjunction with the employer's control, suffices to establish an employment relationship for the purposes of the Act." Slip Op. at 6. The PhD graduate students at Duke who teach or perform research do so as

an incident of their academic training, do not teach or perform research under Duke's control, and do not receive compensation for those services. (2) In a number of academic departments, teaching is not required for academic credit or to obtain a degree, nor expected for financial support. PhD graduate students receive tuition, health care coverage and stipends without regard to whether they teach or perform research. They do not receive compensation for these tasks. (3) Duke places an unparalleled emphasis in training students to become college teachers, and has multiple voluntary programs, including an extensive Certificate in College Teaching (CCT) program in which nearly 500 PhD graduate students are enrolled, as well as numerous courses that PhD graduate students utilize to ensure that their teaching skills will make them productive future faculty members. Teaching at Duke is part and parcel of the PhD educational program, and is not performed as a service to the University. (4) Duke's undergraduate students are not subject to core curriculum requirements, as was the case at Columbia¹, and as a result teaching performed by the University's PhD graduate students is not based on an unrelated curriculum, but is closely connected to their principal areas of study. (5) With regard to research, PhD students choose their own research topics, and are not assigned topics or controlled by the University. PhD students choose to affiliate with one faculty member, perform advanced research on topics of their own choice, funded by research grants that benefit them in that this research forms the basis for their own PhD dissertations. (6) Even if a grant that is funding a student is discontinued, or if that student wishes to change advisors and thereby cease to receive monies from that grant, that student will still be funded through his or her studies by University funds.

¹ See *Columbia*, Slip Op. at 14.

If provided an opportunity to present evidence with regard to the student status of PhD students at Duke, Duke will present witnesses including, but not limited to, Paula McClain, Dean of the Graduate School; Hugh Crumley, Assistant Dean for Academic Affairs; Christopher Nicchitta, Professor and Associate Dean of Research Training of the Duke Medical School; Valerie Ashby, Dean of Trinity College of Arts & Sciences; Adam Wax, Professor and Director of Graduate Studies of Biomedical Engineering; Shanna Fitzpatrick, Associate Dean for Finance and Administration; Debra Brandon, Director of the PhD in Nursing Program; and others who would testify to the following.

INTRODUCTION

(1) PhD students at Duke University seeking degrees from the Duke Graduate School who engage in teaching or research activities are not employed by the University. All of Duke's approximately 2500 PhD students are supported throughout their studies by full tuition fellowships and stipends which are not contingent upon working for Duke. Teaching is not required for all PhD students; teaching is a requirement in approximately half of the departments in which PhD students seek Graduate School degrees. Nonetheless, teaching is an important part of training within the Duke Graduate School, because Duke places a high premium upon preparing its PhD students for academic careers. Duke offers multiple voluntary programs to aid its PhD graduate students in becoming qualified teachers in higher education, including the Certificate in College Teaching program, the Preparing Future Faculty program, and the Bass Instructional Fellowships, discussed in detail below. All PhD students are eligible for these programs, which are the leading pedagogical programs among Duke's peer institutions.

[Witnesses: Paula McClain, Valerie Ashby, Hugh Crumley.]

(2) Because of this emphasis on teaching, approximately half the departments in which students seeking their PhD degrees through the Duke Graduate School require PhD students to engage in teaching in their field of study as part of their education. But PhD students who serve as Teaching Assistants as a degree requirement are **not compensated** for their time spent teaching, as they are fully supported by the Graduate School. Where teaching is not a degree requirement, such as in the Philosophy and Political Science departments, students seeking PhDs are encouraged to apply to one or more of the pedagogical training programs mentioned above, and to seek Teaching Assistantships, to ensure that upon graduation they will be well-rounded candidates poised to secure employment in a number of competitive fields, including academia, government, and industry. Teaching at Duke is therefore an opportunity for students not just to gain teaching experience as training to become future college faculty, but to gain teaching experience in the field in which they have chosen to seek their degree, or that is of particular academic interest to them. [Witnesses: Paula McClain, Valerie Ashby]

(3) PhD students who engage in research activities also do so as part of their training for future roles as researchers or faculty members, and not as employees of Duke. Duke places a high premium on learning to conduct research ethically and effectively. To ensure that all Duke PhDs are equipped with the research-related tools needed to succeed, all PhD students are required to undergo a six-hour orientation and six to twelve additional hours of training on the “Responsible Conduct of Research.” This training touches on the ethical obligations attendant to research and publication of the results of that research; completion of the training results in a notation on each student’s transcript. [Witnesses: Paula McClain, Hugh Crumley]

(4) Publishing the results of research is critical to a PhD student’s future success in his or her field. Particularly in natural science, engineering, and medicine-based disciplines, the research

that a PhD student engages in at Duke serves as a springboard for his or her dissertation and career. Many PhD students who serve as Research Assistants write their dissertations on the same or a related subject that they and their faculty advisor are researching together. While a PhD student may be financially supported through a stipend paid under a faculty member's research grant, the work product underpinning the student's PhD dissertation and degree parallels the research they engage in alongside that faculty member. [Witnesses: Chris Nicchitta, Adam Wax]

(6) Therefore, to the extent that the 1487 PhD students in the petitioned-for unit act as Teaching or Research Assistants, they do so as part of their education, not as paid employees of the University.

