

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNIT DETERMINATION NO. 4-2011:

GRADUATE EMPLOYEE)	Case No. 1020-2011
ORGANIZATION, MEA-MFT,)	
)	
Petitioner,)	
)	
vs.)	FINDINGS OF FACT;
)	CONCLUSIONS OF LAW;
)	AND RECOMMENDED ORDER
MONTANA STATE UNIVERSITY,)	
)	
Respondent.)	

* * * * *

I. INTRODUCTION

The Graduate Employee Organization, MEA-MFT (“GEO”), filed a petition with the Board of Personnel Appeals (“BOPA”), proposing a collective bargaining unit made up of all Montana State University (“MSU”) graduate teaching assistants (“GTAs”) and graduate research assistants (“GRAs”) employed on the date the petition was filed. The petition expressly excluded professional engineers, engineer interns in training, supervisory, management and administrative employees, full-time and adjunct faculty members and classified employees. MSU responded with a Counter Petition asserting that graduate assistants (“GAs”), whether GTAs or GRAs, are not public employees, citing Mont. Code Ann. § 39-31-103.

Hearing Officer Terry Spear conducted a unit determination contested case hearing in this matter on April 12, 2011. Richard Larson represented GEO. Leslie Taylor represented MSU.

Kris Homel, Jim Junker, Elizabeth (Liz) Freedman, David Firmage, Nathanael Lintner, Kristen Brileya, Zach Adam, and Sabrina Behnke, all graduate students and either graduate teaching or graduate research assistants, testified under oath in GEO’s case in chief, as did Melissa Case, MEA-MFT Director of Organizing. Carl A. Fox, Ph.D., MSU Vice Provost, Graduate Education, Max Thompson, MSU Human Resources Finance Manager, Professor Robert C. Maher, MSU Electrical and Computer Engineering Department Head, and Professor Richard J. Smith, MSU Physics Department Head, each testified under oath in MSU’s case in chief.

Exhibits 1, 2, 4, 6, 19, B, C, E, and F were admitted into evidence by stipulation. Exhibits 3, 7, 14, 17, 20, 27, 28, 37, 39-41, 47, and 48 were offered and admitted into evidence. Exhibits 5 and 42 were offered and refused. Exhibit G was

not offered, but was kept as part of the record, albeit not in evidence, for purposes of reference only.

II. ISSUE

The issue is whether graduate students enrolled at MSU who are awarded and work in GTA and GSA positions are public employees under the protections of Montana's Public Employees Collective Bargaining Act, and are an appropriate unit for collective bargaining under that Act. The parties do not contest the jurisdiction of BOPA over this matter.

III. FINDINGS OF FACT

1. MSU is a state institution of higher education and a unit of the Montana University System. Mont. Code Ann. § 20-25-201. It is a public employer. Mont. Code Ann. § 39-31-103(10).

2. MSU provides graduate education to students in a variety of disciplines, conferring Master's degrees and Ph.D. degrees to students who successfully complete the university's various graduate programs.

3. Graduate students must apply to and be accepted by the university to enroll in any graduate degree program. Each student must meet the admission requirements established by the department for its graduate degrees, as well as university requirements for acceptance into Graduate School.

4. Graduate students who have been accepted in a departmental graduate program may be appointed as GAs, either GTAs or GRAs, by an academic department, with approval of the Graduate School.

5. GTAs are those graduate students who are involved in instruction, usually instruction of undergraduates. GTAs perform instructional duties in an area of their expertise, most often in their home departments, although GTAs sometimes have instructional assignments outside of their areas of study.

6. MSU faculty members oversee all GTA teaching duties. General duties include actual instruction in a classroom setting, instruction in recitation sections, assisting with laboratory setup, conducting help sessions and holding office hours to advise students on class assignments, grading papers, exams, lab reports, and homework. Supervising faculty members are responsible for the course content and GTAs teach as directed by the supervising faculty member.

7. GRAs conduct research, usually in a relevant area of their major course of study, under the direction of a faculty member who is usually also an academic advisor for the student's research program. The research conducted is usually a component of the faculty advisor's research that is directly supported by external

funding through grants and contracts with the university, and may sometimes be outside of the individual GRA's major course of study.

8. GRAs are generally expected to carry out a specific research project. The project often forms the basis for the student's thesis or dissertation. The general duties of a GRA include: performing experiments, calculations, analyzing results and disseminating knowledge orally or in written publications, reflecting on the state of the field and proposing new research problems, attending conferences to present results and collaborate with other researchers, training and supervision of less experienced research personnel.

9. Each academic department selects the students to whom it will award GTAs and GRAs. Not only are GTA and GRA appointments limited to students accepted into a graduate degree program at MSU, an appointment terminates if the student appointed is no longer a degree seeking graduate student, fails to enroll in at least 6 credits, or fails to maintain the required grade point average.

10. Instruction conducted by GTAs constitutes a significant portion of MSU's total instruction and is an important part of MSU's commitment to a quality educational enterprise.

11. Research conducted by GRAs is a significant portion of the total sponsored research at MSU and is an important part of MSU's commitment to a quality educational enterprise and dedication to identifying research having commercial potential and developing strategies for exploiting it. Such research is an integral part of technology transfer – a process whereby scholarly work is turned into marketable products or services.

