

NATIONAL CENTER **for the Study of Collective** **Bargaining in Higher** **Education and the** **Professions** **HUNTER** The City University of New York

E-Note

<http://www.hunter.cuny.edu/ncscbhep>

November 2014

The National Center E-Note is an electronic newsletter providing news, updates and analysis concerning events and issues of interest to our constituency groups.

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Confirmed Panels and Workshops for the National Center's 42nd Annual Conference on April 19-21, 2015 in New York City

The National Center's 42nd Annual Conference will take place on April 19-21, 2015 at the CUNY Graduate Center in New York City. The theme of the conference will be *Thinking about Tomorrow: Collective Bargaining and Labor Relations in Higher Education*.

Below are some of the confirmed presentations and panelists for the annual conference. Additional announcements with respect to confirmed conference panels and speakers will be included in upcoming National Center E-Notes and will be posted on our website.

Conference Panels

Academic Freedom and Civility with Risa Lieberwitz, Professor, Cornell ILR, AAUP General Counsel, Tom C. Hogan, Professor, Pennsylvania State University School of Labor and Employment Relations. and moderator Frederick P. Schaffer, CUNY General Counsel and Sr. Vice Chancellor for Legal Affairs.

Reporters Roundtable on Covering Labor-Management Issues in Higher Education with Steven Greenhouse, New York Times, Claudio Sanchez, National Public Radio, Peter Schmidt, Chronicle of Higher Education, and Colleen Flaherty, Inside Higher Education.

The History of Collective Bargaining in Higher Education with Ellen Schrecker, Professor of History Emeritus, Yeshiva University, Derryn W. Moten, Professor of Humanities, Alabama State University, Ernst Benjamin, former AAUP General Secretary, and moderator Donna Haverty-Stacke, Associate Professor, Hunter College, CUNY.

The Impact of Collective Bargaining and Local Appropriations on Faculty Salaries and Benefits at U.S. Community Colleges with Stephen Katsinas, Director

and Professor, University of Alabama Education Policy Center, and moderator DeWayne Sheaffer, Long Beach City College and Member at Large, NEA National Council of Higher Education.

University of Oregon: Bargaining and Implementing a First Contract

with Doug Blandy, Senior Vice Provost for Academic Affairs, Jane Gordon, Senior Project Director, Academic Affairs, Bill Brady, Senior Director, Employee and Labor Relations, Deborah Olson, United Academics Executive Vice President, and David Cecil, United Academics Executive Director.

The Ins and Outs of Faculty Salary Structures and Wage Equity

with Michael N. O'Malley, Senior Vice President, Higher Education Compensation Practice Leader, Sibson Consulting, Pierre Joanis, Associate Vice President for Human Resources, Bucknell University, and John W. Curtis, Director, Department of Research on the Discipline and Profession, American Sociological Association.

Dues and Don'ts after Harris v. Quinn

with Catherine Fisk, Chancellor's Professor of Law, University of California, Irvine, David Strom, General Counsel, AFT, and Richard K. Zuckerman, Lamb & Barnosky, LLP.

Catholic Colleges and Universities: Collective Bargaining and NLRB

Jurisdiction with Nicholas P. Cafardi, Dean Emeritus and Professor of Law, School of Law, Duquesne University, Maryann Parker, Associate General Counsel, SEIU, and Cayton Sinyai, Director, Catholic Employer Project.

Workshops

Effective Contract Administration for Administrators and Labor Representatives

with Debra Gold, Labor Relations Specialist, NYSUT, and Michael J. Lebowich, Proskauer Rose LLP.

Best Practices and Policies on Bullying and Harassment

with Fran A Sepler, Sepler & Associates, and Lesley Burke-O'Flynn, Staff Representative, Federation of Post-Secondary Educators of BC.

Mindfulness and Stress Management for Negotiations and Labor Relations

with Victor Goode, Associate Professor, CUNY School of Law.

Locations, Events and Hotels for 42nd Annual Conference

Conference Locations and Events:

Sunday, April 19, 2015, CUNY Graduate Center: 365 5th Avenue, NY, NY, 10016 (reception, research panels and workshops)

Sunday, April 19, 2015, Heartland Brewery-Empire State Building: 350 5th Avenue, New York, NY 10118 (buffet dinner, open bar)

Monday-Tuesday, April 20-21, 2015, CUNY Graduate Center: 365 5th Avenue, NY,

NY, 10016 (continental breakfast, panels, lunch and workshops)

Please note the new locations for the Sunday, April 19th events are the CUNY Graduate Center and the Heartland Brewery.