General

(1) **PhD Students.** Although the experiences of PhD students at Duke vary by discipline and by academic department, certain aspects are common to PhD students seeking degrees from the Graduate School. All full-time doctoral students pay no tuition or fees whatsoever through at least the first five years of study, at a cost to Duke of approximately \$350,000 or more per student throughout his or her PhD studies. In addition to tuition and health care, students receive annual nine or twelve-month stipends (depending on the student's department), which are guaranteed for at least five years. The stipend amount is uniform for all PhD students, with slight variations based on the school that the student's degree program is homed in.² Although

² See https://gradschool.duke.edu/sites/default/files/documents/tuition_fees_stipend_schedule.pdf. The stipend for the 2016-17 academic year for PhD candidates is as follows:

Arts and Sciences and Nicholas School Departments - \$29,960
Basic Medical Sciences and Nursing Departments - \$30,310
Engineering Departments - \$29,835
Fuqua School of Business - \$27,000

each PhD student may have a different mix of funding sources that makes up his or her stipend, such as a Teaching Assistantship, a Research Assistantship, a Graduate Assistantship or a Graduate School or other external fellowship, the stipend amounts are established by the Graduate School. The Graduate School permits students to “supplement” their stipend on their own by up to \$3,000 during the course of the year, with additional TA or RA assignments.³ [Witnesses: Paula McClain, Shanna Fitzpatrick.]

(2) Some departments guarantee PhD students a sixth year of funding, and most departments financially support their students through a sixth year of study as long as the student continues making academic progress. In most departments, PhD students in the first year or two of their studies are supported with a fellowship or stipend that does not require experience as a TA or RA. In such cases, a student receives free tuition and a stipend for one or two years, during which the only requirement for receipt of that money is that the student makes academic progress towards their PhD degree. During the next several years, PhD students in most programs undertake Teaching or Research Assistantships, based chiefly on the student’s preference and discipline. The assistantship support is a component of the total stipend received and often includes a fellowship or non-compensatory portion to bring the stipend to the appropriate funding level for the respective school or program. The standard TA stipend allocated to all TAs across the Graduate School is \$6,000 per course for an “instructor” and \$3,000 per course for a “grader.” These assignments are not “work for hire.” They are inextricably intertwined with a PhD’s progression towards their degree, and are closely related to each PhD’s area of study and career goals. Some students who are financially supported on a faculty grant as Research Assistants serve as Teaching Assistants without any extra remuneration, because pedagogical

³ See https://gradschool.duke.edu/sites/default/files/documents/policy_stipend_supplementation.pdf.

skills are integral to the completion of a degree and access to career opportunities in their chosen field. [Witnesses: Paula McClain, Shanna Fitzpatrick].

(3) Doctoral students' benefits reflect their status as students, and the benefits they receive are significantly different from benefits offered to Duke employees. All doctoral students receive, at no cost, student health coverage through the Duke Student Medical Insurance Plan ("SMIP"), a platinum-level plan. They also are eligible for a child care subsidy of up to \$5,000 per year per student to help defray childcare costs, as well as seven weeks of paid parental leave for graduate students. Separate and apart from the SMIP, there is also a medical assistance program which provides Ph.D. students up to \$5,000 -- and sometimes more, depending on the circumstances -- for medical expenses that are not covered by the SMIP. PhD students are also eligible for short term loans of up to \$2,500 at competitive interest rates offered through a program negotiated between the Graduate School and the Duke Credit Union. Emergency loans of up to \$1,000, for general expenses or unexpected emergencies, are also available to PhD students, from an endowment account earmarked specifically for loans to graduate students. All such student benefits are provided through the Graduate School; Duke's Human Resources and Benefits departments, which handle these matters for employees, do not provide or administer any such benefits for PhD students. Employee benefits are significantly different from the benefits made available to PhD students. [Witnesses: Paula McClain, Shanna Fitzpatrick].

(4) **Teaching Assistantships and Teaching Programs:** Learning to teach and to evaluate student work is fundamental to the education of graduate students and their preparation for professional lives in teaching and scholarship. This guiding principle is contained within the

Graduate School's published credo, called "Best Practices and Core Expectations"⁴, which every new PhD student receives during orientation. One of the four core components of a graduate education, as listed in the Core Expectations, is "preparation for and experience in a variety of teaching roles." [Witnesses: Paula McClain.]