12. Graduate students appointed as GTAs or GRAs are each required by MSU to sign a Graduate Assistant Agreement Form. This form sets forth the nature of the appointment, the stipend, the tuition waiver, and the hours per week to be worked. The Graduate Assistantship Agreement Form also provides, in pertinent part:

This appointment is NOT A CONTRACT OF EMPLOYMENT. For this appointment to remain in force, the Graduate Assistant must be in good standing (GPA>3.0). Although dates of planned appointment are stated above, the University reserves the right to terminate this appointment at any time upon the occurrence of the following: a) insufficient funds to pay for assistantships services; b) failure of the assistant to satisfactorily provide services; c) unsatisfactory academic performance by the assistant; d) failure of the assistant to comply with all University conduct and/or academic regulations; e) changes in University programs and/or plans which cause

assistant services under this agreement to be no longer needed. By signing below, I have read and understand the Assistantship Policy posted on the DGE [Division of Graduate Education, now known as the Graduate School] website. . . . Students registered in 0-5 credits are subject to FICA and Social Security tax withholdings.

13. GTAs and GRAs are officially expected to perform and are typically paid for at least 10 and not more than 20 hours per week for their GA duties during the regular school year. Summer GTAs and GRAs can be paid for working up to 40 hours per week. The rest of the GTAs' and GRAs' time is officially to be spent pursuing their educational and research projects related to their graduate program. The paid work sometimes relates to the graduate program of the particular GA and other times does not. The actual hours devoted to GTA or GRA duties can and do exceed these guidelines.

14. In every common meaning of the term, GTAs and GRAs at MSU are employees of the university when they are performing their GA duties.

15. GEO has satisfied the statutory and rule requirements for an election to be held among the appropriate GTAs and GRAs at MSU regarding whether they wish to be certified as a collective bargaining unit of public employees, with GEO as their exclusive bargaining representative.

16. When the paid duties of the GAs involve work arguably related to their graduate student programs, it can be unclear where the paid teaching/research duties begin or end and the graduate program work ceases or resumes. However, there is no evidence that this lack of clarity would compromise the ability of GEO and MSU appropriately to bargain collectively and therein define those lines to the extent necessary. There is likewise no evidence that such collective bargaining would damage the academic relationships between GAs and university or faculty.

17. In a typical public employee collective bargaining situation, many of the members of the unit hope or plan to remain in employment for a long time, if not until retirement and very few of the members of the unit are on track for or attempting to become members of management.

18. In GA-university relationships, all of the GAs are attempting to obtain the qualifications (advanced degree) held by their mentors and professors, after which they will stop being GAs, typically within just a few years. It also seems intuitively obvious that, compared with a typical public employee bargaining unit, more GAs have goals that include getting long-term university teaching and research positions after graduation, which would make them "management" for future GAs. These differences do not require exclusion of GAs from collective bargaining, and actually

should facilitate cooperative relations between labor and management in collective bargaining, because labor and management have much more in common than is typically the case.

19. Based upon the foregoing findings of fact (and the following discussion), the GTAs and GRAs in the proposed bargaining unit have a sufficient community of interest to make it an appropriate unit for public employee collective bargaining.

20. Public universities in a number of other states have entered into Collective Bargaining Agreements (CBAs) with their GAs.

IV. DISCUSSION¹

A. The Graduate Assistants are Public Employees.

The threshold issue raised by MSU is whether the GAs (GTAs and GRAs) are public employees instead of students. This appears to be a question of first impression in Montana. It may involve myriad public policy considerations, ranging from interpretation and application of Montana public employee collective bargaining statutes through considerations of preservation of academic freedom as well as collegiality and necessary educational hierarchy in postgraduate studies, all the way to examining the potential financial impact on MSU's postgraduate programs. However, BOPA is the ultimate administrative authority on Montana collective bargaining, and some of the other considerations that could be in play appear to be outside of BOPA's authority. Within BOPA's express authority, after careful consideration of the state of Montana's labor law, labor law under the National Labor Relations Act ("N.L.R.A.") and labor laws of other states regarding this question, the Hearing Officer recommends to BOPA that it construe the law to include MSU's GTAs and GRAs as public employees for purposes of collective bargaining rights.

A.1. *Brown University* is Neither Instructive Nor Persuasive Authority Here.

MSU's fundamental argument, presented very ably by its counsel, is succinctly stated in a single paragraph from its brief in support of its proposed decision.

Although the case turns on the application of Montana law, the extant law of the National Labor Relations Board cannot be ignored. In *Brown University*, 342 N.L.R.B. 483 (2004), the Board carefully considered the unique relationship of the GTA and GRA as a student to the university. The Board noted that the relationship is primarily educational rather than economic. *Id. at* 487. The Board noted the difficulty of introducing the concept of collective bargaining in what is

¹Statements of fact in this discussion are incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

essentially an educational experience involving a mentor faculty member and a student. The Board carefully analyzed all of the relevant NLRB decisions regarding the status of graduate students and concluded that graduate research and teaching assistants were not statutory employees under the National Labor Relations Act. The description of the work, the relationship to faculty, the elements of appointment, provision of financial assistance and all other essential facts are identical to the facts presented in this case. If the Hearing Officer is not going to follow this NLRB precedent in this case, it will be necessary to clarify the specific facts and or law that would distinguish the Brown case from the case presented. Respondent is unable to identify any significant fact that would distinguish the Brown case.

In testimony presented by Melissa Case, and in argument from GEO's counsel, the union responded that, on this particular legal question, BOPA should not rely upon federal precedent, but instead look at the states in which public university GAs have been recognized as public employees with a right to bargain collectively. GEO argued that the N.L.R.B.'s treatment of GAs in private universities, such as Brown University, is irrelevant to the rights of GAs at public universities.

Before *Brown University*, the N.L.R.B. had embarked upon a brand new approach, favorably disposed to collective bargaining by GAs working for private universities. *New York University*, (2000), 332 N.L.R.B. 1205 [*NYU 2000*] (affirming a Regional Director's decision that, under the facts of the particular case, "most of the" university's "graduate assistants are statutory employees").

