Student Workers or Working Students? A Fatal Question for Collective Bargaining of Hospital Staff (Note)

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STUDENT-WORKERS OR WORKING STUDENTS? A FATAL QUESTION FOR COLLECTIVE BARGAINING OF HOSPITAL HOUSE STAFF.

INTRODUCTION

In the past several years there has been increased activity to organize interns, residents and clinical fellows for collective bargaining purposes. When Congress amended the Labor Management Relations Act (LMRA) in 1974 to include nonprofit private hospitals, many assumed that such activity would continue. Recent decisions of the National Labor Relations Board (NLRB) and Pennsylvania Supreme Court promise to sharply curtail collective bargaining rights for house staff. Cedars-Sinai Medical Center and Philadelphia Association of Interns and Residents v. Albert Einstein Medical Center (hereinafter Einstein Medical Center) held that house staff are "primarily students" and therefore not employees entitled to the protections of the LMRA or the Pennsylvania Public Employe Relations Act.

The issue of house staff organizing has become an emotional issue in the medical community. House officers argue that they are primarily service providers and entitled to bargain collectively as employees. Teaching hospitals maintain that house staff work primarily to complete their graduate medical education and that

* The author wishes to thank the various individuals and organizations who provided assistance in obtaining data for this Note.

1. Interns are graduates of medical school licensed to practice medicine only in the teaching hospital. One year of internship is required in most states before one can be licensed to practice as a private physician. Residents are fully licensed and are continuing their graduate medical education to become certified in a specialized field of medicine. Clinical fellows are certified by the specialty boards and are engaged in training for subspecialties. Hereinafter these categories are collectively referred to as house staff or house officers.


4. 223 NLRB No. 57, 91 LRRM 1398 (March 19, 1976), motion for reconsideration denied, 224 NLRB No. 90, 92 LRRM 1302 (June 10, 1976).


collective bargaining is inconsistent with the educational purposes. This Note examines the practical and economic realities of the house staff-teaching hospital relationship. Research directed at this relationship indicates that house staff provide substantial and essential services to the hospitals. In exchange for these services they are paid sizeable "stipends" and are given benefits which are normally associated with employee status. Cedars-Sinai and Einstein are criticized for allowing the primary purpose for affiliation to negate such strong indicia of employment. The decisions are analyzed with reference to the legislative history of the statutes and other labor decisions concerning student workers. Several policy considerations appear to support house staff claims for bargaining rights. Existing house staff collective bargaining agreements are examined in an effort to determine the consequences of house staff organizing. Finally this Note recommends Pennsylvania legislation to provide limited bargaining rights to house staff affiliated with hospitals under the jurisdiction of Act 195.

THE DECISIONS

Cedars-Sinai Medical Center

Prior to the NLRB Cedars-Sinai decision and the commonwealth court decision in Einstein Medical Center, the few jurisdictions which considered the question held that house staff could collectively bargain despite the educational aspect of their relationship with the teaching hospital. Both the New York Labor Relations Board and the Michigan Supreme Court rejected contentions that employee and student status are mutually exclusive categories. Less than two years after Congress repealed the exemption of nonprofit health care institutions from the LMRA, Cedars-Sinai was decided.

In a 4-1 decision the NLRB held that interns, residents and clinical fellows are primarily engaged in graduate educational training, and therefore are students rather than employees entitled to bargaining rights under the LMRA. The decision was premised on a finding that house staff enter into a relationship with the hospital, not primarily to earn a living, but to fulfill educational requirements.


10. 223 NLRB No. 57, 91 LRRM 1398 (March 19, 1976).
imposed by the state or specialty boards. Externally imposed structures, such as the national selection process, and prescription of activities by accrediting bodies, weighed heavily in the conclusion that house staff are primarily students.\textsuperscript{11} That house staff spend most of their time in direct patient care was not indicative of employee status, for "this is simply the means by which the learning process is carried out."	extsuperscript{12} The Board concluded stipends were more in the nature of a living allowance than compensation for services as they were fixed according to the year of post graduate training and did not vary with the hours spent in patient care or with the nature of services rendered.\textsuperscript{13} It was significant that tenure was closely related to the particular educational program, that the relationship was of a relatively short duration, and that there was little probability of establishing a regular employment relationship following completion of the program.

Board member Fanning vigorously dissented from the majority opinion on several grounds. Since the Act purports to cover all employees except those specifically excluded, the crucial question was whether the individual, though ""primarily a student," is nevertheless, an 'employee' under the Act."\textsuperscript{14} Even if student and employee were mutually exclusive terms, finding house staff to be primarily students was contraindicated by the fact that they receive no degrees, grades or examinations.\textsuperscript{15} To determine who is an employee under the Act, the Board should have applied the common law principles with respect to servants. Because house staff perform services for another from whom they receive compensation, and vicarious liability is imposed on the hospital for their actions, they were within the traditional definition and thus should be covered by the Act.\textsuperscript{16} Fanning found that congressional intent supported his conclusion; the statutory definition of professional employee precisely fit house staff, and legislative history indicated the 1974 amendments were partly directed to include house staff under the Act.\textsuperscript{17}

\begin{itemize}
  \item \textsuperscript{11} Id. at ___, 91 LRRM at 1399.
  \item \textsuperscript{12} Id. at ___, 91 LRRM at 1400.
  \item \textsuperscript{13} Id.
  \item \textsuperscript{14} Id. at ___, 91 LRRM at 1401 (emphasis in original).
  \item \textsuperscript{15} Id. at 1403.
  \item \textsuperscript{16} Id. at 1402.
  \item \textsuperscript{17} Id. at 1405-1406.
\end{itemize}
Einstein Medical Center

House Staff at Einstein Medical Center and Temple University Hospital first petitioned for certification in November 1970, under Pennsylvania's Public Employe Relations Act. The Pennsylvania Labor Relations Board dismissed, in a 2-1 decision, holding as a matter of law that interns, residents and clinical fellows were not public employees because the primary purpose for the affiliation was educational. Following a change in board membership, the dismissal was vacated and an election ordered. In the subsequent findings of fact the educational aspect of the program was acknowledged, but did not outweigh facts that members of the proposed unit were extensively engaged in patient care activities and spent only ten to fifteen per cent of their working time in formal teaching relationships. It was considered significant that remuneration varied with years of service, was subject to wage-related taxes, and that house staff received substantial fringe benefits similar to those of other employees. From these facts, the board concluded that interns, residents and clinical fellows were public employees within the meaning of the statute.

