Semi-Student Bargaining

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Recent expansion in public sector employment has been accompanied by increased collective bargaining. This surge in unionization has resulted from management's failure, through its dogged adherence to an absolutist management ethic, to perceive employees' changing economic and attitudinal needs. This failure, coupled with recent legislative enactments recognizing public sector bargaining rights, has fostered union growth and is assuring its institutional legitimacy.[1]

Accompanying this growth in public sector unionization have been the efforts by individuals not traditionally regarded as employees to improve their status by collective bargaining. Graduate Assistants, Medical Interns and Residents, in particular, although enjoying a dual "student employee" status, have sought collective representation as a means of improving their professional and economic standing. To date, employer reception to such bargaining has generally been hostile on the bases that Assistants, Residents and Interns are not "employees" as defined in state public employment laws, or if "employees," they lack a sufficient community of interest to warrant independent organization or inclusion in faculty or hospital bargaining units. Management's consistent and adamant opposition, however, has not successfully checked bargaining attempts. Assistants and Interns are increasingly unionizing as their numbers and disaffection with management grow.

ASSISTANT, INTERN AND RESIDENT GROWTH

Graduate Assistants, Medical Interns and Residents exist in substantial numbers both absolutely and relative to university and hospital staffs. At the University of Wisconsin there are now more than 1,800 Teaching Assistants,[2] while the Universities of Indiana and Michigan respectively have 1,700[3] and 2,200[4] Graduate Teaching and Research Assistants. These numbers are steadily increasing as is the proportion of Graduate Assistants to faculty members. At Fordham University there are now 150 Assistants to 501 instructors[5] and Adelphi University has 125 Assistants to a staff of 338.[6]

The size of Intern and Resident classes is likewise substantial. At a recent medical conference in Washington, D.C. attendant spokesmen represented 18,000 of the nation's 56,000 Interns and Residents, indicating their national strength.[7] Comparatively, their numbers are equally significant, as is evidenced by the University of Michigan Hospital Center where 650 Interns, Residents and Post-Doctoral Fellows compare with 300 staff physicians.[8] These numbers of Graduate Assistants, Medical Interns and Residents indicate their extent of use by management as well as potential bargaining strength. However, numbers alone do not dictate degree of unionization. Much of the current impetus behind Assistant, Intern and Resident collective bargaining stems from increased numbers coupled with imbalances among these individuals' academic qualifications, assigned duties and professional status.

GRADUATE ASSISTANT UNREST

The graduate Assistantship is a university program designed to attract top doctoral candidates by providing them stipends and free or reduced tuition. Universities' use of this program increases with undergraduate class size, education costs and emphasis on teaching as an aspect of graduate development. Therefore, when increased enrollment necessitates additional teachers, the Assistants, commanding a mere $2,650 per year,[9] are seen as an inexpensive and eager source of manpower. Their eagerness stems from probable interest in college teaching careers and the belief that graduate teaching experience will bolster their chances in a dwindling job market. On these bases it is not surprising that at some universities virtually every underclassman has Graduate Assistant instructors or discussion leaders.

In return for their modest compensation Graduate Assistants are expected to provide substantial and significant services. Educators differ as to the exact nature of such services, with some contending Assistants should not teach but merely aid the university educational community.[10] Ideally this may be desirable, but in actuality the Assistants often bear the full burden of instruction. As expressed by educator Harold Taylor in *Students Without Teachers: The Crisis in the University:* "The fact that they (Assistants) do not yet possess teaching credentials and higher degrees cannot disguise the fact that they are already functioning as teachers regardless of faculty status . . ." As teachers, the Assistants have a quasi-professional interest in the facets of educational policy which affect their activities. However, as most universities characterize them exclusively as students, they have no imput into the educational process.

In addition to teaching, Assistants are typically assigned the less desirable tasks of recording class attendance, grading daily assignments and preparing laboratory experiments. The impact of these onerous assignments on the highly qualified Assistants has been great. As powerfully described by W. M. Wise:

> "I must report that, with a handful of exceptions, the morale of these Teaching Assistants is low. They believe they are being exploited by their institutions to meet the press of expanding undergraduate enrollments. They report they get little help from senior faculty members on the teaching problems they encounter. They seldom report that they are treated as young colleagues by members of the regular faculty; instead, more frequently they report feeling that they are treated as individuals of low status employed to do the work that no one else wants to do."[11]

Unable to reconcile their considerable talent and teaching responsibilities with menial chores, low pay and lack of professional legitimacy, Graduate Assistants are increasingly unionizing.