Public employee collective bargaining at America's public universities was and is subject to the vagaries of public employee collective bargaining law in the various states. *E.g.*, "Catching the Union Bug: Graduate Student Employees and Unionization," 39 Gonz. L. Rev. 105, 108-09 (2004) [footnotes omitted]:

The legal standards governing the organizational rights of graduate students depend on whether the university is public or private. State law governs the organizational rights of graduate students at public universities. Employees of state governments are specifically exempted from protection under the NLRA. State employees, including employees at public universities, are governed by state labor laws that vary greatly in their perspectives towards collective action by employees. Under these state law schemes, some states have recognized graduate students' status as employees as well as their corollary right to organize and negotiate collective bargaining agreements.

According to the Coalition of Graduate Employee Unions (“CGEU”), an organization that promotes the unionization of graduate students, public university graduate employees are explicitly eligible for collective bargaining rights in fourteen states. In eleven states, public university employees are generally allowed collective bargaining rights, but the eligibility of graduate student employees remains undetermined. One state, Ohio, specifically excludes graduate employees from those public university employees eligible for coverage under collective bargaining agreements. According to the CGEU, twenty-three states deny collective bargaining rights to all university employees. The significant variation between state labor laws means that emerging unions and public university administrators must look to the specific statutory scheme of the state in order to determine which policies and procedures govern the rights of public university graduate assistants.

At private universities, however, the NLRB’s current designation of graduate student workers as employees for purposes of the NLRA [NYU 2000] places them under the purview of the Act and provides substantial federal rights regarding organizational activities. The NLRA safeguards the rights of covered employees to organize, join labor organizations, and engage in collective bargaining and other activities for mutual aid and protection. Therefore, a private university cannot discriminate against a graduate student as a result of union activity protected by the NLRA.

If a graduate student union gains majority support and wins an election, the university is required to bargain in good faith with the union over wages, hours, and the working conditions of student assistants. A union may not automatically force a university to meet its demands, but may engage in a strike under the NLRA to pressure university officials to agree to such terms. The university can also initiate a lockout of student employees in order to pressure the union to meet its conditions. The NLRA does not grant graduate assistants the rights to have their demands met, but simply to receive protection of their concerted activity.

Brown University, 342 N.L.R.B. 483 (2004) reversed *NYU 2000* and restored what it spoke of approvingly as “more than 25 years of Board precedent” that was “never successfully challenged in court or in Congress.” *Brown University* describes its scope succinctly on the very first page, “In our decision today, we return to the Board’s pre-NYU precedent that graduate student assistants are not statutory

employees.” In that “pre-NYU precedent,” the N.L.R.B. conclusively decided that GAs are always primarily students, and therefore not entitled to bargain collectively.

After *Brown University*, the prospects for collective bargaining by GAs in public versus private universities returned to the situation that had existed prior to *NYU 2000*. GAs in public universities still faced the vagaries of interpretations and applications of various state laws. GAs in private universities were back to zero again, no longer statutory employees, but once again fully students, not employees at all.² Thus, the prospects for successful petitions to certify a GA collective bargaining unit were now better, in some states, in the public arena than in the private arena, and equally poor in other states for public and private arenas.

Seven years later, the N.L.R.B. may now be ready to return to its former “new” position with regard to collective bargaining by GAs in private universities, and to turn away from *Brown University*. Last year, the N.L.R.B. reversed the Region 2 director’s dismissal, without hearing, of an N.Y.U. GA collective bargaining recognition petition from an United Auto Workers’ GA organizing committee. *New York University*, 2010 NLRB LEXIS 430, 356 NLRB No. 7 (slip opinion), Case 2-RC-23481 (10/25/2010) [*NYU 2010*]. The reasons the N.L.R.B. gave for sending the matter back for a regional decision on a full factual record before reviewing the case are instructive:

Finally, we believe there are compelling reasons for reconsideration of the decision in *Brown University*. The Petitioner points out that *Brown University* overruled the decision in *New York University*, which had been issued just 4 years earlier. The Petitioner argues that the decision in *Brown University* is based on policy considerations extrinsic to the labor law we enforce and thus not properly considered in determining whether the graduate students are employees. The Petitioner also offered to present evidence of collective-bargaining experience in higher education as well as expert testimony demonstrating that, even giving weight to the considerations relied on by the Board in *Brown University*, the graduate students are appropriately classified as employees under the Act. Finally, the Petitioner argues that the decision in *Brown University* is inconsistent with the broad definition of employee contained in the Act and prior

² For a snapshot of the frustration *Brown University* caused among GAs and union organizers, as well as law review note writers, see “Note: Breaking down the Ivory Tower Sweatshops: Graduate Student Assistants and Their Elusive Search for Employee Status on the Private University Campus,” 20 St. John’s J. L. Comm. 157 (2005).

Board and Supreme Court precedent. The Employer, however, contends that *Brown University* was correctly decided.

We believe the factual representations, contentions, and arguments of the parties should be considered based on a full evidentiary record addressing the questions raised above as well as any others deemed relevant by the Regional Director. Accordingly, the Regional Director's dismissal of the petition is reversed, the petition is reinstated, and the case is remanded to the Regional Director for a hearing and the issuance of a decision.

NYU 2010, slip opinion pp. 4-6 [Footnote omitted.]

After developing a full record, the Regional Director again dismissed the petition on June 16, 2011, expressly stating, on page 6 of 36 pages, that he was bound by *Brown University*. *New York University*, "Decision and Order Dismissing Petition," Case 2-RC-23481(6/16/2011). Web site contact with the N.L.R.B.'s office in Washington D.C. indicates that the petitioner has requested full N.L.R.B. review of this decision. Telephone contact with that same office indicates that the employer has also appeared, apparently to request an extension of time to respond.