(5) The Core Expectations also define the mission of the Graduate School, and establish expectations of every constituency that participates in a graduate student's education, namely: Graduate Faculty, Graduate Students, Graduate Departments and Programs, and the Graduate School. Each stakeholder has a role to play in sharpening students' pedagogical skills, which include:

- **Graduate Faculty** - "To encourage and assist students in developing teaching and presentation skills, including course development, lecture preparation, classroom communication, examining and grading."
- **Graduate Students** - "To receive an appropriately sequenced variety of teaching opportunities relevant to their career expectations and likelihoods."
- **Graduate Departments and Programs** - "To provide pedagogical training appropriate to and regular assessment of the TA assignments given to graduate students... [and] to provide a range of teaching opportunities relevant to likely career prospects."
- **The Graduate School** - "To ensure that fair and reasonable guidelines are in place to regularize the assignment of graduate teaching and research assistantships."

[Witnesses: Paula McClain.]

⁴ Available at <https://gradschool.duke.edu/academics/academic-policies-and-forms/standards-conduct/best-practices-and-core-expectations>.

(6) The opportunity to engage in teaching is offered to all doctoral students through a Teaching Assistantship. Teaching Assistantships awarded to doctoral students come out of the Graduate School's budget, not the budget from which Duke employees are compensated. All doctoral students within a given program are offered the same base stipend at the time of admission. Their teaching opportunity is included in the financial aid package and is considered part of the student's academic program. In the rare event that a student participating in required teaching is unable to find an appropriate teaching opportunity in a given semester, he or she nevertheless will receive financial support through some other means for that semester. [Witnesses: Paula McClain, Valerie Ashby, Shanna Fitzpatrick.]

(7) Even in academic departments in which it is expected that students will serve as TAs to fund their studies, when extenuating circumstances prevent a student from doing so, they are still guaranteed funding, either through the department or through the Graduate School, regardless of whether they teach or not. Departments may not withdraw funding to a PhD student because they are unable to meet their service requirement. [Witnesses: Paula McClain.]

(8) While teaching is an academic and financial requirement in some of Duke's 47 PhD-offering academic departments and programs, learning how to teach is an expectation for most doctoral students as part of their training. Specifically, 41 of these 47 departments and programs in the Graduate School treat service as a TA as integral to the program, and is heavily encouraged as part of a student's professional development; indeed, in 29 of those departments, it is an academic requirement. In the other six departments, which are all housed within the Medical School, Teaching Assistantships are generally available to PhD students who desire to gain teaching experience. Some Graduate School academic departments have guidelines indicating which semesters PhD students are eligible to teach, while others do not. For example,

in order to fulfill the TA requirement for a doctoral degree in Biochemistry, students must serve as a TA during their second year of study.⁵ In the Biomedical Engineering department, although PhD students are required to teach for two semesters to graduate, the department does not specify at what point in their academic career a student must do so. [Witnesses: Paula McClain, Valerie Ashby, Adam Wax].

(9) In some departments, students are required to serve as both a TA and an RA. For example, each of the approximately 600 PhD students in the five departments within Pratt School of Engineering is required to attend a teaching orientation⁶, then serve as a TA for two engineering courses. This is true even though every engineering PhD is funded by either a research grant or an external fellowship, the amount of which is set independent of whether a student teaches or not. There is no connection between an Engineering PhD student's teaching requirement and his or her financial support; teaching is required strictly to foster pedagogical skills in PhD students. [Witnesses: Adam Wax.]

(10) Other departments have a highly structured sequence of teaching courses and opportunities that PhD students must progress through. For example, each of the 64 total PhD students in the English department, in their first and second years, do not serve as TAs, but rather must complete a "Teaching Apprentice" program, in which they observe two undergraduate courses and meet with the professors of those courses each week to discuss pedagogical issues. Teaching Apprentices may not be given responsibilities or assignments beyond observing and mock grading. For the third through fifth years of their PhDs, English students will serve either as a TA or as the instructor-of-record for a course. In the sixth year, students are not allowed to

⁵ See <https://www.biochem.duke.edu/phd-program>.

⁶ See <http://pratt.duke.edu/sites/pratt.duke.edu/files/u49/Fall%202016%20TA%20Seminar.pdf> for the August 2016 Orientation Program.

serve as TAs or instructors, so that they may focus on the completion of their dissertation; they are fully funded by the department. Significantly, students receive the same stipend amounts for years one through six of their course of study, although the teaching expectations/requirements vary greatly from year to year. [Witnesses: Valerie Ashby.]

(11) The Nursing School also has a highly structured teaching and research requirement for each of its 37 PhD students. In the first two years, each Nursing PhD student must complete a Research Practicum, and by the end of the third year, a Teaching Practicum, for course credit. The purpose of the Research Practicum is to enhance student knowledge and skills in research through work on one or more research projects. The Teaching Practicum is a mentored teaching experience for students to gain experience in university teaching in nursing; to learn specific teaching methods; and to document their teaching and professional growth in their portfolio. [Witnesses: Debra Brandon.]