"Graduate assistants are increasingly unionizing"

GRADUATE ASSISTANT BARGAINING

Already Assistants at three major universities are collectively bargaining through representative associations. In 1971 the Teaching Assistants' Association at the University of Wisconsin gained recognition as the exclusive negotiating representative of its Graduate Assistants.[12] In April, 1974 the University of Michigan Teaching Assistants overwhelmingly selected the Graduate Employees Organization as the exclusive agent for that University's 1,600 Teaching Assistants.[13] Teaching Assistant bargaining has also become a reality at the University of California at Berkley.[14] The fact that Assistants at these schools have successfully bargained while others have failed[15] reflects the misunderstanding of the Assistants' legal status as "employees' under state public employment laws. This misunderstanding is also jeopardizing Intern and Resident bargaining attempts which increase with their numbers and growing dissatisfaction with hospital management.

INTERN AND RESIDENT DISSATISFACTION

Hospitals offer Internships and Residencies to highly qualified medical school graduates to provide new physicians with clinical experience and the opportunity to develop specialized expertise. In return for this sponsorship, the Interns and Residents provide the hopitals with valuable medical services in such areas as emergency room treatment, surgical assistance and outpatient care. The extent of these medical services is great, as Residents and Interns devote 75 to 90 per cent of their working time to providing patient care,[16] with the remaining period of classroom or seminar training always subordinate to the medical needs of their patients.

In spite of their excellent academic credentials and the professional level of medical services they provide, Interns and Residents characteristically suffer from inadequate pay and poor working conditions. Interns and Residents average between $10,000 and $14,000 per year,[17] which is modest in light of their hours of work which often exceed 100 per week.[18] The physical rigors of these long work days are further compounded by what Interns and Residents protest are inadequate equipment and support personnel. Increasingly convinced that their compensation is not commensurate with their training and responsibilities and that improper scheduling and inadequate hospital facilities impair effective medical treatment, Residents and Interns have sought relief in collective bargaining.

INTERN AND RESIDENT BARGAINING

To date, several of these bargaining attempts have been successful. Since 1972 the Committee of Interns and Residents has bargained for those individuals at New York City Hospital.[19] In 1973 the Intern and Resident Association at the University of Michigan Medical Center was recognized as the exclusive representative of that hospitals' Interns, Residents and Post-Doctoral Fellows.[20]

In May, 1975, the Interns and Residents at Chicago's Cook County Hospital voted 419 to 4 in favor of representation by the Cook County Housestaff Association[21] Finally, during an October, 1975 Conference of the Physicians National Housestaff Association in Washington, D.C., representatives of 18,000 Residents and Interns voted overwhelmingly to convert their professional organization into a bargaining union.[22] In spite of these numerous successes, Intern and Resident unionization continues to draw strong management opposition for the same reasons as bargaining by Graduate Assistants: Interns and Residents are regarded as students, not employees, and therefore cannot collectively bargain.

PUBLIC EMPOYEE LEGISLATION

Whether Interns, Residents and Graduate Assistants are employees with bargaining rights or students without recourse depends on their status under state public employment laws. Examination of public employment legislation discloses that only two states have specific provisions prescribing Intern and Assistant bargaining status. North Carolina has effectively, though undesirably, resolved the controversy through express prohibition of all public employee collective bargaining.[23] At the opposite end of the spectrum, Iowa in 1974 enacted

legislation specifically establishing Assistants, Interns and Residents as public employees with bargaining rights.[24] In the remaining 48 states the status of these individuals is much less settled. To date, 15 states are without comprehensive public employment laws,[25] although several have enacted legislation recognizing the bargaining rights of specific groups. Of these 15 states, only Illinois has been confronted with any significant bargaining attempts. [26] If the bargaining success of the Cook County Hospital Residents serves as any indication, then even absent comprehensive legislation bargaining may be available in Illinois and the remaining 14 states.

In states with comprehensive public employment laws the status of Assistant, Resident and Intern remains surprisingly uncertain because of vague or non-existent "public employee" definitions. As a result of this uncertainty, it is becoming increasingly common for bargaining potential to be settled by ad hoc judicial resolution. Courts, by careful weighing of student characteristics against indicia of employment are determining when Assistants and Interns are employees with bargaining rights. By general examination of the factors Courts consider, and of their application to two recent bargaining attempts by Interns in states with comprehensive public employment lesiglation, the ineffectiveness of judicial determination becomes evident.