Also of interest, in terms of using *Brown University* as persuasive authority in favor of dismissing the present case, is a Massachusetts law review article, arguing that the federal courts have the power to "moderate the frequent swings in [N.L.R.B.] Board-made labor law" through appropriate application of existing "arbitrary and capricious standards" to Board adjudicatory decisions. "Judicial Control of the National Labor Relations Board's Lawmaking in the Age of Chevron and Brand X," 89 *Bost. Univ. L. Rev.* 189, 191 (Feb. 2009). One of the two N.L.R.B. decisions used to explicate the author's analysis was *Brown University*, about which the article concluded:

Whatever its view of the ultimate result in *Brown*, and whatever its mode of statutory interpretation, a reviewing court should have little difficulty rejecting the claim that this result was mandated by the statute and that the contrary position taken in *New York University* could not have survived Chevron Step One review. The statute does not define the word "employee" except by certain express exclusions, none of which are relevant to graduate students who are paid for work by the universities that also offer them education. Furthermore, the *Brown* Board could cite no legislative history even indirectly referring to the coverage of those in an educational relationship with a possible employer. In other cases not governed by statutory language or clear legislative history, the Supreme Court has repeatedly confirmed that the

statute's "broad" and open-ended definition of employee should be read to afford the Board considerable discretion or "legal leeway" in setting the meaning of the term, at least when it does so consistent with the common law of agency.

Prior Supreme Court decisions, because of their stress on the common law, might be read to support the argument that the statute requires the Board to exclude at least certain graduate students from coverage if the common-law definition of employee does not cover those in a "primarily educational" relationship with an entity that would otherwise be their employer. But this argument was not made by the three-Member majority of the Board in *Brown*. It was made by only one of those Members in a separate footnote; and it would, in any event, ultimately have to fail for the simple reason that the common law recognizes no such exclusion. There is no doubt, for instance, that a graduate student acting as a teaching fellow in a geology class would subject her university to liability as an employer for her negligent driving of a van of students to a geological site. An individual providing service to an entity that both accepts and controls the manner and means of that service is an employee of the entity under the common law regardless of whether the relationship is primarily "economic."

Indeed, given the common law's clear coverage of graduate student fellows as employees, the absence of any express exclusion in the statute, the lack of any discussion in the legislative history relating to education or to relationships that are not primarily economic, and the Court's repeated references to the "breadth" of the statutory definition, a stronger argument can be made for the Board's decision in *New York University* being compelled by the statute than can be made for its decision in *Brown*. This argument is not necessarily defeated by the Court's holding in *NLRB v. Bell Aerospace Co.* that the Board must exclude from coverage all "managerial employees" who "formulate and effectuate management policies," whether or not they are covered by the express exclusion of supervisory employees. The *Bell Aerospace* holding was based on strong legislative history of the Taft-Hartley Act of 1947, and there is no such history relevant to the exclusion of those whose relationship with a putative employer can be characterized as "primarily educational." The *Brown* decision, thus, might not be able to withstand *Chevron* Step One review.

Id. at 215-17.

Given the specific facts and related legal issues pending before the N.L.R.B. regarding *Brown University*, the Hearing Officer believes it inappropriate to recommend that the Board of Personnel Appeals simply apply and follow that decision. An N.L.R.B. Regional Director may be bound by N.L.R.B. precedent. BOPA and the Montana judiciary are not bound by N.L.R.A. administrative and judicial precedent, although such precedent can be useful in the absence of Montana precedent when the two bodies of labor law are sufficiently congruent to make the federal precedent instructive, or in some instances persuasive. *Great Falls v. Young* (1984), 211 Mont. 13, 686 P.2d 185, 187. Even if *Brown University* were not now coming under careful scrutiny, for reasons which could be pertinent in this present case, the reality is that the N.L.R.A. does not address GAs at public schools, while the laws of this state and other states do. State law from other jurisdictions is potentially more useful here, since the N.L.R.B. does not address collective bargaining between public employees and their public universities.

On the other hand, BOPA and the Montana courts have regularly applied N.L.R.A. precedent to questions arising under the Montana public employee collective bargaining law. For all of the reasons discussed herein, BOPA has the opportunity, in this case of first impression, to decide whether to adhere to N.L.R.A. precedent until it changes or until the Montana legislature expressly manifests an intent that GAs be included in the definition of “public employee.” The Hearing Officer recommends departure from N.L.R.A. precedent and inclusion of GAs as public employees for collective bargaining purposes.

A.2. GAs Have Collective Bargaining Rights Under Some States’ Laws.

GEO has presented evidence that actual CBAs including public university GAs as members of units do exist in a number of states. Consideration of the breadth of the definition of “public employee” under Montana Public Employee Collective Bargaining law is certainly proper here, and comparing Montana law to that of states in which public school GAs can collectively bargain is of more potential value than simple reliance upon *Brown University*, even if it survives current scrutiny.

There are states in which, according to the evidence GEO submitted, public university GAs have collective bargaining rights. The question is whether there is any law on that issue, as opposed to existing CBAs between GA representatives and the public universities that employ the GAs, approved by the governing state boards. If the mere fact of such CBAs stands alone, it is not authority for the proposition that the Montana Board of Personnel Appeals must or should recognize such bargaining rights, outside of instances in which employing schools and their graduate students have agreed to such rights. Obviously, MSU has not agreed that GEO members have such rights, so persuasive or at least informative legal authority from other

jurisdictions would consist of cases, regulations or statutes conferring or recognizing such rights in circumstances analogous to those arising under current Montana law.

GEO has not provided a single citation to any such authority. GEO has provided evidence, through Melissa Case, that there are such agreements in 13 states – California, Florida, Illinois, Iowa, Kansas, Massachusetts, Michigan, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, and Washington (Exhibit 47). The evidence is simply that those states have CBAs between schools and GAs, not that GAs have any legal entitlement to bargain collectively with a recalcitrant public employer who challenges whether they have such a right.