This decision was affirmed by the court of common pleas. The commonwealth court reversed, holding in a 4-3 decision that house staff are not employees under the Act. They "come to the hospital primarily to further their medical expertise with the incidental effect of rendering needed service to the hospital."

Almost two years after the commonwealth court decision, and only months after the NLRB Cedars-Sinai ruling, the Pennsylvania Supreme Court held 4-3 that house staff were not public employees within the meaning of Act 195. The brief majority opinion written by Justice O'Brien emphasized the primary purpose for the affiliation as fulfillment of educational requirements and thus was not "the true bargained-for exchange normally associated with the

18. 1 PPER 123 (1971).
19. Unpublished order and notice of election contained in Record before the Supreme Court of Pennsylvania, No. 283 January Term, 1975 [hereinafter cited as RECoRD] vol. 2 at 447a. In its brief before the Pennsylvania Supreme Court Einstein Medical Center argued that the later decision can be attributed solely to a change in the board's composition, and thus exceeded proper administrative authority. Brief for Appellee at 50-51.
20. RECoRD, supra note 19, at 449a. There was no factual finding on the primary purpose for affiliation.
employer-employee relationship." Although house staff “are clothed with the indicia of employee status, the true nature of their reason for being at Temple University negates their employee status.” Justice O’Brien concluded that because the proposed bargaining unit was composed of persons who were not attempting to establish a continuous relationship with the hospitals, the spirit of Act 195 would not be served by certification.

There were three dissenting opinions. Justice Roberts criticized the standard of review used by the majority, asserting that where there was substantial evidence for the board’s factual findings, great deference should be given to its legal inferences due to the board’s expertise in the field of labor relations. Even if such deference to legal conclusions were not required, he maintained that house staff fit within the statutory definition of employees and that the majority incorrectly created a judicial exception to the definition. He found support for his conclusion by examining the Act’s purpose—to provide means for resolution of disputes between public employers and their employees which, unresolved, would be injurious to the public. House staff provide necessary services and their relation-

23. ___ Pa. at ___, 369 A.2d at 714, 92 LRRM at 3412.
24. Id. at ___, 369 A.2d at 714, 92 LRRM at 3412.
25. Id. at ___, 369 A.2d at 715, 92 LRRM at 3413. The court found that the count against Einstein, a private hospital, was moot due to federal preemption by passage of the 1974 amendments to the LMRA. Temple University Hospital is a state-related public employer under the jurisdiction of Act 195. Therefore, the court’s analysis of the employment status of house staff is addressed only to Temple University Hospital.

While the issue of preemption is beyond the scope of this Note, it should be noted that the court’s analysis is consistent with a subsequent decision of the NLRB, Kansas City Gen. Hosp. and Medical Center, Inc., 225 NLRB 14A, 93 LRRM 1382 (November 8, 1976), revising 225 NLRB No. 14, 92 LRRM 1379 (1976). This decision reiterated the Board’s intent “to find federal preemption of the health care field to preclude States from exercising their power to regulate preemption in this area.” 93 LRRM at 1384. Whether this ruling is correct is open to dispute, and is presently being litigated in New York. See, e.g., Misericordia Hosp. Medical Center, 39 SLRB No. 32 (July 14, 1976) (petition dismissed on federal preemption grounds); Comm. of Interns and Residents of New York State Labor Relations Board (unpublished decision of federal district court, Southern District of New York, noted in 176 N.Y.L.J. No. 63, September 29, 1976 at 28) (remanding to state court); on remand the Supreme Court, New York County, held that there was no preemption, citing Kansas City General, 225 NLRB No. 14, which held that house staff are not employees, and thus hospitals are not employers under the Act. Comm. of Interns and Residents v. NYSNLRB, Index No. 15928/76 (N.Y. Sup. Ct., Special Term: Part I, Filed Oct. 14, 1976). See also 1974 Legis. History, infra note 24, at 363-365 (remarks of Sen. Williams, author of bill; of Sen. Mondale, allowing NLRB to cede jurisdiction to state boards where comprehensive and workable statutes are successfully operating), and Nash, Initial Questions for Hospital Legislative Amendments to the NLRA, 27 N.Y.U. Conf. on Labor 93, 119-20 (1976) (comments by Peter G. Nash, NLRB General Counsel).

26. Id. at ___, 369 A.2d at 722, 92 LRRM at 3415.
ship to the hospital "can spawn problems of the type embraced in
the public policy objectives of this Act." 28

Justice Eagen's dissent 29 considered the primary purpose test
inherently subjective and fraught with potential for inconsistent
and absurd results. 30 Appellate court review of PLRB conclusions of
law has been narrowly limited. The board's familiarity with various
employment contexts enables it to determine whether the purposes
and intent of the PERA will be advanced. 31 Since the board's factual
determinations on the terms of the relationship were supported by
substantial evidence, the court's sole inquiry, as a question of law,
was "whether the objective circumstances incident to the relation-
ship are such that the rights, privileges, and duties of the employer,
individuals, and the public require the protections and procedures
provided by the PERA." 32 Although house staff lack a continuous
relationship with the hospital, they provide substantial and essen-
tial services to the public, "[t]he uninterrupted flow of [which]
is undoubtedly one of the major purposes" of the Act. 33

ANALYSIS

Cedars-Sinai

Legislative history of the 1974 amendment to the LMRA contains
strong indications of congressional intent to extend the Act's cover-
age to house staff. Further, the statutory definition of professional
employee encompasses persons who have completed formal courses
of instruction and are working to become fully qualified profes-
sionals. The NLRB's opinion in Cedars-Sinai made no mention of legis-
islative history or statutory language, nor did the Board support its
holding with any of its own precedent.