(12) TAs generally are evaluated by undergraduate students, and by the faculty member of record for the course they are teaching. The evaluation process is meant chiefly to assist TAs with their pedagogical development. Unlike Duke employees, TAs are virtually never removed or terminated when their performance is inadequate or lacking. Rather, if a TA has performance issues, the faculty member teaching the course, and in some instances a department administrator, *e.g.*, a Director of Graduate Studies, will counsel the student, tailor their TA duties and responsibilities to their unique situation, and possibly bring in another TA to assist them in their duties. [Witnesses: Paula McClain, Valerie Ashby]

(13) The teaching TAs perform is related to their academic discipline. The majority of PhD TAs assist with courses in the same department in which they are seeking their degree. Duke, unlike Columbia University, does not have an undergraduate “core curriculum” program,

requiring PhD TAs to teach outside of their or a closely related field of study. In the instances when TAs teach outside their department, it is because the student seeks permission to do so to advance their own academic interests. For example, a PhD student enrolled in the Biology Department may obtain a relevant teaching opportunity in another academic department or program, such as Evolutionary Anthropology, which is related to the student's interests. Through their experience as teaching assistants, PhD graduate students are afforded opportunities to develop knowledge in areas within their disciplines outside the focus of their dissertation research, both within and outside of their home academic department. This experience is invaluable when students enter the job market, as most employers seek candidates who are versatile teachers with a broad base of knowledge within and beyond their given fields. Teaching experience also prepares graduate students for work outside academia, as the ability to convey complicated information in a clear and effective manner is essential to a PhD in any employment setting. [Witnesses: Paula McClain, Valerie Ashby]

(14) PhD TAs are encouraged to participate in one or more teaching training programs offered centrally by the Graduate School, which are the leading pedagogical programs among Duke's peer institutions in their breadth and scope. For example, Duke offers the Certificate in College Teaching (CCT) program.⁷ This voluntary program is designed to provide PhD graduate students with a foundation for learning how to teach in a college or university setting. Since its inception in 2011, enrollment in the CCT program has increased by at least 17 percent every year. Currently, nearly 500 PhD graduate students, with representation across each of the four

⁷ See <https://gradschool.duke.edu/professional-development/programs/certificate-college-teaching>.

divisions⁸ of the Graduate School, are voluntarily enrolled in this program. To complete the CCT program, students must fulfill three requirements:

- Complete two courses in college teaching, which can be either general or discipline-specific. There are eight courses offered directly by the Graduate School that are not specific to any particular discipline, and more than 20 courses that are offered by specific academic departments teaching pedagogy unique to those particular disciplines;
- Serve in a formal teaching role for at least one semester, and both observe and be observed by peers in the CCT program; and
- Complete an online teaching portfolio, designed to be used in a job search for a teaching position in academia.

Duke also offers the Preparing Future Faculty (PFF) program.⁹ The PFF provides an opportunity for PhD students to learn about faculty roles and responsibilities by interacting regularly with faculty mentors at six partner institutions in North Carolina. The PFF, originally a national program that was funded by the Pew Charitable Trust, is now funded by the Graduate School at Duke, and is designed to prepare graduate students for the variety and complexity of classroom environments they will encounter. Students are paired with a faculty member at one of the six partner institutions, and shadow that faculty member for a semester while they teach and attend faculty meetings. PhD students are awarded a stipend of \$500 to offset travel costs to and from the partner institutions. Each year, 25 PhD students enroll in the PFF program as a result of a competitive process.

⁸ Humanities, Social Sciences, Natural Sciences, and Basic (Medical) Sciences.

⁹ See <https://gradschool.duke.edu/professional-development/programs/preparing-future-faculty>.

Finally, the Graduate School offers Bass Instructional Fellowships¹⁰, which are competitive fellowships awarded each year to PhD students seeking to gain substantive pedagogical experience in one of three ways: by being Bass Instructors of Record, Bass Instructional Teaching Assistants, or Bass Online Apprentices. [Witnesses: Hugh Crumley]

(15) Bass Instructors of Record design and teach their own course. There are approximately 18 fellowships awarded in this category each year. [Witnesses: Hugh Crumley]

(16) Bass Teaching Assistants are students who are seeking a degree in a department that has no undergraduates, and therefore limited teaching opportunities, and apply for the fellowship to be funded as a TA in another department. For example, a PhD student in Cell Biology, which is housed in the Medical School and therefore has no undergraduates, could be funded through a Bass fellowship as a TA in the Biology department. There are 5 to 6 of these fellowships awarded per year. [Witnesses: Hugh Crumley]

(17) Bass Online Apprentices work with Duke's Center for Instruction Technology in designing and producing Massive Online Open Courses ("MOOC's"), which are free classes online that are open to the public. [Witnesses: Hugh Crumley]

(18) The Graduate School also offers a number of other opportunities and programs through which PhD students are encouraged to learn more about teaching and develop their teaching and research skills to assist them in their job search upon graduation. For example, the Graduate School offers a Professional Development Series of workshops and panel discussions every year. The theme for the Series alternates between academic jobs, and jobs beyond academia, to ensure that students are presented with information on the full range of careers available to them. The

¹⁰ See <https://gradschool.duke.edu/professional-development/programs/bass-instructional-fellowships>.

theme for the 2016-17 year is “Careers Beyond Academia¹¹,” and includes the following workshops and panels:

- “Take Your Teaching Skills Anywhere: Identifying Transferable Skills From Your Teaching Experiences.”
- “Sharing Academic Research With a Broad Audience: Insights From Dr. Tovah Klein, Psychology Professor and ‘Toddler Whisperer.’”
- “How to Identify And Leverage Your Transferable Skills,” with separate workshops for Humanities and Social Sciences Disciplines, and Science, Technology, Engineering and Mathematics Disciplines.