Conference Hotels:

Affinia Dumont: 150 East 34th Street, NY, NY, 10016
Affinia Shelburne: 303 Lexington Avenue, NY, NY, 10016

Room Rate: \$289/night

First Contracts for Adjunct Faculty at Georgetown University and Tufts University to be Examined at the 2015 Annual Conference

In the past month, first contracts for adjunct faculty have been ratified at two major private sector institutions of higher education: Georgetown University and Tufts University. There will be joint panel presentations by university and SEIU representatives at the 2015 annual conference relating to these new collective bargaining agreements. The details about each panel will be announced in the near future.

2014 Annual Conference Proceedings, Webcasts and Podcasts Available

We have posted on our website the conference proceedings from the 41st Annual Conference that took place earlier this year.

We thank Eastern Illinois University Vice President for Academic Affairs Jeffrey Cross, Dean Allen Lanham and Institutional Repository Librarian Todd Bruns for their efforts in making the Proceedings of the National Center's 41st Annual Conference available on-line. [Click here for Conference Proceedings.](#)

We have also posted three webcasts and seven podcasts from conference panel discussions. [Click here for Podcasts and Webcasts.](#) The webcasts were produced by Hunter College's Institutional Computing and Information Technology Department with the assistance of Becca Pulliam from Please Repeat the Question Productions. The podcasts were produced by Becca Pulliam from Please Repeat the Question Productions with the assistance of Charlie Spatz.

Free Speech Claim By Adjunct Union Leader Reinstated

The recent First Amendment decision by the United States Court of Appeals for the Seventh Circuit in *Meade v. Moraine Valley Community College* provides important lessons concerning constitutional protections for union activity by adjunct and tenure track faculty and other employees at public sector institutions of higher education. While the decision is procedural in nature, it underscores the direct relevance of First Amendment protections to associational activities on public college and university campuses.

Factual and Procedural Background

Robin Meade was a contingent faculty member at Moraine Valley Community College (Moraine Valley) in Illinois, and the president of the Moraine Valley Adjunct Faculty Organization (MVAFO). In her capacity as MVAFO president, Meade wrote a letter to the League for Innovation in the Community College (LICC) criticizing the treatment of adjunct faculty working for Moraine Valley and its adverse impact on student performance. In her letter, Meade informed LICC that she had refused Moraine Valley's request that she support its reappointment to the LICC board. Two days after sending the letter, Meade received a termination notice citing the content of her letter as the basis for the discharge.

Following her termination, Meade commenced a lawsuit against Moraine Valley alleging that her constitutional rights to free speech and due process had been violated. In response, Moraine Valley successfully moved to have the lawsuit dismissed in the lower court on the basis that Meade's letter was unprotected under the First Amendment because it failed to touch upon an issue of public concern. [Click here for District Court decision.](#)

On October 30, 2015, the United States Court of Appeals for the Seventh Circuit reversed the lower court's decision finding that Meade's conduct, as alleged in her complaint, was protected activity under the First Amendment. In addition, it reinstated her claim that the termination violated her constitutional right to due process. As a result, Meade's lawsuit was reinstated and remanded to the lower court. [Click here for Court of Appeals' decision.](#)

Legal Background and Analysis

A body of judicial precedent over the past half-century has established that the First Amendment protects employees at public colleges and universities, as well as other public sector workplaces, against retaliation for engaging in speech, petitioning and associational activities. Among the accepted legal precepts is recognition of the special status of academic freedom under the First Amendment. These set of constitutional protections establish a floor of rights that can be supplemented and enhanced by tenure, state collective bargaining statutes and other laws, and negotiated terms of collective bargaining agreements.

1. The Public Concern Test

There are limits to the scope of First Amendment protections recognized by Supreme Court decisions. Among those limitations is a doctrine that finds that speech or a petition by a public employee that does not touch upon an issue of "public concern" is unprotected under the First Amendment. Under the public concern test, an individual employee's workplace complaint or petition concerning her or his own particular workplace conditions will not be constitutionally protected unless the content and context of the activity demonstrates that it relates to a larger issue of social or political import. [Click here for article on First Amendment protections in public employment.](#)

As the Supreme Court stated in 1983,

"[w]e hold only that when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior."