Cedars-Sinai is particularly subject to criticism for its failure
to refer to legislative history. When Congress repealed the exemp-
tion of private, nonprofit hospitals from the Act's coverage in the
1974 amendment, it stressed the need for continuous health ser-
vice. The committees were impressed with the fact that the

28. ___ Pa. at ___, 369 A.2d at 724, 92 LRRM at 3416.
29. Justice Manderino joined Justice Eagen's dissent except on the issue of preemption,
which he thought could not be determined without consideration of the retroactivity of the
1974 amendment. Justice Eagen concurred with the majority's finding of preemption with
respect to Einstein Medical Center.
30. ___ Pa. at ___, 369 A.2d at 716, 92 LRRM at 3417.
31. Id. at ___, 369 A.2d at 717, 92 LRRM at 3418.
32. Id. at ___, 369 A.2d at 718, 92 LRRM at 3419.
33. Id. at ___, 369 A.2d at 717, 92 LRRM at 3418.
exemption had resulted in numerous recognition strikes and expected that the amendment would "completely eliminate the need for any such activity . . . ." 34

There is nothing in the legislative history which indicates intent to exclude house staff from the Act's coverage. On the contrary, it appears that the amendment was passed partly in response to the testimony and lobbying efforts of the Committee of Interns and Residents and the Physicians National House Staff Association. 35 In addition, both the Senate and House committee reports contained statements on the non-supervisory status of house officers:

Various organizations representing health care professionals have urged an amendment to Section 2(11) of the Act so as to exclude such professionals from the definition of "supervisor". The Committee has studied this definition with particular references to health care professionals, such as registered nurses, interns, residents, fellows, and salaried physicians and concludes that the proposed amendment is unnecessary because of existing Board decisions. The Committee notes that the Board has carefully avoided applying the definition of "supervisor" to a health care professional who gives direction to other employees in the exercise of professional judgement, which direction is incidental to the professional's treatment and thus is not the exercise of supervisory authority in the interest of the employer. The Committee expects the Board to continue evaluating the facts of each case in this manner when making its determination. 36

This statement implicitly assumes that house staff are employees. Were they not considered employees, their status as supervisors would not be pertinent. 37 The NLRB belatedly answered this assertion in a case subsequent to Cedars-Sinai, stating that Congress simply determined that house staff are not supervisors, and "left the question as to whether they were 'employees' . . . for resolution by the Board in the exercise of its discretion." 38

35. See, e.g., Remarks of Senator Cranston, 1974 LEGIS. HISTORY, supra note 34, at 93, where the floor leader of the Senate bill stated that it was designed in part to redress notoriously low pay of hospital employees including housestaff. He noted that the long hours worked by housestaff yields a net hourly wage of from $1.92 to $2.74.
36. 1974 LEGIS. HISTORY, supra note 34, at 13,275, S. REP. No. 93-766 at 6, H.R. REP. No. 93-1051 at 7 (emphasis added). Section 14(a) of the Act provides that employers are not required to deem supervisors as employees for collective bargaining purposes.
37. This argument was made to the Board in Cedars-Sinai, Amicus Curiae Brief of Physicians National Housestaff Association (PNHA) at 14.
Additional support for the position that house staff are employees is found in the statutory definitions of professional employee. Section 12(b) includes those who have completed "the courses of intellectual instruction" and are "performing related work under the supervision of a professional person to qualify" as a professional employee. This definition appears to contemplate the house staff context by including persons not yet fully qualified who are performing work for the purpose of fulfilling professional requirements. Curiously, the Board made no mention of this section in Cedars-Sinai, although house staff services are in fulfillment of certification requirements.

Einstein Medical Center

While deviation from congressional intent renders Cedars-Sinai vulnerable to sharp criticism, perhaps the lack of clear legislative intent and other policy considerations justify the supreme court's decision in Einstein. Neither the statutory definition nor legislative history of Act 195 provides clear support for the proposition that coverage was intended for persons, such as house staff, in the unique role of student-service providers. Section 301(2) broadly defines public employee as "any individual employed by a public employer . . . ." Although the legislative debates addressed hospital situa-
tions, specific references were made only to nurses and practical nurses, with more general references to hospital workers and employees.

Act 195 was passed in response to a rash of illegal strikes by public employees in order to prevent future strikes by providing mechanisms for orderly negotiation and dispute resolution. As constructed, disputes are to be resolved through mediation and fact-finding; if unsuccessful, the factfindings are to be publicized so public opinion will force resolution. After compliance with these procedures, most public employees are permitted to strike subject to the courts' injunctive powers when the strike "creates a clear and present danger or threat to the health, safety or welfare of the public."

One dissent accused the Einstein majority of usurping the legislative function by creating a judicial exception to the definition of employee. Justice Eagen suggested the proper question for the court when reviewing such a question of law is whether the Act's purpose—to provide mechanisms for dispute resolution to insure uninterrupted flow of basis services—would be effectuated. Perhaps these factors were silently considered by the court. In the absence of clear statutory language and indications of legislative in-

officials, appointees of the Governor with the advice and consent of the Senate as required by law, management level employees, confidential employees . . ." clergy and personnel at facilities used primarily for religious purposes, and police and fire fighters covered by Act. No. 111, PA. STAT. ANN. tit. 43, § 217.1 et seq. (Supp. 1976). This definition differs from the Michigan and New York statutory definitions. MICH. COMP. LAWS ANN. § 432.202 (1967) (Employee is one "holding a position by appointment or employment . . ."); N.Y. CIVIL SERVICE LAW (McKinney) § 200(7)(a) (Supp. 1976) (An employee is "any person holding a position by appointment or employment in the service of a public employer . . .")

46. Id. § 1101.1001. Guards at prisons or mental hospitals, and employees necessary to functioning of Commonwealth courts are prohibited from striking. Section 805, Id. § 1101.805, provides that bargaining impasses involving these employees shall ultimately be submitted to binding arbitration, except where the panel decision would require legislative enactment, in which case it is only advisory.
47. Id. § 1101.1003 (Supp. 1976).
48. ___ Pa. at ___, 369 A.2d at 722, 92 LRRM at 3415.
49. Id. at ___, 369 A.2d at 718, 92 LRRM at 3419-20.
tent, the majority exercised judicial restraint. Numerous strikes under the Act may have encouraged such restraint.

Consideration of such factors is appropriate in order that the court not rewrite legislation. However, if this analysis is correct, the opinion failed to inform the legislature of its need to address the issue. Instead of invoking the legal fiction of primary purpose, the court should have articulated these considerations. This approach would squarely place responsibility with the legislature to determine the status of persons who are both students and paid service providers.

The *Einstein* opinion may also be criticized for failing to adhere to the proper standard of review. Act 195 provides that "findings of the board as to the facts, if supported by substantial and legally credible evidence, shall be conclusive." While not obligated to do so, Pennsylvania courts have previously accorded deference to the PLRB's legal conclusions in recognition of its expertise in the field of labor relations. In performing its duties, the board is expected to appreciate the economic realities of particular relationships and to recognize the aims sought to be accomplished by the statute. Thus,

> [u]pon judicial review . . . it is the duty of the court to determine whether the findings of the board are supported by the substantial and legally credible evidence required by the statute and whether the conclusions deduced therefrom are reasonable and not capricious.