Additionally, the Graduate School has a Professional Development Blog¹² where graduate students are encouraged to share their professional development experiences. Recent posts by graduate students include “How to Take Your Teaching Skills Anywhere,” and “From the Lab to Wall Street: An Interview with the Director of Investor Relations at Intercept Pharmaceuticals.” Finally, the Graduate School puts on a Teaching IDEAS Series of workshops¹³, designed to assist PhD students in improving their teaching skills and address topics relevant to classroom teaching, dealing with students, faculty life and career paths. Past workshops have included “Daring to Debate: Strategies for Teaching Controversial Topics in the Classroom,” and “FLIP a Lesson! Creating an Engaging Learning Environment.” [Witnesses: Hugh Crumley]

¹¹ See <https://gradschool.duke.edu/professional-development/programs/professional-development-series#beyondacademia>.

¹² <https://gradschool.duke.edu/professional-development/blog>.

¹³ <https://gradschool.duke.edu/professional-development/programs/teaching-ideas-series>.

(19) In academic departments in which there are a greater number of PhD students who are required to teach than there are available teaching opportunities, the Graduate School and the academic departments make every effort to create a TA position, even when course enrollment does not justify the position in terms of numbers. For example, in the Medical School, there is no undergraduate enrollment, meaning there are few teaching opportunities. In some of these academic departments and programs, PhD students meet their teaching requirement by serving as TAs for graduate-level courses. As noted above, the Graduate School also will assist these students in finding relevant teaching opportunities in related fields, through the Bass Instructional Fellowships and other means. When an appropriate teaching opportunity cannot be identified or created, the Graduate School frequently designates doctoral students as “Graduate Assistants,” and identifies professional development opportunities for them, such as research projects or literature reviews. Doctoral students who seek to fulfill a teaching requirement or expectation for which no teaching or professional development opportunity can be identified or created still receive full funding even though they do not teach during a given term. [Witnesses: Paula McClain]

(20) Assisting in teaching is an important part of the students’ doctoral studies. When graduate students complete the CCT, or participate in the PFF, it is noted on their transcript, along with coursework, grades, comprehensive examinations, and other academic milestones. Virtually all students enrolled in the Graduate School are registered for full-time study as they pursue a PhD. Doctoral students devote their full effort to course work, preparation for qualifying examinations, gaining related teaching experience, and the research and writing leading to the completion of the dissertation. [Witnesses: Paula McClain, Hugh Crumley]

(21) While learning to teach is an important skill for PhD students, completing their own coursework and research is paramount. For that reason, the Graduate School has a rule (as stated in the Core Expectations) that academic departments and programs must “ensure that TA’s and RA’s not doing work directly related to their theses or dissertations are not being asked to perform inappropriate academic chores or to work in service roles more than 19.9 hours per week averaged across the academic year.” In many departments, TAs, and RAs whose research is not directly related to their dissertation, spend an average of 5 to 10 hours per week on their TA and RA responsibilities, far less than the maximum 19.9 hours. Regardless of the number of hours a TA or RA spends on their service responsibilities, they are awarded the same stipend. All fellowships with other kinds of service requirements are also subject to this limit. The Graduate School assiduously monitors and enforces this limit, to ensure that students are able to focus primarily on their coursework and research. For example, the Graduate School offers a competitive fellowship called the Rubenstein Fellowship; students who receive the Rubenstein Fellowship are given the opportunity to work with and assist in cataloging certain collections of rare books and manuscripts. In overseeing this program, the Graduate School ensures that the Rubenstein Fellows are spending no more than 19.9 hours on cataloguing tasks, and that they are assisting with collections related to their dissertations. During the course of a five-year program of doctoral study, the total amount of time dedicated to teaching for those graduate students who actually teach, and to research that is not directly related to a student’s dissertation, is very small compared to their total effort, which is primarily devoted to classwork, research related to their dissertation, and writing. [Witnesses: Paula McClain, Shanna Fitzpatrick]

(22) The Graduate School invests significantly more funding to train graduate students through teaching than it would spend to hire employees to do teaching currently performed by

graduate students. The total cost of funding a graduate student through five years of study exceeds \$350,000. [Witnesses: Paula McClain]

Research Assistantships

(23) Along with teaching, research is another critical component of PhD student education at Duke. As stated in the Core Expectations, Duke is committed to ensuring that each graduate student engages in “development of an individual research agenda.” Each stakeholder in graduate students’ education is given expectations regarding developing students’ research, including:

- **Graduate Faculty** - “To provide appropriate guidelines, including expected timetables, for completion of research projects, and to respect students’ research interests/goals and to assist students in pursuing/achieving them.”
- **Graduate Students** - “To learn the research methods, ethical dimensions, and historical knowledge bases of the discipline ... [and] [t]o discover and pursue a unique topic of research in order to participate in the construction of new knowledge in the chosen field and application of that knowledge to new problems/issues.”
- **Graduate Departments and Programs** - “To provide appropriate resources, both faculty and facilities, to allow students to complete their education and research in a timely and productive manner.”; and
- **Graduate School** - “To facilitate, where possible, promotion and publication of graduate student research through research grants, conference travel grants, and other centrally administered mechanisms.”