Ten years ago, the Supreme Court sought to reformulate the test for public concern as being "something that is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public at the time of publication." Consistent with that reformulation, national media coverage about the treatment of adjuncts at colleges and universities was referenced in *Meade v. Moraine Valley Community College* as a basis for concluding that Meade's letter discussed matters of public concern. Although the public concern test remains amorphous, and subject to differing applications based on the facts in each case, the decision demonstrates that prior news coverage concerning a particular subject matter is more likely to lead to a judicial determination that communicative conduct by a public employee about that topic is protected under the First Amendment.

2. Collective Conduct v. Individualism Regarding Workplace Issues

The decision in *Meade v. Moraine Valley Community College* highlights an important legal reality: collective activities concerning public sector employment conditions are more likely to be found constitutionally protected in federal court than an individual personal complaint about a workplace issue that is not directly related to academic freedom. The decision also reinforces the importance of discernment prior to communicating as a pragmatic means for insuring First Amendment protections.

In concluding that Meade's letter satisfied the public concern standard, the appellate court referenced the fact that she wrote it in her role as a union leader on behalf of its adjunct faculty members as a group who felt aggrieved by their treatment. In addition, Meade's letter explicitly linked the treatment of the adjunct faculty with student performance, and it did not delineate Meade's own personal experiences or workplace frustrations.

It is well-settled that the First Amendment protects the formation of associations of public employees and the advocacy by those associations on behalf of their members. Similarly, speech concerning pending collective bargaining negotiations has been found to touch upon an issue of public concern. In contrast to the Canadian constitution, however, the constitutional right of free association in the United States has not been interpreted to mandate that a public employer recognize a union and bargain with it. Nevertheless, the First Amendment remains a primary source of law for the protection of associational activities and academic freedom on public campuses in states without an applicable public sector collective bargaining statute. On a practical level, First Amendment doctrines constitute a legal incentive for collective conduct, as opposed to individualistic responses, when it comes to issues emanating from the workplace, particularly for those without tenure or alternative forms of job security protections.

The case of *Meade v. Moraine Valley Community College* will be closely followed as it

proceeds through the courts. The ultimate significance of the case on the rights of faculty at public sector colleges and universities will have to await a final judicial determination concerning the merits of Meade's First Amendment claim.

Tenure Denial Challenge at Morehead State University Rejected

Frieder v. Morehead State University, 2014 U.S. App. LEXIS 20554 (2014)

A federal appellate court recently affirmed the grant of summary judgment dismissing a lawsuit by a former tenure-track assistant professor of art history at Morehead State University that sought to challenge the university's decision to deny him tenure. According to the decision, the professor "excelled in professional achievement and service but had difficult teaching" as demonstrated by evaluations during his probation. The court rejected his First Amendment claim that he was retaliated against because of his "idiosyncratic teaching methods" of extending his middle finger during class. It also rejected his discrimination claim premised on him being diagnosed with bipolar disorder with the court concluding that there was no evidence that the individuals involved in the tenure decision were aware of the diagnosis or that they treated him as someone with a disability.

Termination of Tenured University of Arkansas Professor Upheld

Tarasenko v. University of Arkansas, 2014 U.S. Dist. LEXIS 151415 (2014)

A lawsuit by a terminated tenured biology professor at the University of Arkansas was recently dismissed by a federal judge who concluded that the complaint failed to allege sufficient facts to state a claim upon which relief can be granted. In her lawsuit, the professor challenged the termination on various grounds including alleged constitutional violations of her substantive and procedural due process rights and her right to engage in free speech. The federal complaint alleged that the termination took place following the university president's rejection of the faculty review committee's findings that the university had failed to present sufficient cause for dismissal and had deprived the professor of her due process rights.