The PLRB's factual findings determined that house staff spend approximately eighty-five percent of their working time in patient care activities, while the remaining time is "spent in formal teaching relationships such as rounds, classes, conferences and lectures." They are remunerated for these services and in other respects are treated as employees. While these findings acknowledge that house staff are pursuing licensing or specialty requirements, there are no findings of fact on the primary purposes for affiliation. Although the court maintained it accepted the board's factual findings, its holding implies a revision of the facts in order to conclude

54. *Record, supra* note 19, at 448a.
55. ___ Pa. at ___, 369 A.2d at 714, 92 LRRM at 3412.
that the primary purpose of petitioner's members was educational. As Justice Eagen emphasized, the board's factfindings were supported by substantial and legally credible evidence, and therefore should be conclusive. Nor did the Einstein majority defer to administrative expertise although the board's legal conclusion that house staff were employees was not arbitrary or capricious.\textsuperscript{56} The court is not required to defer to the board. However when the court rejects the board's legal conclusions, it should articulate the policy considerations so the board and legislature can act in accordance with those considerations.

\textit{Criticisms Common to Both Decisions}

The absence of cited case law to support the holdings in the instant decisions is disturbing. Cedars-Sinai cited no cases, although some prior NLRB decisions denied bargaining rights to student workers using the "primarily student" rationale.\textsuperscript{57} While the NLRB infrequently cites cases in its opinions, it is desirable that it do so in important cases of first impression. This is particularly relevant because the board has subsequently cited Cedars-Sinai in denying numerous other certification petitions.\textsuperscript{58} This flaw was not corrected in the Einstein opinion which heavily relied upon Cedars-Sinai, and failed to mention cases where the identical issue had been decided in favor of the house staff position.\textsuperscript{59}

Admittedly, these cases are not binding precedent for Pennsylvania or the NLRB. But the opinions would appear better reasoned had they discussed and expressly rejected the rationales adopted by the other jurisdictions. By not referring to any case law or legislative history, Cedars-Sinai and Einstein leave the impression that they were decided according to the independent predelictions of the majorities.

\textit{Student and Employee: Dual Status or Mutually Exclusive?}

Both Cedars-Sinai and Einstein utilized a primary purpose test in

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\item \textsuperscript{56} Id. at \textsuperscript{\textendash}, 369 A.2d at 718, 92 LRRM at 3419.
\item \textsuperscript{57} Adelphi University, 195 NLRB No. 107, 79 LRRM 1545, 1548 (1972); Leland Stanford Junior Univ., 214 NLRB No. 82, 87 LRRM 1519 (1974).
\item \textsuperscript{58} Univ. of Chicago, 223 NLRB No. 154, 92 LRRM 1039 (1976); St. Clare's Hosp., 223 NLRB 163, 92 LRRM 1001, (1976); Buffalo General Hosp., 224 NLRB No. 17, 92 LRRM 1197 (1976); Kansas City General Hosp., 224 NLRB No. 14, 92 LRRM 1379 (1976) \textit{revised} 225 NLRB No. 14A, 93 LRRM 1362 (1976); Barnes Hosp., 224 NLRB No. 83, 92 LRRM 1366 (1976).
\item \textsuperscript{59} \textit{See} cases in note 8 and 9 \textit{supra}.
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holding that house staff are not employees. The opinions relied on externally imposed factors which bring about the house staff-teaching hospital relationship. Implicit in this focus on primary purpose is that employee and student are mutually exclusive terms. There are several problems with this approach. First, there is no apparent reason why one cannot be a student for some purposes and an employee for others. The NLRB has recognized such a dual status for some persons training for nonprofessional positions. Second, the board has previously found the absence of a traditional master-servant relationship and indicia of employment to indicate that graduate students are primarily students. Yet in the instant cases the presence of these factors was ignored in view of the primary purpose of affiliation. Finally, even if mutually exclusive categories were the correct approach, the practical and economic realities of the house staff context should militate in favor of a primarily employee status. When determining whether persons fulfilling educational requirements while providing substantial services are employees under a labor relations statute, the tribunal should also consider principles of master-servant and the benefits to the "educating" institution from the services provided.

House staff are involved in a unique relationship with the teaching hospital. They are required by state law or specialty boards to obtain "on the job" training in the practice of medicine. Graduate medical education is akin to apprentice programs required before certain workers become fully qualified.60 The quality of the educational program frequently takes precedence over monetary considerations when prospective house staff apply for placement at a particular hospital.61 However, emphasis on education as the primary purpose fails to consider the traditional employment services which benefit the hospital for the duration of the relationship.

Michigan, New York and Massachusetts have rejected contentions that student and employee are mutually exclusive categories. The Supreme Court of Michigan found that whether persons with a dual status are to be excluded is for legislative, and not judicial determination. It noted:

60. Overnite Transportation Co. v. NLRB, 327 F.2d 36 (1963); United Aircraft Corp. v. NLRB, 333 F.2d 819 (1964), cert. denied, 380 U.S. 910 (1965). House staff have been referred to as apprentices in medical literature. See 206 J.A.M.A. 2110-2111 (1968).

61. RECORD, supra note 19, vol. 2 at 552a; Brief for Appellant, Philadelphia Association of Interns and Residents (PAIR) at 14-17.
The fact that they are continually acquiring new skills does not detract from the findings of the MERC that they may organize under the provisions of the [public employee relations act]. Members of all professions continue their learning throughout their careers. For example, fledgling lawyers employed by a law firm spend a great deal of time acquiring new skills, yet no one would contend that they are not employees of the law firm.

Instead of allowing student status to negate employment rights, the unique relationship was reconciled by limiting the scope of bargaining only to employment issues and precluding bargaining over educational matters.

The NLRB has also recognized a dual status in some situations. For example, in Parkwood IGA Foodliner⁶⁴ high school distributive education students were included as a bargaining unit with other employees because they were an integral part of the work force and had the same wages, duties and working conditions as other employees. Similarly, student-trainees required to complete a one year internship as technologists were considered employees for collective bargaining purposes.⁶⁵ In cases where the board has found mutually exclusive categories,⁶⁶ the workers were primarily engaged in traditional academic pursuits. They were enrolled in formal course work, paid tuition, worked few hours, and lacked other indicia of employment. Graduate medical education differs from those educational contexts. While a residency program may result in certification which is comparable to a degree, services performed in a traditional employment context are an integral part of the training. Unlike other students in professional training, house staff attend few formal classes and pay no tuition. Thus the factual context surrounding house staff is substantially different from that in prior board decisions which found mutually exclusive categories.