[Witnesses: Paula McClain]

(24) Duke also takes very seriously its obligation to train all PhD students in ethical research practices. To this end, every PhD student is required to complete a six-hour Responsible Conduct in Research (“RCR”) orientation, and to complete six to twelve additional hours of RCR training during their first four years of study.¹⁴ This requirement can be met by attending RCR Forums, which are two-hour workshops, offered each semester, on a wide range of topics. For example, for the Fall 2016 semester, there are RCR Forums entitled, “An Introduction to Human Subjects Review,” and “Ethics in the Era of Inveillance: Data Mining in Biomedical, Scientific & Social Science Research.” [Witnesses: Paula McClain, Hugh Crumley]

(25) For many PhD students serving as Research Assistants, their dissertations are inextricably intertwined with the research in which they are assisting their faculty advisor. For example, in the Engineering School, each of the approximately 600 total PhD students are admitted to work with one specific faculty member selected by the prospective student and the faculty in advance. For the entirety of their academic journey at Duke, these students learn research skills and techniques alongside the faculty member they are admitted to work with. Additionally, they choose to write their dissertations on a topic that is closely related to that research. [Witnesses: Adam Wax.]

(26) Similarly, PhD students in the Medical School engage in research directly related to the grant of a faculty advisor who runs the research lab they have joined. PhD students in the Medical School do not engage in research for their first two years of study. During those two years, the students pay no tuition and receive a full stipend (approximately \$30,000 per year) for their course work. They rotate between laboratories every 6-8 weeks that are investigating

¹⁴ See <https://gradschool.duke.edu/professional-development/programs/responsible-conduct-research/rcr-forums>.

particular scientific issues. At the end of two years, each PhD student is expected to affiliate with a laboratory within the Medical School investigating specific issues, where they spend the next three to five years researching alongside the faculty member who runs the laboratory. During these years, PhD students work well in excess of 19.9 hours per week because they are working on their own PhD thesis and dissertation. They receive a pre-established stipend that does not vary with the hours spent working in the lab. Students and faculty members may co-author papers on their work together, which usually is directly related to the student's doctoral dissertation. [Witnesses: Chris Nicchitta]

(27) When there is conflict between an RA and their faculty advisor, the RA is not “dismissed” from the position, and does not lose his or her funding. For example, in the PhD programs offered through the Engineering School, if an RA wishes to switch faculty advisors, thereby changing the research grant through which their studies are funded, the Engineering School facilitates that change. Students in this position do not lose their financial support even when there is a gap between the time they have ceased to be funded by their former advisor's research grant, and the time that they find a new advisor. The Engineering School offers students in this position both tuition and a stipend for up to one semester while they transition. Similarly, if the faculty member that a graduate student is working with as an RA loses his or her grant funding, that graduate student will not lose his or her tuition remission and stipend. The Graduate School has in place a “backstop agreement” that each graduate student is guaranteed to continue to receive his or her stipend and tuition support even in the event of a loss of external funding.¹⁵ [Witnesses: Adam Wax]

¹⁵ See https://gradschool.duke.edu/sites/default/files/documents/policy_phd_student_affiliation_and_backstop.pdf.

(28) Many RAs, including in the Engineering School and in departments in the Basic (Medical) Sciences, are funded year round by their faculty advisor's research grants, and continue their academic pursuits during the summers. For students that have no summer support, the Graduate School guarantees summer research fellowships after their first and second academic years of study.¹⁶ In addition, the Graduate School has 43 endowment accounts that fund an additional 150 students without summer support in years 3 and beyond. The purpose of these fellowships is to allow PhD students to dedicate the summer months to their research and making progress on their degree without distractions. When applying for these fellowships, students must submit to their Directors of Graduate Studies a brief proposal outlining how the summer funding will be used to advance their educational pursuits. [Witnesses: Paula McClain]

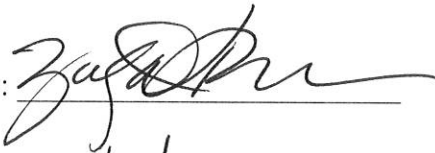
Conclusion

Based on the above facts, Duke University PhD students are distinguishable from the graduate students discussed in the Board's recent decision in *Columbia University*, 364 NLRB No. 90 (2016), and are thus students, not "employees" within the meaning of § 2(3) of the National Labor Relations Act. Denial of a hearing on this issue would be a deprivation of due process and a violation of the plain language of Section 9(c) of the Act, which directs the Board to conduct a hearing if there is reasonable cause to believe that a question of representation affecting commerce exists. In addition, the absence of testimony (testimony was permitted in the only two recent graduate student representation hearings at Columbia and Yale University) would severely prejudice Duke's ability to seek judicial review of Board determinations in this case, as is Duke's right.