The federal judge dismissed the substantive due process claim on the grounds that the professor did not allege facts in her pleading, which if proven, would demonstrate that the termination was malicious, arbitrary, or for reasons trivial, unrelated to the education process or unsupported by fact. Instead, the complaint alleged that the professor was discharged based upon a student complaint that the professor had made discriminatory and threatening remarks. In dismissing the procedural due process claim, the judge found that the professor had received notice and an opportunity to be heard prior to her termination, and the alleged failure of the university to follow its own investigatory procedures did not rise to a constitutional violation. Finally, the First Amendment retaliation claim was dismissed based upon the judge's conclusion that the professor's internal report concerning alleged academic fraud by a student did not touch upon an issue of public concern.

Facebook Posts Proposing Insubordination Held Unprotected by NLRB

Richmond District Neighborhood Center, 361 NLRB No. 74 (2014)

On October 28, 2014, the National Labor Relations Board (NLRB) issued a decision finding that social media posts by two at-will private sector employees working at a San Francisco high school afterschool program were unprotected under the National Labor Relations Act (NLRA) because they were objectively egregious. Specifically, the NLRB found the posts unprotected because they contained "pervasive advocacy of insubordination" including describing "a wide variety of planned insubordination in specific detail."

Section 7 of the NLRA grants private sector employees a statutory right of association to act together to improve their terms and conditions of employment. In prior rulings, the NLRB has made it clear that the statutory right of association includes the right of employees, whether unionized or not, to use Facebook and other social media to communicate with each other and with the public for that purpose. At the same time, however, online employee conduct found to be objectively egregious will be found to be outside of NLRA protections.

California PERB Dismisses ULP against Los Angeles Comm. Coll.

Los Angeles Community College District, Case No. LA-CE-5871-E

The California Public Employment Relations Board (PERB) has affirmed the dismissal of an unfair labor practice complaint filed by a former Los Angeles Community College tenured faculty member Constantino Gabriele on the ground that the charge failed to allege sufficient facts to state a *prima facie* case of a violation of the California Educational Employment Relations Act (EERA).

As a part of a disciplinary settlement, Gabriele agreed to remain on paid administrative leave until he retired at age 55, when he would be eligible for retiree health benefits. His ULP was dismissed by California PERB because he failed to allege that he engaged in any protected activity under EERA prior to the settlement of the disciplinary proceeding.

NH Comm. Coll. Faculty Vote to be Represented in New Fragmented Unit

Community College System of New Hampshire, Case No. E-0165-1

As we reported in the October 2014 E-Note, the New Hampshire Public Employee Labor Relations Board ordered a mail-ballot election to be held among the faculty of the Community College System of New Hampshire (CCSNH) to determine whether they wished to be fragmented from an existing bargaining unit with professional and operating staff and placed into their own new separate unit. The election stemmed from a representation petition filed by the incumbent union, State Employees' Association of New Hampshire, SEIU Local 1984 (SEA) seeking to fragment the CCSNH faculty into a separate unit.

On October 2, 2014, the tally of the mail ballots took place. Among the 299 eligible voters, 202 voted in favor of representation of the fragmented unit by SEA, and 4

voted against.

Washington University Adjunct Faculty File Petition to Unionize

Washington University, Case No. 14-RC-139451

A representation petition has been filed by SEIU seeking to become the exclusive representative of the following bargaining unit at Washington University:

Including: All non-tenured and non-tenure-eligible faculty employed by Washington University who teach at least one credit-bearing course, but less than 12 credit hours per semester, in a degree-granting program (including hybrid and blended courses) at the Main campus, 1 Brookings Drive, St. Louis, MO. An employee working for the University in another capacity who also teaches a course identified above shall not cause that employee to lose status as a bargaining unit member unless expressly excluded in the exclusion listing below.

Excluding: All tenured or tenure-track faculty; Law School faculty; Olin Business School faculty; School of Medicine faculty; deans, provosts, administrators, department chairs, graduate assistants, graduate students, athletic coaches, and faculty who teach only online, only courses away from the Main campus, only courses as a field supervisor, and/or only non-degree granting courses; all other employees, managers, confidential employees, guards and supervisors as defined by the Act.