Going beyond what the parties provided, the Hearing Officer has searched for such authorities in the 13 jurisdictions, in light of the existing legalities in Montana.

The first existing legality is Montana’s definition, for collective bargaining purposes, of “public employee,” which follows:

.....

When used in this chapter, the following definitions apply:

- (9) (a) “Public employee” means:
 - (i) except as provided in subsection (9)(b), a person employed by a public employer in any capacity; and
 - (ii) an individual whose work has ceased as a consequence of or in connection with any unfair labor practice or concerted employee action.
- (b) Public employee does not mean:
 - (i) an elected official;
 - (ii) a person directly appointed by the governor;
 - (iii) a supervisory employee, as defined in subsection (11);
 - (iv) a management official, as defined in subsection (7);
 - (v) a confidential employee, as defined in subsection (3);
 - (vi) a member of any state board or commission who serves the state intermittently;
 - (vii) a school district clerk;
 - (viii) a school administrator;
 - (ix) a registered professional nurse performing service for a health care facility;
 - (x) a professional engineer; or
 - (xi) an engineer intern.

Mont. Code Ann. § 39-31-103, in pertinent part (2010).

This Montana definition of “public employee” includes every person employed by a public employer in any capacity, with only certain specific exclusions, none of which are based upon status as a GRA or GTA at a public university.

Another existing reality is that Montana excludes “student-intern” positions from a number of requirements and benefits applicable to public employees, under parts 1 through 3 and part 10 of Title 2, Chapter 18, “State Employee Classification, Compensation and Benefits.” Mont. Code Ann. § 2-18-101(24). A “student-intern” is a person accepted in or currently enrolled in a school, college or university and hired by the agency as a student-intern. These exclusions are nullified for some of the requirements and benefits if covered by CBAs addressing the requirements and benefits. *See, e.g.*, Mont. Code Ann. § 2-18-102(1). The same exclusion of “student-intern” positions appears in Title 39, Chapter 30, “Persons with Disabilities Public Employment Preference,” Mont. Code Ann. § 39-30-103(5)(h).

These exclusions do not change the very broad definition of “public employee” for collective bargaining purposes. They do demonstrate that the Montana Legislature knows very well how to exclude particular categories of student employees from various statutory rights and privileges extended to other employees.

Another existing reality is that Montana Unemployment Insurance law excludes from “employment” work done for money in the employ of a student’s school or university, as well as work done by the spouse of a student if the spouse is advised, at the time of hire, that (1) the spouse’s employment is provided under a program to provide financial assistance to the student by the school or university and (2) the employment is not covered by any program of unemployment insurance. Mont. Code Ann. § 39-51-204(1)(t). Likewise, it is not “employment” for UI law when a student in a full-time program taken for credit at an non-profit or public school or university that combines academic instruction with work experience works for an outside employer as part of the student’s academic program and the school has certified that fact to the employer. Mont. Code Ann. § 39-51-201(1)(u).

This also is not directly pertinent to the collective bargaining question, but it does again show that the Montana Legislature is entirely competent to include and exclude various classes of student employees from benefits or rights available to other employees (or even other classes of student employees). Our Legislature can and has defined particular categories of student employees as public employees for some purposes, while excluding those categories of students from the definition of “public employees” for other purposes. It has not enacted any specific provision excluding GAs from the general definition of “public employee.”

Another existing reality is that GTAs are covered under Montana’s workers’ compensation/occupational disease laws, entitled to the benefits due thereunder when

suffering from either a work related injury or occupational disease, and barred from suing their employer/school for damages resulting from the same injury or disease, even if injurious exposure was only partially while working as a GTA and also was partially while pursuing graduate studies. *Torres v. State* (1995), 273 Mont. 83, 902 P.2d 999, 1002-3. In this context, under Montana law, the status of the student as an employee has greater legal weight than the status of the student as a student.

The question raised by this current case does not appear to have come up before in this state, since the parties have cited no Montana authority on point. Thus, the existing legal reality is that GAs in public universities in Montana have never been ruled to be public employees for collective bargaining purposes, because the question has not previously been presented.

With those existing realities in mind, here are snapshots, at particular times in particular other jurisdictions, showing what legal bases have confirmed that GAs have public employee collective bargaining under various laws.

California has conferred collective bargaining rights upon students at certain campuses of public universities within the state, when those students are employed by the university at which they study and either (a) the services they provide are unrelated to their educational objectives, or (b) their educational objectives are subordinate to the services they perform and coverage under California collective bargaining law would further that law's purposes. Cal. Gov. Code §3562(e) (2011). There is no statute in Montana expressly conferring collective bargaining rights upon a defined class of student workers under specified conditions. Of course, there is no general exclusion of student workers from collective bargaining rights, so it makes sense there would be no statute restoring the collective bargaining rights of certain student workers.

Florida Stat. § 447.203(3)(I) (2011) excludes from the definition of public employee (defined generally in subpart (3) as "any person employed by a public employer") "those persons enrolled as undergraduate students in a state university who perform part-time work for the state university." Some years ago, that subsection also excluded from the definition of public employee "those persons enrolled as graduate students in the State University System who are employed as graduate assistants" A Florida district court ruled that exclusion was unconstitutional and ordered the "graduate assistants" provision struck from the law. *United Faculty of Florida, Loc. 1847 v. Bd. of Regents* (1982), 417 423 So. 2d 1055; ***clarified to apply to all five kinds of GAs***, 423 So. 2d 429. The original decision was never appealed. At some later date, the legislature apparently amended the law to comply with the 1982 ruling. In Montana, there is no comparable statute excluding undergraduate and/or graduate students who are also employed in the Montana university system from the definition of "public employees." With no such exclusion,

it is unremarkable that there is no case law in Montana addressing whether such an exclusion is unconstitutional in part or whole.