¹⁶ See <http://registrar.duke.edu/sites/default/files/graduate/2016-17/index.html>.

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By: 
Dated: 11/28/2016

Attachment B

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10, SUBREGION 11**

)	
In the matter of:)	
)	
DUKE UNIVERSITY,)	
Employer,)	
)	Case No. 10-RC-187957
and)	
)	
SERVICE EMPLOYEES INTERNATIONAL)	
UNION CLC/CTW,)	
Petitioner.)	
)	

RESPONSE TO OFFER OF PROOF

Duke’s offer of proof seeks to establish a litany of facts regarding miscellaneous aspects of Duke University’s PhD program. Duke does not attempt to argue why the assertions in this list, if accurate, would result in a different outcome that that reached in *Columbia*. They plainly would not. The assertions in Duke’s offer of proof either support the Petitioner’s position, are completely irrelevant, or were unequivocally rejected by the Board in *Columbia University*. Duke’s offer of proof is insufficient to sustain Duke’s position.

Many of the facts Duke seeks to support the Petitioner's position. *Columbia* emphasized the extent to which the training and supervision of graduate students workers demonstrates a university’s control over them. *Columbia*, 364 NLRB No. 90 at *14, (2016) (“Teaching and research occur with the guidance of a faculty member or under the direction of an academic department.”). Here, Duke seeks to prove facts showing the robust extent of training, supervision, and faculty evaluations. *See* p. 8 (paragraph (5)); p. 10-11 (paragraphs (9)-(12); p. 14-15 (paragraph (18)).

Columbia emphasized the extent to which the counseling of graduate students demonstrated a university's control over them. *Columbia*, 364 NLRB No. 90 at *14 ("In the teaching context, poor performance by an instructional officer is addressed through remedial training although in one instance poor performance resulted in the University's removal of a student's teaching duties, and the cancellation of his stipend."). Here, Duke seeks to prove facts showing that the University can and does discipline and counsel graduate student workers who fail to perform adequately. *See* p. 11 (paragraph (12) (noting that Duke has "virtually never" terminated a teaching assistant when their performance is lacking, and instead generally engages in other remedial responses including faculty counseling)).

Duke's purported distinctions are overlapping, and all are irrelevant. The majority of Duke's points simply show that there is an educational component to the teaching or research duties of graduate student workers. *See* p. 1-2 (points (1) and (3) (noting in point one that teaching is "an incident of [PhD students'] academic training," noting in point three that Duke places "an unparalleled emphasis in training students to become college teachers")), p. 3-4 (paragraphs (1), (2), (3), and (4)); *see also, e.g.*, p. 7-8 (paragraph (4)); p. 9-11 (paragraphs (8), (10) and (13)); p. 14 (paragraph (18)); p. 16 (paragraph (20)); p. 18-19 (paragraphs (23), (24) and (26)).

The *Columbia* decision makes clear that student workers' duties can have both educational components and economic components, and that it does not matter whether one component predominated over the other. *See Columbia*, 364 NLRB No. 90 at *2 ("Statutory coverage is permitted by virtue of an employment relationship; it is not foreclosed by the existence of some other, additional relationship that the Act does not reach."); *id.* at 6 ("Even when such an economic component may seem comparatively slight, relative to other aspects of

the relationship between worker and employer, the payment of compensation, in conjunction with the employer's control, suffices to establish an employment relationship for purposes of the Act.”); *id.* at 17 (“We have rejected an inquiry into whether an employment relationship is secondary to or coextensive with an educational relationship.”). Thus, the fact that Duke considers teaching to provide students with educational benefits does not mean that they are not employees.

Duke also includes conclusory assertions disavowing the compensatory nature of payments made to its student employees. *See* p. 2-3 (points 1 and 2 (claiming in point one that student workers “do not receive compensation for those services” and claiming in point two that students “do not receive compensation for these tasks)); p. 4 (paragraph (2) (claiming that students who are required to work as teaching assistants to receive a degree “are **not compensated** for their time spent teaching”). The only asserted fact that supports this disavowal is the argument that Duke pays its students the same stipend, regardless of whether they have teaching or research duties in a given semester. *See* p. 4 (paragraph (2)). This argument was also rejected in *Columbia*, ending the inquiry. *Columbia*, 364 NLRB No. 90 at *15 (2016) (“Although the payments to Ph.D. student assistants may be standardized to match fellowship or other non-work based aid, these payments are not merely financial aid. Students are required to work as a condition of receiving this tuition assistance during semesters when they take on instructional duties, and such duties confer a financial benefit on Columbia to offset its costs of financial aid, even if it chooses to distribute the benefit in such a way that equalizes financial aid for both assistants and nonassistant students.”).