JUDICIAL WEIGHING

Attempts to balance "student-employee" characteristics have been repeatedly undertaken by the Commissioner of Internal Revenue and the Courts to determine the taxable consequences of stipends paid to Assistants and Interns. Traditionally, Graduate Assistants seeking exclusion of stipends from taxable income have argued that under §117 (a) of the Internal Revenue Code such payments are "scholarships" designed to meet educational expenses, not payment for services rendered. The Commissioner, meanwhile, has ruled these payments are for services performed and in accordance with §117 (b) and has claimed deficiencies on the untaxed stipends. In essence, the Assistants contend they are students receiving study allowances, while the Commissioner argues a taxable employment relation exists between Assistant and university. Recent Tax Court cases resolving this controversy have heavily favored the Commissioner's position in spite of Assistants' arguments that "the primary function of the Graduate Assistantship is to enable Graduate students to pursue their Graduate studies"[27] and that their teaching and research duties are primarily personal learning experiences.

The Assistants' repeated failures to sway the Court are largely due to the universities' procedure for selecting Graduate Assistants. This selection usually depends on the number of unfilled teaching positions rather than the availability of qualified applicants. Therefore, in appointing an Assistant the university is replacing an employee it must otherwise hire. On this basis Courts infer the Assistant provides substantial and valuable service for which his stipend compensates him. Another factor mitigating against Assistant success is the often proportional relationship between his stipend and faculty pay for equivalent teaching. This relation leads the Courts to infer that the Assistant is being compensated by his stipend.

There have also been numerous cases involving taxation of Resident and Intern stipends, with the majority of cases holding stipends taxable since the hospital-student relationship had all the indicia of an employer-employee relationship.[28] "The almost unanimous conclusion of the courts has been that the Intern or Resident was furnishing valuable services to the hospital and that payments received by him were compensatory." [29]

In addition to characterizing Interns, Residents and Assistants as employees by the taxation of their stipends, Courts have examined additional indicia in resolving the "student-employee" dichotomy. In *Sweet v. Pennsylvania Labor Relations Board,* 322 A. 2d 362 (1974) the Pennsylvania Supreme Court identified characteristic traits of an employer-employee relationship: " . . . (w)hen a party has a right to select the employee, the power to discharge him and the right to direct both the work to be done and the manner in which such work will be done . . ." such a relationship exists. As the university and hospital clearly have such power over the selection, retention and supervision of Assistants, Interns, and Residents, a strong case for such an employer-employee relationship can be made.

The degree of responsibility accorded the Assistant, Intern and Resident also has bearing on their status as students or employees. Employers contend that too little responsibility carries the presumption that teaching and medical ministering by such persons are primarily learning exercises rather than services for which they are paid. Courts, however, have adopted more flexible standards and find that, where Assistants and Interns have more than minimal responsibility, arguments holding them "students" for lack of responsibility are largely specious.

Finally, where Assistants, Interns and Resident participate with faculty and hospital staffs in employment fringe benefits, their case for "employee" status is strengthened. Such benefits include but are not limited to: accumulation of annual and sick leave, selective service reemployment rights, social security withholdings, and coverage by life insurance, hospitalization, workmen's compensation and pension plans.

Consolidation of these numerous "employee" characteristics lends considerable credence to the argument that Assistants, Residents and Interns are employees capable of bargaining under or absent state public bargaining provisions. Rarely, however, do individuals possess all of these employment elements, which accounts for the conflicting Court determinations of Intern and Assistant bargaining status. Examination of two similar Intern and Resident bargaining attempts in states with comprehensive public employment legislation illustrate this divergence.

MICHIGAN INTERNS BARGAIN

In March, 1970 members of the University of Michigan Intern-Resident Association sought recognition by the University's Regents as bargaining representative for that school's Interns, Residents and Post-Doctoral Fellows. Following rejection of this request on the basis that they were "students," The Association petitioned the Michigan Employment Relations Commission (MERC) for a certification election. In March, 1971 MERC acceded to this request, identifying the University of Michigan as a public employer and the Interns and Residents public employees under the Public Employment Relations Act. (PERA).[30] In January, 1972, the Court of Appeals rejected MERC's holding on the basis that as the PERA did not define "employee" to include Interns and Residents, they were presumed to be excluded.[31]