In Illinois, the court interpreted Illinois Educational Labor Relations Act, 115 Ill. Comp. Stat. 5/1 *et seq.* (West 1998), to exclude GAs from the definition of public educational employees only when their work was significantly related to their academic roles, ruling that GAs were public educational employees with rights to bargain collectively when their work was not significantly related to their academic roles. *GEO v. Illinois Ed. L.R.B.* (2000), 733 N.E.2d 759, 764. In Montana, there is no comparable statutory exclusion. With no such exclusion, there are no comparable cases interpreting the exclusion to apply only to graduate students whose work for their schools is significantly related to their academic roles (*i.e.*, their graduate studies).

Iowa has included GAs in the category of public employees entitled to bargain collectively by making them an exception to the statutory exclusion of students working part-time as public employees from public employees' collective bargaining rights:

The following public employees shall be excluded from the provisions of this chapter:

.....

4. Students working as part-time public employees twenty hours per week or less, except graduate or other postgraduate students in preparation for a profession who are engaged in academically related employment as a teaching, research, or service assistant. [Emphasis added.]

Iowa Ann. Statutes, Title 1, Subtitle 8, Chapter 20, Public Employment Relations (Collective Bargaining), §§20 and 20.4 (2011). Montana has no express statutory exclusion of students who work part-time for public employers from the definition of "public employees" for purposes of collective bargaining rights, from which GAs could be exempted.

In 1973, the Michigan Supreme Court reversed the decision of the Michigan Court of Appeals and affirmed the decision of appellant Michigan Employment Relations Commission that interns, residents, and postdoctoral fellows were employees of the University of Michigan for collective bargaining purposes. *Regents of the University of Michigan V. Employment Relations Commission*, 389 Mich. 96, 204 N.W.2d 218, 226 (1973). As far as the Hearing Officer can ascertain, this is still the law of Michigan today.

In Oregon, students with graduate teaching fellowships that required fulfillment of contractual teaching obligations received, in return, monthly salaries,

health insurance benefits, Graduate Teaching Fellows Federation membership opportunities, a tuition waiver and workers' compensation insurance like all other University of Oregon employees. The Oregon Tax Court ruled that such fellowships for GTAs are compensatory in nature, and therefore under Oregon law, which mirrors federal law, the compensatory payments under the fellowships are taxable personal income to the GTAs. *Herzog v. DOR* (2010), TC 4935, 2010 Ore. Tax LEXIS 230.

It is possible that such cases followed statutes or more directly applicable cases, but the Hearing Officer has found neither. There appear to be no comparable tax cases in Montana.

In 2002, the Washington State Legislature adopted what became RCW 41.56.203, "University of Washington-certain Employees Enrolled in Academic Programs-scope of Collective Bargaining." By that enactment, Washington approved collective bargaining for GAs (as well as others) employed by the University of Washington. It appears that the law of Washington has not since changed.

In a Kansas law review note written about undergraduate research and intellectual property rights, the conclusory statement appears, "In the cases where such written agreements are not used [regarding the respective rights of all parties to any research done by GAs], the tendency of the law has, in many cases, been to treat such graduate students as employees and treat them no differently from faculty or professional staff." "Undergraduate Research & Intellectual Property Rights," 6 Kansas J. L. & Pub. Policy 34, 35(Sum. / Fall 1997). The footnote to that statement comments that "There has not been much litigation on the employee status of graduate students for intellectual property purposes. In labor cases, the trend would seem to be towards treating graduate students as employees. For instance, Kansas now treats graduate students as employees for collective bargaining purposes [no citation]." *Id.*, n. 15. Notwithstanding the law review note, the Hearing Officer has not found any statute, rule or case that expressly requires Kansas to treat GAs as employees for collective bargaining purposes.

Likewise, the Hearing Officer has not found any specific statute or case that requires public universities in Massachusetts, New Jersey, Pennsylvania, and Rhode Island, to bargain collectively with their GAs. Melissa Case's evidence that at least some public universities in those states collectively bargain with their GAs remains uncontroverted, but there is no authority cited or found that there is any kind of legal imperative for such bargaining in those states.

A.3. Lack of Law Addressing the Question in Other States.

It is difficult to draw any conclusions from the Hearing Officer's inability to find any law, in a quick sampling from among the other 37 states, addressing whether GAs in public universities are employees for collective bargaining purposes. The

parties did not cite any useful cases. Given the broad net that legal research in either LEXIS or WestLaw allows a researcher to throw, the lack of law certainly suggests that for a majority of states, GAs at public universities may not have public employee bargaining rights, simply because no statute has yet been construed in those jurisdictions to expressly confer such rights upon them, perhaps only because the question has not yet been litigated.

A.4. BOPA Should Apply Montana Law According to Its Express Content, Vindicating Collective Bargaining Rights for GAs within their Employment.

The law regarding statutory construction by Montana courts offers a reasonable guide for construing the definition of “public employee.” A statute is construed by ascertaining and declaring the meaning of the statute – what is actually contained in the statute – without inserting what is not there or omitting what is there. Mont. Code Ann. § 1-2-101. Where the plain meaning of the statute is clear from the statute itself, the job of statutory construction is done and the plain meaning is used, without reference to legislative history or other outside matter which would only be appropriate when the language of statute itself is ambiguous. *Glendive Medical Center, Inc. v. D.P.H.H.S.*, ¶15, 2002 MT 131, 310 Mont. 156, 49 P3d 560. In addition, a statute with several provisions or particulars must be construed, if possible, to give effect to all of them. Mont. Code Ann. § 1-2-101.

The definition of “public employee” (quoted above at pages 11-12) does not expressly exclude GAs, and it does have several express exclusions. Thus, the plain meaning of the statute is to include GAs, assuring for them the collective bargaining rights appurtenant to that status. Consistent with that construction of the statute, GAs, for teaching or research purposes, are public employees, entitled to bargain over the terms and conditions of their employment.