**Indicia of Employment**

Prior to Cedars-Sinai, the absence of indicia of employment had been decisive in finding student-workers to be primarily students. By resorting to the primary purpose test, the instant decisions dis-

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63. Id. at ____, 204 N.W.2d at 224.
64. 210 NLRB No. 57, 86 LRRM 1131 (1974). Although the program terminates with the school year, the Board found no evidence that employment ends at that time.
65. Beecher Ancillary Services, Inc., 225 NLRB No. 83, 92 LRRM 1456 (July 7, 1976). Even though several participants left at the end of the program, the Board distinguished Cedars-Sinai, stating they left for personal reasons, the training was directed at the performance of routine tasks, and was not for the purpose of acquiring an education.
66. See cases in note 57 supra.
counted the significance of factors which normally indicate an employment relationship. "[W]hile appellants herein are clothed with the indicia of employee status, the true nature of their reason for being at Temple University negates their employee status." This shift in emphasis fails to follow the logic of prior decisions by ignoring the presence of a master-servant relationship and other strong employment indicators.

In *Adelphi University* the NLRB held that graduate teaching and research assistants should be excluded from the faculty bargaining unit. Their employment status was dependent upon student status, they were enrolled in a full course load, received minimal compensation and no employee benefits except free tuition. From these facts the Board concluded that they lacked sufficient community of interest with regular faculty to warrant inclusion in the bargaining unit. *Leland Stanford Junior University* is closer to the issue in the instant case. Candidates for graduate physics degrees performing research as part of the educational requirements were seeking to form a separate bargaining unit. The NLRB denied the petition because they received no employee benefits and the relationship was "not grounded on the performance of a given task where both the task and time of its performance is [sic] designated and controlled by an employer." It found that the students chose their own research topics, were required to do the research whether or not they received stipends, and the research benefited only the students, not the university. The Board also noted that the stipends were intended to provide financial aid and that the students did not participate in any fringe benefits, sick leave, vacation or pension programs. *Adelphi* and *Leland Stanford* indicate criteria used by the Board to decide in favor of primarily student status: payment of stipends which are true living allowances, the absence of a master-servant relationship and of other employment indicia.

Consistent application of these criteria to the house staff context would yield a different result from that in the principal cases. The teaching hospital schedules working hours, departments and tasks to be performed. Unlike the research assistants in *Adelphi* and *Leland Stanford*, house staff have completed the formal course work and have been awarded the M.D. degree. As opposed to the twenty

67. ___ Pa. at ___, 369 A.2d at 714, 92 LRRM at 3412.
68. 195 NLRB No. 107, 79 LRRM 1545, 1548 (1972).
69. 214 NLRB No. 82, 87 LRRM 1519 (1974).
70. *Id.* at ___, 87 LRRM at 1521.
hours per week worked by the graduate students in Adelphi and Leland Stanford, house officers work an average of eighty hours a week, and may work as much as 130 hours in one week.71 One study reported that out of 79.4 average house staff weekly hours, only 12.7 were spent in professional development activities, including study.72 While it may be argued that patient care activities are required course work, the hospital's right of control, employment indicia and the substantial amount of time spent performing hospital services should preclude finding that house staff are primarily students.

Both Cedars-Sinai and Einstein noted that stipends are fixed according to years of service, and do not vary with the hours or quality of work, concluding "that the payments are more in the nature of a living allowance than compensation for services rendered."73 Yet, a fixed amount dependent upon years of service can readily be viewed as an established salary scale for professional employees exempt from coverage by the Fair Labor Standards Act.74 House staff stipends are not minimal living allowances comparable to the stipends in Adelphi and Leland Stanford.75

Unlike the graduate students in Adelphi and Leland Stanford and the medical students at Temple University, house staff receive many of the same fringe benefits given to salaried physicians.76 That the hospital provides these fringe benefits to house staff can be seen as recognition that they are not in the purely educational role of medical students; these benefits are part of the remuneration in

71. A. CARROLL, PROGRAM COST ESTIMATING IN A TEACHING HOSPITAL, A PILOT STUDY (1969) at 76. This study was jointly sponsored by the Association of American Medical Colleges (AAMC), American Hospital Association (AHA) and American Medical Association. A copy of chapter 6, "Interns and Residents: Their Role in a Teaching Hospital and Their Effect on Hospital Economics" was submitted to the NLRB as Appendix B, PNHA brief. It has been suggested the study was conducted to convince third party payors to bear the costs of hospital training programs. HOSPITAL PHYSICIAN, October, 1975, at 10.

72. CARROLL, supra note 71, at 76.

73. 91 LRRM at 1400; ___ Pa. at ___, 369 A.2d at 715, 92 LRRM at 3413.


75. In 1971 house officers at Temple received yearly salaries ranging from $8,000 as interns, and $11,000 as fifth year residents; they were given annual increments of five to seven hundred dollars after each year of service. RECORD, supra note 19, vol. 1 at 71a-73a. While Temple asserted that stipends are to help defray living expenses, no adjustments were made for the particular economic circumstances of house staff. Id. at 71a-74a.

76. They are covered by the hospital's malpractice insurance and are entitled to the same vacation, holidays and sick leave as salaried physicians. However in some respects house officer fringe benefits differ somewhat from those of salaried physicians; they get an initial uniform allowance, meals when on duty, and professional courtesy in lieu of major medical insurance. Salaried physicians can participate in pension, life, accident and disability insurance programs as well as take part in university tuition remission benefits. Record, supra note 19, vol. 1 at 223a-231a.
exchange for services given to the hospital. It is disconcerting that the primary purpose for affiliation was permitted to outweigh all these factors which normally are indicative of an employment relationship.

**Hospitals Receive Substantial Benefits from House Staff Services**

In its *Cedars-Sinai amicus curiae* brief the American Association of Medical Colleges (AAMC) admitted that patients and hospitals receive a benefit from house staff services but maintained that patient care was an integral part of the education process. Due to the expense of graduate medical education programs, any possible economic advantages from these services were offset. Research submitted to the Board renders this conclusion questionable. One such study delineated several ways that house staff contribute to patient care: in addition to providing direct patient care, "they free the members of their supervising staff [to take] responsibility for more patients than would otherwise be the case"; they provide the means for attending physicians and hospitals "to maintain constant stand-by physician services" for all patients at a considerably lower cost than would otherwise be possible.