Final resolution of the controversy came in a February, 1973 State Supreme Court hearing of the *Regents of the University of Michigan v. Michigan Employment Relations Commission* case, 398 Mich. 98, 204 N.W. 2d 218 (1973). In this decision the Court reversed the Court of Appeals verdict and found the Association members were within PERA's "entire public sector of employment" purview. The Michigan Supreme Court based this determination largely on the employment characteristics of the Association members. Pointing to their hospitalization benefits, receipt of W-2 employee withholding forms and regular payment schedule, the Court found that Interns and Residents were employees. In addition, the Court found a strong argument for employment in the loyalty oath required of Interns and Residents prior to their appointment. As this oath was one required by Michigan law of all employees, the Court felt the Regents, in administering it, considered an employer-employee relation existed. Finally, the Court identified the numerous and substantial patient care services performed by Association members during more than three-fourths of their working time as indications of their employment status.

The aftermath of this judicial balancing was that the University of Michigan Intern-Resident Association was determined to be a public employee organization under Michigan's PERA and became exclusive representative of more than 650 Interns, Residents and Post-Doctoral Fellows.

PENNSYLVANIA INTERNS FAIL

In the second case, *Wills Eye Hospital v. Pennsylvania Labor Relations Board* 15 Pa. 532, 328 A. 2d 539 (1974). Intern and Resident bargaining attempts were less successful. In November, 1971 the Philadelphia Association of Interns and Residents (PAIR) petitioned the Pennsylvania Labor Relations Board (PLRB) for a representative election to certify PAIR as the exclusive bargaining representative of Interns, Residents and Clinical Fellows at Albert Einstein, Temple University, and Wills Eye Hospitals. After initially dismissing the petition in 1972, the PLRB vacated that order and held an election which PAIR won. The Hospitals appealed this certification to the Philadelphia County Court of Common Pleas, which in 1973 supported the PLRB ruling.[32]

In upholding the PLRB ruling, the court found that the individuals concerned enjoyed many incidents of employment, including the devotion of 85-90 per cent of their time to patient care, and the payment of taxes on their stipends. Additionally, Interns and Residents shared in medical, life and malpractice insurance, parking, cafeteria and laundry privileges, and coverage by workmen's compensation. Finding that the Interns and Residents performed services integral to the hospitals' function which could not be terminated without serious disruption the Court held that they were clearly employees.

In Decemeber, 1974, against the weight of convincing PLRB and Common Pleas Court arguments, the Pennsylvania Commonwealth Court in the *Wills Eye Hospital* case, ruled Interns and Residents were not public employees, thereby stripping PAIR of its representative status. In reversing, the Commonwealth Court held Interns and Residents were "fulfilling educational aspir-

ations in their service at the respective hospitals and that the status of student is incompatible with the status of public employee".[33]

While PAIR, in February, 1975, obtained an appeal to the Pennsylvania Supreme Court, the chance for reversal is uncertain at best. Moreover, the fact that the recent Commonwealth ruling so authoritatively opposes the Michigan position despite strong case similarities: common employee characteristics of the Interns, comprehensive-yet defined public employment legislation, and approval of bargaining by both states' labor boards, indicates continued piecemeal judicial determination is inadequate.

CONCLUSION

Numerical growth coupled with a militancy borne of desperation is prompting Graduate Assistant, Intern and Resident bargaining attempts. Tired of working long hours under inadequate conditions for grossly, inadequate wages, these student-employees have seized upon unionization as a means of achieving greater professional recognition and economic satisfaction. Against arguments that as students they are precluded from bargaining, Interns and Assistants point to their substantial services, de facto doctor-teacher status and numerous incidents of employment. Employers, recognizing the zeal if not the merit of their claims, continue to hold fast to an absolutist management stance.

This alone may not prevent bargaining, however, as Interns and Assistants, assisted by liberal court construction of vaguely defined public employment laws and farsighted provisions like the Iowa Public Employment Relations Act are realizing the fruition of their bargaining efforts. If this success is to continue, as indeed it must, the current approach of piecemeal judicial determination of bargaining status will not be adequate. The lack of clear standards and equitable results in the court determinations points to the needs for express statutory provisions to ensure the Graduate Assistant, Intern and Resident of much needed relief. Clearly these "students" are also "employees" in need of legislative guidance to ensure their bargaining rights.