B. In the Face of the Public Policy in Favor of Collective Bargaining for Public Employees, the Other Specific Defenses Interposed by MSU Fail.

In addition to its primary reliance upon *Brown University*, MSU also interposed some more specific bases for determining that GAs are not public employees for collective bargaining purposes, or that the proposed bargaining unit is not appropriate. If, as recommended herein, BOPA finds that Montana collective bargaining law is properly construed to include GAs as public employees, these defenses fail. If BOPA construes our law to exclude GAs from public employees, those defenses are simply unnecessary.

B1. The Provision in the Graduate Assistantship Agreement Form Specifying that It Is Not a Contract of Employment Is Void as Against Public Policy.

The Montana Supreme Court described the factors by which a contract becomes a contract of adhesion:

When determining whether a contract is one of adhesion, we focus on the nature of the contracting process, rather than the parties' relative sizes, resources, or bargaining power. Hence, we have held that contracts of adhesion "arise when a standardized form of agreement, usually drafted by the party having superior bargaining power, is presented to a party, whose choice is either to accept or reject the contract without the opportunity to negotiate its terms." *Passage*, 223 Mont. *at* 66, 727 P.2d *at* 1301.³ Although the doctrine of adhesion itself does not constitute a sufficient basis for invalidating a contract, the adhesive nature of a contract, or contract provision, is generally noted to support other contract formation defenses such as unconscionability or public policy. See *Cohen v. Wedbush, Noble, Cooke, Inc.* (9th Cir. 1988), 841 F.2d 282, 286; *Passage*, 223 Mont. *at* 66, 727 P.2d *at* 1301-02.

Iwen v. U.S. West Direct, ¶128, 1999 MT 63, 293 Mont. 512, 977 P.2d 989.⁴

The contract provision that the Graduate Assistantship Agreement Form is not a contract of employment is in a standardized form of agreement, drafted by MSU, the party having substantially superior bargaining power, and presented to prospective GAs, who have the choice of accepting it and obtaining their GAs, or rejecting it and having to find other financing for their graduate studies. It is manifestly an adhesive contract provision.

Since the inclusion of GAs in the definition of "public employee" demonstrates that the public policy of this state is that these persons have the right to bargain collectively, an adhesive contract provision defining them out of "employment" and thereby taking away those rights is contrary to public policy. A contract provision contrary to public policy is void even though that portion of the contract that has lawful distinct objects is valid. Mont. Code Ann. § 28-2-604. Although the statement that the Graduate Assistantship Agreement Form is not a contract of

³ *Passage v. Prudential-Bache Securities, Inc.* (1986), 223 Mont. 60, 727 P.2d 1298.

⁴ *Iwen* involved a mandatory arbitration clause, requiring that disputes be resolved by arbitration rather than adjudication. However, the decision is very clear that it is based upon generally applicable principles of Montana contract law. *Iwen at* ¶¶24-26. Thus, *Iwen* is appropriate authority to apply to the contract provision that the Graduate Assistantship Agreement Form is not a contract of employment.

employment is void, the rest of the form, including the requirements of maintaining student status, grade point average, and progress toward a graduate degree, are valid.

B2. The Right to Bargain Collectively about Employment Issues Does Not Extend to a Right to Bargain Collectively about Educational Issues.

There is a distinction between employment issues (about which public employees can bargain collectively) and educational issues (which are not subject to collective bargaining rights). This is an important distinction for GAs as well as their universities. In some other states, the distinction is expressly made in existing CBAs involving GAs, some administrative and judicial decisions about GA collective bargaining, and a few statutes. *Brown University* and perhaps also the “more than 25 years of Board precedent prior case law from the N.L.R.B.” that it resurrected rested in part upon concerns about interference with the educational relationships between GAs and their universities, generally and specifically with regard to their thesis advisers and other faculty members participating in their educations.

When GAs at public universities have collective bargaining rights, the distinction between terms and conditions of employment and terms and conditions upon matriculation may be vital.⁵ Collective bargaining rights properly apply only to the GAs’ employment relationships with the schools, not to their educational relationships. The Hearing Officer has no credible evidence in this record, and there is no anecdotal evidence referenced in the various decisions, rules and statutes, that collective bargaining between GAs and their public universities, in states that allow or require it, has interfered with such educational relationships. Thus, MSU’s arguments that recognizing GAs’ right collectively to bargain would be extremely harmful to MSU’s graduate studies programs was not proved.

To the extent it may be relevant here, the Hearing Officer recommends that BOPA expressly limit the collective bargaining rights of GAs to those involving their terms and conditions of employment.

B3. The GTAs and GRAs at MSU Have a Community of Interest.

The common conditions under which the various GTAs and GRAs work demonstrate their community of interest as employees. Although their precise tasks and studies vary according to their academic disciplines, their general employment

⁵ One of the three justifications for requiring a full record before undertaking review of the propriety of following *Brown University* (N.Y.U. 2010) was that such considerations might be entirely outside the jurisdiction of the N.L.R.B. Since that is another issue that has not been decided under Montana public employee collective bargaining law, the Hearing Officer is briefly addressing this consideration.

descriptions involve very similar kinds of tasks within their separate disciplines. They also have in common very long hours of graduate study as well as often very long hours of GA work. The relative brevity of their individual sojourns in graduate study and work is another common feature that established their community of interest.

It is also true that GRAs will do work directed by their faculty members to meet the objectives of each GRA's funding grant and work that each GRA will use in his or her specific course of study. Similarly, GTAs will typically teach undergraduate courses and/or supervise labs both within and outside of the scope of their own specific courses of study. It is difficult to parse when the GA is working only on the grant objectives (with no educational benefit to the student) and when the grant objectives align with the student's research that the GA's work relates directly to both. These factors are decisive in determining whether GAs are public employees, but the same factors demonstrate the community of interest the GTAs and GRAs have.