77. It was significant in *Leland Stanford* that the stipends were tax exempt under section 117(b) of the Internal Revenue Code. 87 LRRM at 1521. This section precludes exclusion from taxation amounts received by degree candidates which represent "payment for teaching, research, or other services in the nature of part-time employment required as a condition to receiving the scholarship or fellowship grant." Neither majority opinion discussed the taxability of house staff stipends. Although the applicability of tax precedent to labor relations is debatable due to different statutory purposes, since this was a factor in *Leland Stanford* it merits noting in the present context. The test of whether such scholarship payments are taxable has turned upon whether they are "relatively disinterested, 'no-strings' education grants, with no requirement of any substantial *quid pro quo* from the recipients." Bingler v. Johnson, 394 U.S. 741, 751 (1969). Numerous court decisions and revenue rulings have denied house officers this exclusion by finding the requisite *quid pro quo* exchange of services for salary and benefits. *See, e.g.*, Birnbaum v. Commissioner, 474 F.2d 1339 (3d Cir. 1973) *aff'sg* 30 T.C.M. 989 (1971); Tobin v. United States, 323 F. Supp. 239 (S.D.Tex. 1971); Coggins v. United States, 26 Am. Fed. Tax R. 2d 5775 (N.D.Tex. 1970); Rev. Rul. 72-469, 1972-2 C.B. 79 (1972). In the few cases allowing house staff the exclusion, the courts have found an exclusive training context where the house staff did not provide indispensable services to the hospital. *See, e.g.*, Leathers v. United States, 471 F.2d 856 (8th Cir. 1972), cert. *denied*, 412 U.S. 932 (1972); Shuff v. United States, 331 F. Supp. 807 (D.W.Va. 1971); Wroblewski v. Bingler, 161 F. Supp. 901 (W.D.Pa. 1958).

78. House Staff Unionization and the Process of Graduate Medical Education, *amicus curiae* brief filed with NLRB by the American Association of Medical Colleges, at 11 [hereinafter cited as AAMC Brief].


80. *Id.* at 78. The cash value of house staff teaching activities was estimated to be ten percent of the total annual intern-resident cost.
In support of assertions that interns' and residents' activities are academic, not economic in nature, the AAMC and Temple suggested that such programs could be eliminated for more efficient and effective patient care. However, at least one study found it would not be possible for a hospital to discontinue all educational programs and maintain the same level of services without a concomitant increase in cost. This study was conducted at the Hartford Hospital to determine the cost of hospital educational programs and the projected cost of replacement services should all such programs be eliminated. In addition to finding that the replacement cost of hospital-essential services exceeded the net cost of graduate medical education, it also determined that house officers provide medical-essential services that would have to be replaced at a cost of two to four million dollars. "This is a cost, which does not now exist, that would be placed on the community. The hospital would not have saved anything by eliminating its educational programs, but in so doing it would have placed on the community a new cost of several million dollars." That house staff "stipends" and benefits are regarded as part of a quid pro quo exchange for services rendered is further evidenced by the fact that 68% of all reporting teaching hospitals use patient care revenue to pay for more than 76% of intern and residency costs. Thus, teaching hospitals are dependent upon house staff services to maintain the present level and quality of patient care, are paid for these services by patients, and compensate house staff in consideration for these services. Even if one accepts the notion of mutually exclusive categories, house staff are an integral part of the hospitals' work force and therefore should be considered "primarily employees" and not primarily students.

81. AAMC Brief, supra note 78, at 10-11, Brief for Temple University—appellee at 7-8.
82. Ernst & Ernst Management Consultants, Hartford Hospital: Study of the Cost of Education Programs, Year Ended September 30, 1971 (unpublished, 1972 copyright by Hartford Hospital). The results are summarized in an article by administrators at Hartford Hospital, Freymann & Springer, Cost of Hospital-Based Education, 47 J. AM. Hosp. Assoc. 65 (March 1, 1973).
83. Freymann & Springer, supra note 82, at 70-71.
84. Percentages computed from figures contained in Coth Survey of House Staff Policy 1970-1971 at 19-20 [hereinafter cited as Coth Survey]. This report is compiled by the Council of Teaching Hospitals, a division of the AAMC. Only 1.7% of the institutions support more than 51% of these educational costs through medical school appropriations or university affiliated funds.
The Recommended Test

Agency principles have historically been applicable to determining employee status under labor relations statutes. The question has typically been whether workers were employees or independent contractors but the master-servant test could be modified to determine whether student-workers are primarily employees or students. The Restatement of Agency, Second specified several criteria relevant to the house staff context: whether the master has the right to control the physical conduct of one employed to perform services; whether the place of work, tools and instrumentalities are supplied by the employer; and whether the work is part of the employer's regular business. Interns, residents and clinical fellows precisely fit the classical definition of employee. They use hospital facilities while rendering substantial services which the hospital is in the business of providing to the public, and are subject to the hospital's supervision and control.

By focusing on the raison d'être for the affiliation, Cedars-Sinai and Einstein failed to conduct a sophisticated examination of the house staff-teaching hospital relationship. Tribunals considering this question before and after Cedars-Sinai have rejected "primarily student" arguments and have applied master-servant principles in holding that house staff are employees. In Brooklyn Eye and Ear Hospital the New York State Labor Relations Board (NYSLRB) found the time, place and method by which services were performed subject to the hospital's control. The New York board held that student and employee status are not mutually exclusive, and certified a bargaining unit comprised solely of house staff.

This approach was adopted and refined by the Massachusetts Labor Relations Commission after Cedars-Sinai was decided. That agency's test requires a case-by-case determination "whether the employee status rises to a level significant enough to effectuate the policies of the Act, . . ." weighing "traditional indicia of employee status . . . against the other interests in the relationship." It sepa-

86. Restatement (Second) of Agency, § 220(2).
88. 32 SLRB No. 21 (N.Y. 1969).
90. Id. slip op. at 19.
rated employment indicia into two categories: those objective factors which are externally imposed, such as income tax and workmen's compensation statutes; and those factors imposed by the employer, including agency principles, fringe benefits, competitive salary scales, and how the hospital perceives the relationship. The Commission determined that the hospital's primary emphasis was on the services provided to the hospital rather than educational benefits to the house officers. Applying those criteria it concluded that house officers are both employees and students.