FOOTNOTES

1. The prospect of parallel development in the private sector has been halted by a recent National Labor Relations Board (hereinafter N.L.R.B.) decision. In March 1976, the N.L.R.B. ruled that Interns, Residents and Clincial Fellows were students not meeting the employment criterion of the National Labor Relations Act. Cedars-Sinai Medical Center, 21 L.R.R.M. 1341, 223 N.L.R.B., No. 57 (1976).
2. Wollett, *The Status and Trends of Collective Negotiations for Faculty in High Education*, 1971 WIS. L. REV. 5 (1971) (hereinafter cited as Wollett).
3. Majer, *Preparing College Teachers*, 49 VIEWPOINTS 43 (1973).
4. GOV'T. EMPLOYEE REL. REP. No. 594, at B-16 (1975) (hereinafter cited as GERR).
5. Kahn, *The NLRB and Higher Education: The Failure of Policy Making Through Adjudication*, 21 U.C.L.A.L. REV. 63 (1973); Fordham University, 79 N.L.R.B. No. 23 at 6 (1971).
6. Id.; Adelphi University, 195 N.L.R.B. No. 107 (1972).
7. Cohn, *Interns, Residents Seek to Form Union*, The Washington Post, Oct. 11, 1975, at 1, col. 5.
8. GERR No. 577, at B-11 (1974).
9. Heim and Bogard, *Compensation of Graduate Assistants, 1968-59*, 55 BULL. A.A.U.P. 483 (1969).
10. Wenicka, *Are Teaching Assistants Teachers?*, 20 IMPROVING COL. & UNIV. TEACH. 97 (1972).
11. Wise, *Who Teaches the Teachers?*, in IMPROVING COLLEGE TEACHING 81 (C.B.T. Lee ed. 1967).
12. Wollett, *supra* note 1, at 5; Sherman and Loeffler, *Universities, Unions and the Rule of Law: The Teaching Assistants at Wisconsin*, 1971 WIS. L. REV. 195 (1971).
13. GERR No. 550, at b-20 (1974).
14. Wollett, *supra* note 1, at 5.
15. Adelphi University, 195 N.L.R.B. No. 107 (1972). Fordham University, 79 N.L.R.B. No. 23, at 6 (1971); *Wills Eye Hospital v. Pennsylvania Labor Relations Board*, 15 Pa. 523, 328 A.2d 539 (1974).
16. GERR No. 628, at B-6 (1975); Albert Einstein Medical Center, 86 L.R.R.M. 2440 (1973).
17. GERR No. 531, at B-13 (1973).
18. Cohn, *Residents at Hospital Win Contract*, The Washington Post, Nov. 17, 1975, at 21, col. 1-2.
19. GERR. No. 406, at B-8 (1971).
20. *Regents of the University of Michigan v. Michigan Employment Relations Commission*, 389 Mich. 98, 204 N.W. 2d 218 (1973).
21. GERR No. 605, at B-18 (1975).
22. TIME, Oct. 27, 1975, vol. 106, no. 17, at 36.
23. 1974 PUBL. PERSONNEL AD.-LAB MGT REL.: Vol. 2.
24. IOWA PUBL. EMPLOYMENT REL. ACT 4, Par. 11.104 (July 1, 1974).
25. Alabama, Arizona, Arkansas, Colorado, Georgia, Idaho, Illinois, Louisiana, Mississippi, New Mexico, Ohio, Tennessee, Utah, Virginia and West Virginia.
26. GERR No. 605, at B-18 (1975).
27. Robert H. Steiman, 56 T.C. No. 106 (Sept. 23, 1971).
28. *Parr v. United States*, 469 F. 2d 1156 (5th Circ. 1972); *Woodall v. Commissioner*; 321 F.2d 721 (10th Cir. 1963); Sheldon A.E.Rosenthal, 63 T.C. No. 454 (Jan. 13, 1975); *Marvin L. Dietrick v. Commissioner*, 75-1 USTC Par. 9,463 (Sept. 25, 1974); Steven Michael Weinberg, 64 T.C. No. 74 (Aug. 4, 1975).
29. Robert W. Carroll, 60 T.C. No. 96 (April 23, 1973)
30. GERR No. 400, at B-20 (1971).
31. *Regents of the University of Michigan v. Michigan Employment Relations Commission*, 38 Mich. App. 55, 195 N.W. 2d 875 (1972).
32. Albert Einstein Medical Center, 86 L.R.R.M. 2440 (1973).
33. *Wills Eye Hospital v. Pennsylvania Labor Relations Board*, 15 Pa. 532, 328 A.2d 539 (1974).