Boston University Adjuncts File for Unionization

Boston University, Case No. 01 -RC -139754

SEIU has filed a representation petition seeking to represent the following bargaining unit at Boston University:

Including: All graduate and undergraduate faculty (adjuncts, part-time lecturers, lecturers, part-time instructors, or instructors) employed by Boston University at its Massachusetts campuses to teach at least one class in "Center for English Language and Orientation Programs" and/or one credit-bearing course (including hybrid and blended courses) in a degree-granting or prematriculation certificate program, and who are compensated on a per course or per hour basis. An employee working for the University in another capacity who also teaches a class or course identified above and is compensated per course or per hour for teaching shall not cause that employee to lose status as a bargaining unit member unless expressly excluded in the exclusion listing below.

Excluding: All tenured or tenure-track faculty; full-time faculty; visiting or contract faculty; School of Medicine faculty (except for Division of Graduate Medical Sciences); School of Dental Medicine faculty; School of Management faculty; Graduate School of Management faculty; deans, provosts, administrators, program coordinators, program directors, department chairs, graduate assistants, graduate students who teach only courses pursuant to a stipend, athletic coaches, and faculty who teach only online, courses at non-Massachusetts campuses, non-degree

granting courses (including the Center for Professional Education), and/or courses as a teaching supervisor; all other employees who are not compensated additionally for teaching; and managers, confidential employees, guards and supervisors as defined by the Act.

Adjuncts at Saint Michael's College in Vermont File Unionization Petition

Saint Michael's College, Case No. 01-RC-138466

Another representation petition by SEIU pending at the NLRB is for the representation of the following bargaining part-time adjunct unit at Saint Michael's College in Vermont:

Including: All part-time graduate and undergraduate faculty (adjuncts, lecturers or instructors) employed by St. Michael's College at its Main Campus, 1 Winooski Park, Colchester, currently teaching at least one credit-bearing course (including hybrid and blended courses) including any English as a second language course and who are compensated on a per course basis. An employee works for the College in another capacity who also teaches at least one credit-bearing course identified above and is compensated on a per-course basis shall not cause that employee to lose status as a bargaining unit member unless expressly excluded in the exclusion listing below.

Excluding: All tenured or tenure-track faculty; full-time faculty; visiting or contract faculty; faculty that teach only online courses, deans, provosts, administrators, department chairs, department coordinators, graduate assistants, graduate students, athletic coaches, and employees who only teach only online courses, courses away from the Main Campus, or courses as a teaching supervisor; all other employees who are not compensated additionally for teaching; and managers, confidential employees, guards and supervisors as defined by the Act.

Representation Petitions filed for Adjuncts at St. Mary's College of California and Dominican University of California

St. Mary's College of California, Case No. 32-RC-139812

A representation petition has been filed by SEIU seeking to become the exclusive representative for approximately 226 adjuncts at St. Mary's College of California in following proposed bargaining unit:

Including: Fall Semester 2014 Adjuncts, Adjunct Professors, Adjunct Assistant Professors, Adjunct Associate Professors, Adjunct Instructors, Lecturers, Visiting Assistant Professors.

Excluding: Tenured faculty, executive assistants, managers, assistant managers, independent contractors, guards, and supervisors as defined in the National Labor Relations Act.

Dominican University of California, Case No. 20-RC-140506

SEIU also recently filed a representation petition seeking to represent approximately 176 adjuncts at Dominican University of California in the following bargaining unit:

Including: Fall Semester 2014 Instructors, Adjunct Professors, Adjunct Assistant Professors, and Adjunct Associate Professors.

Excluding: Tenured faculty, executive assistants, managers, assistant managers, independent contractors, guards, supervisors as defined under the National Labor Relations Act.

Donate to Support the National Center's Work and Mission

On-line contributions to the National Center can now be made on our website. Donations enable the National Center to enhance its programming, publications and initiatives. On-line contributions can be made at the Hunter College Foundation's website. At the website, select the National Center for Collective Bargaining Fund in the "Give To" drop down menu. [Click here to donate to the National Center.](#)

Submit Articles to the Journal of Collective Bargaining in the Academy

We encourage scholars, practitioners and students in the fields of collective bargaining, labor representation and labor relations to submit scholarly articles to the National Center's Journal of Collective Bargaining in the Academy (JCBA). JCBA is an open access, peer-review online publication. It is edited by Jeffrey Cross, Eastern Illinois University, and Steve Hicks, Pennsylvania State Colleges and Universities Faculties. JCBA is hosted by the Booth Library, Eastern Illinois University. [Click here for JCBA website.](#)



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