Expectancy of Continued Employment

Both Cedars-Sinai and Einstein briefly referred to the low expectation of continued employment as a factor indicating that house staff are not employees. This concept can be analyzed by reference to cases concerning casual or temporary employees. The question is typically whether casual employees have a sufficient community of interest to warrant inclusion in a bargaining unit with regular employees. Until Cedars-Sinai, expectation of continued employment has not been a factor in denying collective bargaining rights to persons working on a full time basis. Graduate medical education may continue for eight years. No other full time workers are required to show expectation of continued employment, and in practice collective bargaining rights are granted to groups of employees with comparable or greater turnover rates. If this criterion is to be con-

91. Id. at 21.
92. See Trans World Airlines, 211 NLRB No. 99, 86 LRRM 1434 (1974) (seasonal employees returning for third year are paid at same rate as full time employees and have a reasonable expectation of re-employment in the future; included in bargaining unit); Georgetown Univ., 200 NLRB No. 14, 82 LRRM 1047 (1972) (students working part-time for less than full academic year, compensation reduced by other financial aid, have facts peculiar to themselves; excluded from bargaining unit for insufficient community of interest with regular employees).
94. In Pennsylvania the turnover rates from July 1970 to July 1971, and January 1975 to 1976 for Psychiatric Nurse Interns were 32.5% and 28.3% respectively. Turnover rates for Staff Physicians I on those dates are 9.8% and 20%. Both groups are represented by bargaining units under Act 185. The Act was passed in July 1970, thus these comparison dates reflect changes in job stability that may be due to collective bargaining. In times of greater economic stability these turnover rates may be higher. Statistics provided by Commonwealth of Pennsylvania, Central Management Information Center, computer run July 8, 1976. It is interesting to note that the annual nursing turnover may be significantly higher than that of house staff. "Frequently, turnover ratio runs as high as 50 to 75 percent, with some hospitals facing a change in nursing personnel of more than 100 percent during a 12-month period." Nat'l. Comm. for the Study of Nursing and Nursing Education, An Abstract For Action at 35
sidered in the student-worker context, it should be limited to instances where the maximum possible tenure is quite brief.95

**POLICY CONSIDERATIONS**

*Survey of Existing House Staff Collective Bargaining Agreements*

In *Cedars-Sinai* the AAMC pursuasively argued that collective bargaining would adversely affect the process of graduate medical education because topics traditionally negotiated as terms and conditions of employment are inextricable from the educational aspects of the relationship.96 Whether this position is correct is open to debate. The American Medical Association *Directory of Approved Internships and Residencies*[97] recommends formal contracts between the house officer and hospital concerning such items as salary, terms and conditions of the relationship, vacations, fringe benefits and hours; a satisfactory grievance mechanism is required for accreditation. The AMA has endorsed the notion of house staff collective bargaining by adopting guidelines for such agreements.98 This section surveys various house staff contracts in an effort to examine whether collective bargaining can realistically coexist with effective graduate medical education. It also addresses concerns that, because of the high turnover rate, there will be little continuity from one agreement to the next. This survey indicates substantial continuity between contracts and the possibility of separating educational and medical issues from more traditional subjects of such agreements.99

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95. The limited tenure of house officers presents unique problems concerning continuity of the bargaining process. This can be ameliorated by limiting the scope of bargaining to employment issues, and by instituting practices to apprise house staff of issues previously agreed upon. See contract survey, discussed in text accompanying notes 107-109 infra.

96. AAMC Brief, supra note 78, at 23-27.

97. AMERICAN MEDICAL ASSOC. DIRECTORY OF APPROVED INTERNSHIPS AND RESIDENCIES 1974-75 at 134.


99. An explanation on methodology is necessary at this point. In hopes of conducting a representative survey on the practical effects of house staff organizing, including economic, operational and educational consequences, questionnaires were sent to ten hospitals and their respective house staff associations. Due to insufficient response, this comprehensive approach was not possible. Three hospitals responded with the requested information, Health and Hospitals Governing Commission of Cook County [hereinafter referred to as Cook County]; Brooklyn Hospital; and University Hospital, University of Michigan [hereinafter referred to as University Hospital]. Three (including Long Island College Hospital, the subject of an...
In some respects the contracts examined are comparable to collective agreements in other industries. Salaries, benefits, leaves of absence and grievance procedures are prominent issues. There are, however, several striking differences. Each house staff contract contained provisions designed to protect the educational facet of the relationship. Non-renewal of appointment and discipline or discharge for medical/professional reasons are typically not subject to the traditional grievance procedure which may result in arbitration.\textsuperscript{100} The University Hospital contract leaves questions of suspension, non-reappointment, or termination from a residency program within the exclusive discretion of the University, and not subject to any grievance procedure.\textsuperscript{101} League and City agreements with the Committee of Interns and Residents (CIR) have reconciled this matter by distinguishing between medical and administrative grievances. While administrative matters are ultimately subject to arbitration, a medical board is the final authority on medical and professional issues. This distinction is designed to protect house officers from arbitrary action while preserving the hospital’s autonomy in determining medical and educational matters.\textsuperscript{102}

House staff participation on hospital committees is a significant contractual issue. CIR and Cook County agreements provide for house staff representation on committees dealing with grievances and discipline. While the University Hospital contract does not provide for employee representation on those issues, it allows significantly greater participation on other hospital committees

\textsuperscript{100} Early New York labor board decision certifying a house staff unit) responded that their house staff were not collectively organized. No response was received from the remaining six. In addition, the CIR provided contracts negotiated with the League of Voluntary Hospitals and Homes of New York [hereinafter referred to as League] and with the New York City Health and Hospital Corporation [hereinafter referred to as City]. PNHA provided a Memorandum of Understanding between Joint Council of Intern & Resident Association and Los Angeles County-University of Southern California Medical Center, Martin Luther King Jr. Hospital, and Harbor General Hospital [hereinafter referred to as Los Angeles County]. Evaluation of continuity is based upon City agreements from 1968-1976, League agreements from 1970-1976, and to a lesser extent, on Cook County Memorandum 9/1972-9/1973 and agreement 11/1975-9/1977. A total of eleven contracts are included in this analysis.

\textsuperscript{101} Los Angeles County grievance procedure applies only to interpretation and application of the memorandum’s provisions. No mention is made of disciplinary action or non-renewal of appointment in the memorandum so presumably these are not subject to grievance or arbitration.

\textsuperscript{102} American Hospital Association, Staff Working Paper on House Staff Organizations (unpublished paper available from AHA, Chicago) recommends this type of approach [hereinafter cited as AHA Staff Paper].
dealing with medical and patient care issues.  

Provisions dealing with work schedules have evolved over the course of several agreements. The earlier contracts either contained a policy agreement on the undesirability of excessive hours as being inconsistent with optimum patient care and high training standards or did not explicitly address the issue. Later agreements established committees with house staff representation to review scheduling practices and make recommendations in accordance with quality patient care, specialty board requirements, rest and social needs of house staff.

