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NLRB Ruling a "First Down" for Northwestern University Scholarship Football Players, But the Game is Still Far From Over

By Vincent T. Norwillo

To many legal observers, students who are compensated with grant-in-aid scholarships to play sports in college are not employees. This has been the state of the law for decades. However, a recent decision from the National Labor Relations Board ("NLRB") may mark a significant, if not historic, change from that position, as according to the NLRB's director in Chicago, Peter Sung Ohr, at least college athletes at big-time private universities are "employees" under the National Labor Relations Act ("NLRA").

In *Northwestern University v. College Athletes Players Association (CAPA)*, Case 13-RC-121359, Director Ohr found that Northwestern University scholarship football players "fall squarely" within the NLRA's broad definition of "employees" eligible to unionize under federal labor law. Applying the common law "right to control" test, Director Ohr based his conclusion upon the following:

- The scholarship football players perform a service (playing football) for compensation (a scholarship);
- The scholarship players' commitments to play football in exchange for the scholarship constitutes a contract for hire; and

- The scholarship players are under significant control of the university for the entire year, including in-season and out-of-season workouts, restrictions on and control of their entire personal lives, travel requirements and obligations, and detailed regulations players must follow at the risk of losing their scholarship.

In contrast, Director Ohr held that "walk-ons do not meet the definition of 'employee' for the fundamental reason that they do not receive compensation for the athletic services that they perform." He also noted that walk-on players appeared to have more freedom from school control than did grant-in-aid scholarship players. Accordingly, he ordered that an election be conducted among all football players receiving grant-in-aid scholarships who have not exhausted their playing eligibility for the university. Somewhat ironically, CAPA, the union that brought the case before the NLRB, is seeking, among other demands, the creation of an educational trust fund to help former players re-enroll as students and actually graduate.

Director Ohr's decision could have a huge impact on both private- and public-sector educational institutions. If upheld, it is possible many private university scholarship athletes, at least in revenue-generating sports, would have the right to bargain collectively with school administrators over their "wages, hours, and other terms and conditions of employment." Public university athletes may similarly attempt to organize in states where public employees in the educational sector are permitted to organize.

Right now, one of the few certainties is that Director Ohr will not have the final word on whether college athletes are employees of their university. As expected, Northwestern University has already announced its intent to appeal to the full five-member NLRB in Washington, D.C. Given the high-profile nature of the case, the NLRB's ruling on the appeal, as well as any subsequent appeal to federal court, is certain to attract intense media attention. GSH will provide further updates on this case as warranted.

In the interim, school administrators are best advised to consider the enforcement of the academic standards required of "student-athletes" to secure and maintain their scholarships. Indeed, one of the lynchpins in his decision was Director Ohr's finding that the school's scholarship football players were essentially athletes first and students a distant second. In this regard, Director Ohr wrote: "The record makes clear that [Northwestern's] scholarship players are identified and recruited in the first instance because of their football prowess and not because of their academic achievement in high school."

This finding was one of the several findings that Director Ohr

used to distinguish this case from the controlling precedent of *Brown University*, 342 NLRB 483 (2004), in which the NLRB found that Brown University graduate students in paid positions as teaching and research assistants were not "employees" because, among other reasons, they were required to achieve specific academic performance levels to qualify for and maintain these paid positions. Accordingly, the Board found that the graduate assistants continued to function "primarily as students" and therefore were not eligible for collective bargaining.

Accordingly, regardless of the outcome of the *Northwestern University* decision, administrators may be able to better position themselves against similar arguments as those asserted here by enforcing the existing requirements that athletes must remain students in good standing to receive scholarship compensation for their athletic efforts. Indeed, the NCAA's existing bylaws establish, in exhausting detail, that a student must maintain sufficient academic standing and progression towards a degree in order to practice or compete, or to even receive athletic-based financial aid. However, as shown by the perennial success of infamous "one and done" programs in men's college basketball and the scandals that arise over the class work performed by athletes at some successful sports programs, Director Ohr's skepticism on compliance is understandable. Nonetheless, in the aftermath of his decision, administrators may have no choice but to reinforce "student" as a significant and required component of their "student athlete" definition. Otherwise, picket signs and strike notices may someday replace pool entries and mock drafts as annual rites of spring for the American sports fan.


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