Unquestionably, without the faculty and the university, the GAs (as well as the rest of the graduate students) would not have the support necessary for completion of their graduate degrees. For many of the GAs, without the grants that pay their GA stipends (wages), they also would not have the financial support necessary for completion of their graduate degrees, and would be forced to leave school because of the increased debt load required to complete those degrees. This further establishes their community of interest. And although GAs do not have all advantages and benefits available of full-time permanent university employees, such differences are typical for temporary and/or part-time employees. Those common differences also establish the community of interest among the GAs.

C. In its Role as the Final Administrative Arbiter of Montana Labor Law, BOPA May Choose to Construe Montana Public Employee Collective Bargaining Law to Exclude GAs.

In submitting this proposed decision for BOPA's consideration, the Hearing Officer notes that BOPA may, in its role as the final administrative authority on Montana public employee collective bargaining, construe the law differently should objections be filed to this proposed decision. For one example, if BOPA construes the definition of "a public employee" to exclude GAs, then the adhesive contractual provision that the Graduate Assistantship Agreement Form is not a contract of employment would not be contrary to public policy. Since that provision could not be a surprise to the signing GAs, being explicit and unconcealed, it would not be otherwise illegal. Thus, it would not be subject to other contract formation defenses and would be effective.

This case does not present any easy questions. As already noted, there are also numerous public policy issues involved in this controversy, some of which are outside of the usual scope of BOPA's authority over public employee collective bargaining cases. Because of the dual nature of the relationship between the GAs and the professors who direct both their educational and their employment activities, there are educational issues that are not typically before BOPA. There could also be public policy considerations about increased costs for MSU should its GAs be able to bargain collectively and thereby either reduce the amount of work they are expected to do for their stipends or increase the amount of the stipends.⁶

These kinds of possible public policy considerations could be what the N.L.R.B. was referring to when it noted in *N.Y.U. 2010* that the petitioner in that case had argued that the *Brown University* decision was based on policy considerations extrinsic to the labor law at issue and therefore not properly considered in determining whether the GAs were employees. Along the same line of reasoning, this Hearing Officer cannot see how such considerations are within the reach of BOPA in deciding Montana labor law issues. Therefore, the Hearing Officer has recommended that BOPA order an election be held, based upon the labor law that BOPA does interpret.

D. Timing of the Election and Identification of Participants.

GAs are not career university employees, a fact important for differential treatment for tax and some other purposes. While this does not mandate excluding GAs from public employee status for collective bargaining purposes, it does raise a question about appropriate timing of the election.

The Hearing Officer recommends that BOPA follow its standard election practices, with one exception. That exception is to identify MSU's current GAs (as of this Fall's term) as appropriate votes in the election, rather than utilize only GAs as of the time of the petition, many of whom may no longer be GAs at MSU. In addition to challenging other parts of this decision, the parties can object to this recommendation and file authority to the contrary with BOPA in support of their positions.

V. CONCLUSIONS OF LAW

1. The Board of Personnel Appeals has jurisdiction to approve a bargaining unit for Montana State University graduate teaching and research assistants. Mont. Code Ann. §§ 39-31-202 and 207.

⁶ This is speculation by the Hearing Officer. There appears to be an undertone of concern about precisely this result, but the evidence really does not include it.

2. Montana State University graduate teaching and research assistants are public employees with collective bargaining rights with regard to the terms and conditions of their employment. Mont. Code Ann. § 39-31-103(9).

3. The unit proposed by the Graduate Employee Organization, MEA-MFT, of all Montana State University graduate teaching and research assistants, excluding professional engineers, engineer interns in training, supervisory, management and administrative employees, full-time and adjunct faculty members and classified employees, is an appropriate unit. Mont. Code Ann. § 39-31-202.

4. An election as to whether BOPA should certify that collective bargaining unit, with the Graduate Employee Organization, MEA-MFT, as its exclusive bargaining representation, should be conducted as soon as possible. The eligible voters should be those unit members employed by MSU as graduate teaching assistants and graduate research assistants at the commencement of the 2011-2012 school year, with the exclusions set forth in Conclusion of Law No. 3, herein. Mont. Code Ann. § 39-31-208.

VI. RECOMMENDED ORDER

An election by secret ballot shall be conducted as soon as possible, in accordance with the rules and regulations of the Board of Personnel Appeals, among the employees in the proposed bargaining unit. The bargaining unit shall consist of all Montana State University graduate teaching assistants and graduate research assistants, as of the commencement of the 2011-2012 school year. Professional engineers, engineer interns in training, supervisory, management and administrative employees, full-time and adjunct faculty members and classified employees are excluded from the bargaining unit, either because they are outside of the definition of public employees or do not share the community of interest of the unit members.

DATED this 27th day of July, 2011.

BOARD OF PERSONNEL APPEALS

By: /s/ TERRY SPEAR
Terry Spear
Hearing Officer

NOTICE: Pursuant to Admin. R. Mont. 24.26.215, the above RECOMMENDED ORDER shall become the Final Order of this Board unless written exceptions are postmarked no later than August 19, 2011. This time period includes the 20 days provided for in Admin. R. Mont. 24.26.215, and the additional 3 days mandated by Rule 6(e), M.R.Civ.P., as service of this Order is by mail.

The notice of appeal shall consist of a written appeal of the decision of the hearing officer which sets forth the specific errors of the hearing officer and the issues to be raised on appeal. Notice of appeal must be mailed to:

Board of Personnel Appeals
Department of Labor and Industry
P.O. Box 6518
Helena, MT 59624-6518