Even if it were necessary to explore further the issue of whether students are compensated for their services, the remainder of the facts Duke seeks to prove make the

compensatory nature of payments abundantly clear. Duke concedes that for student workers, a portion of their stipend depends on the work they perform. *See* p. 6 (noting that student positions “such as a Teaching Assistantship, a Research Assistantship, [or] a Graduate Assistantship” may comprise the “mix of funding sources that make up [a student’s] stipend”); p. 9 (noting that teaching is a “financial requirement” in some departments). It concedes that it places economic value on these services. *See id.* (noting that the school provides \$3,000 for “graders” and \$6,000 for “instructors”). It admits that students can increase the amount of their pay by taking on additional TA or RA assignments. *Id.* Duke has not only failed to suggest any facts that distinguish its approach to compensation from Columbia’s approach, it has offered to prove facts that make clear *Columbia* applies with force.

Duke also claims that not all departments require all students to act as teaching assistants. *See* p. 4 (paragraph (2)). This is also irrelevant. Regardless of whether all departments require all students to act as teaching assistants, Duke concedes that individual students can be assigned teaching responsibilities as part of their financial aid packages. *See* p.6 (paragraph (2)). *Columbia* recognized that “Students are required to work as a condition of receiving this tuition assistance during semesters when they take on instructional duties[.]” *Columbia University*, 364 NLRB No. 90 at *15 (2016) (emphasis added). Regardless of whether universal participation in teaching duties is required, Duke cannot claim that once a student assumes an assistantship, they are able to simply abandon it without repercussion. *See Columbia*, 364 NLRB No. 90 at *6 fn. 52. (noting that student assistants cannot be fairly categorized as “volunteers” rather than employees).

Duke also asserts that its “undergraduate students are not subject to core curriculum requirements.” *Id.* This is irrelevant. The Board’s analysis in *Columbia* did not turn on the

existence of a core curriculum. Indeed, it is unclear whether all teaching assistants at Columbia taught core curriculum classes. *Columbia*, 364 NLRB 90 at *14 (“Notably, *some* Instructional Officers teach components of the core curriculum, which is Columbia’s signature course requirement for all undergraduate students regardless of major.”) (emphasis added). Duke PhD students teach courses that provide undergraduate students with academic credit. Nothing in Duke’s offer of proof indicates that Duke PhD students are not providing Duke a valuable service.

Duke also asserts that research assistants’ research topics are not assigned or controlled by “the University,” that they affiliate with faculty members who fund them through their own research grants, and that for many students, the research they do for their faculty member’s grant will also provide the basis for their dissertation. *See* p. 2 (point (5)); p. 4-5 (paragraph (4)); p. 19 (paragraph (25)). This is consistent with nearly all research assistants, at every research university. *Columbia* addressed an identical class of research assistants who were funded by their faculty member’s grant, and whose research also informed their own dissertation. *Columbia* found that students in this situation were still providing the University a service, and were still employees. *Columbia*, 364 NLRB No. 90 at *17-18 (“[T]he fact that a research assistant’s work might advance his own educational interests as well as the University’s interests is not a barrier to finding statutory-employee status . . . The research of Columbia’s student assistants, while advancing the assistants’ doctoral theses, also meets research goals associated with grants from which the University receives substantial income.”).

Duke also asserts that even when grants funding students are discontinued or changed, the students will still be funded by the University. *See* p. 2 (point 6). This is irrelevant. *Columbia* addressed student workers whose work was supported by external grants,

and students whose work was supported independently of such grants. *Columbia*, 364 NLRB No. 90 at *2, *17-18. Both categories of workers were employees, regardless of funding source. *Id.* That an individual might move between the two categories is irrelevant.

Finally, Duke claims that the region's approach towards offers of proof is somehow unprecedented or a deprivation of due process. This argument is frivolous. Regulations provide that "[t]he hearing officer may solicit offers of proof from the parties or their counsel as to any or all issues" that may be litigated at a hearing. *See* Rules and Regulations § 102.66(c). "If the regional director determines that the evidence described in an offer of proof is insufficient to sustain the proponent's position, the evidence shall not be received." *Id.* The ability to make an offer of proof *is* due process. Duke has no due process right to introduce evidence that is irrelevant to the disposition of the hearing. It has no due process right to needlessly delay this proceeding. It has no due process right to force all parties to expend tremendous resources on a proceeding that, ultimately, has no bearing on hearing's outcome.

The way Duke treats its student workers is materially indistinguishable from the way *Columbia* treats its student workers. Duke seeks to prove a laundry list of facts which are irrelevant to the analysis required by the Board's decision in *Columbia*. As indicated by its position statement, Duke plainly believes that *Columbia* was wrongly decided. But Duke cannot establish any material differences in how it and *Columbia* treat its employees as indicated by its failure to raise any such points in its position statement.

CONCLUSION

The Union respectfully requests that the Region find that the evidence described in the offer of proof is insufficient to sustain Duke's position, and decline to receive that evidence.

Respectfully submitted, this the 28th day of November, 2016.

SERVICE EMPLOYEES INTERNATIONAL
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