Patient care issues figured most prominently in the agreements with University Hospital, Cook County, and in the Los Angeles County memorandum. The Cook County agreement provided for the establishment of minimum standards for medical care and administrative services, and for a medical care review committee to address long term goals. Immediate goals to be effectuated were concerned with availability of basic medical supplies, laboratory and radiology services, and interpreters for Spanish-speaking patients. This is in sharp contrast to the patient care issues referred for consideration to the Physician Liason Council at University Hospital. Rather than establishing minimum quality for patient care, the referrals are directed towards improving the outpatient clinic, medical records, and obtaining adequate paramedical services. The Los Angeles County memorandum agreed to improve the physical facilities and to recommend a 1.1 million dollar budget increase for improvement of nursing, paramedical and interpreting services.

The League agreement contains a sideletter including patient care as a meet-and-discuss issue.

The relatively high turnover rate for house staff has the potential for causing difficulties in the bargaining process. The University Hospital, which negotiates directly with its house officer association on an annual basis, reported some difficulties in this respect.

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103. Cook County house staff are also represented on all medical committees.

104. CIR-City agreement, supra note 99, at 8-9 (1972-1974).

105. Patient care was reportedly the primary negotiating obstacle resulting in an eighteen day strike and the jailing of six house staff in fall, 1975. Coste, The Cook County Strike: Bitter Victory, 25 THE NEW PHYSICIAN, No. 1 at 32 (January 1976).

106. Memorandum, supra note 99, at 7. Physical facilities to be improved include providing sufficient bed space so patient care will not have to take place in hallways except under emergency conditions.

107. Letter from Kevin F. Hickey, Assistant to Director, University Hospital (December 28, 1976) [hereinafter cited as University Hospital letter].
priorities. Recognizing the potential for conflict, the American Hospital Association (AHA) has suggested that management should develop means by which newcomers can be apprised of issues dealt with previously.\textsuperscript{108} Perhaps longer contracts, for a minimum of two years, can provide greater stability in the negotiating process by allowing new leadership a period of operation under an existing agreement.\textsuperscript{109}

Despite this potential difficulty, the University and Brooklyn hospitals evaluated their overall experience with the house staff association in a positive light. An effective grievance system facilitates amiable dispute resolution.\textsuperscript{110} Other advantages include: improved credibility between house staff and administration; ability to deal with one organization versus separate training programs; improved use of house staff in the administrative process; and pressure to implement necessary patient care improvements.\textsuperscript{111}

Whether or not hospitals are legally obligated to bargain with house staff associations, the AHA has recognized that "management will have to engage in activities with house staff that approach collective bargaining."\textsuperscript{112} Since the hospitals and house officers are mutually dependent, they are advised to work cooperatively and to develop effective problem solving techniques.\textsuperscript{113} The agreements considered here demonstrate that this can be accomplished through collective bargaining without encroaching upon the educational aspects of the program.\textsuperscript{114}

\textit{Quality Patient Care}

Long hours worked by house staff are "an undisputed historical

\textsuperscript{108} AHA Staff Paper, supra note 102, at 4.

\textsuperscript{109} There is the greatest degree of continuity among CIR contracts due to the fact that one organization is negotiating each agreement. While this is a remedy for the problem, hospitals and their house officers are then less able to contractually resolve problems peculiar to the institution.

\textsuperscript{110} Letter from Richard Billotti, Administrative Assistant to the Director of Personnel, Brooklyn Hospital (December 6, 1976).

\textsuperscript{111} University Hospital Letter, supra note 107. Other negative aspects, see text accompanying note 107 supra, are related to the expense and time required by the bargaining process; potential for a whipsawing effect between other hospital unions; and the potential (as yet unrealized) for strong demands made by the House Officer Association.

\textsuperscript{112} AHA Staff Paper, supra note 102.

\textsuperscript{113} Id.

\textsuperscript{114} Nor is there any indication that unionization of housestaff would result in unreasonably high salaries. The contracts reviewed call for salaries ranging from $12,400 to $15,400 for the first year of post-graduate work, from $16,600 to $23,364 for the seventh year of post-graduate work.
Undoubtedly the house officers would like more free time for personal and social needs. Recent studies indicate patients should also be concerned about house staff hours. While house staff are permitted to sleep when working long shifts, they may be awake as long as sixty hours during a week-end on call. Sleep deprivation may impair concentration abilities, resulting in decreased accuracy or efficiency and may produce negative mood changes. A fatigued physician may present additional risks to patients in need of competent medical care.

Adverse working conditions of some house staff assignments may also have a negative impact on the quality of patient care. Emergency room services were evaluated during a New York house staff strike in 1975. Medical records completed by attending physicians were used as indicators of actual performance and quality of care. The researchers concluded that the principal strike issue, hours and working conditions as related to quality of care, was not illogical.

The survey of house staff contracts indicates that patient care concerns are not merely a public relations ploy. Patient care provisions have been a significant obstacle in the bargaining process. While it may be questioned whether such issues are appropriate subjects of bargaining, some of the resulting provisions appear essential to basic medical care.

115. AAMC Brief, supra note 78, at 24.
118. Friedman, supra note 117, at 203.
119. Hobson, supra note 117, at 1345.
120. McNamara, Greene, An Evaluation of Emergency Room Services During the New York City House Officer Strike, 66 AM. J. PUB. HEALTH 135 (February, 1976).
121. Id. at 136.
122. Id. at 138.
123. See text accompanying notes 96-113 supra, survey of negotiated contracts.
CONCLUSION

Both the Cedars-Sinai and Einstein Medical Center decisions focused upon primary purpose for affiliation as a legal fiction which fails to account adequately for the realities of the house staff-teaching hospital relationship. Although educational considerations are undoubtedly important in the selection of a hospital, the terms and conditions of the relationship fit within the classical definition of employment. Interns, residents and clinical fellows perform substantial and essential services which benefit the teaching hospital; they are subject to the hospital’s control and supervision, are paid and given fringe benefits in remuneration for these services. Initial motivations for the relationship should not negate factors which are strongly indicative of an employment relationship. The fact that tenure is limited to the duration of the educational program should not exclude house staff from the definition of employees. Unlike casual employees, house staff have sufficient regularity and duration of employment to share a community of interest and to responsibly participate in the negotiation process. Student and employee need not be mutually exclusive categories. A more appropriate test would consider the policies of the Act, indicia of employment imposed by the employer and by external forces, and would determine whether a master-sevant relationship was created. The decisions failed to take these practical considerations into account.

Cedars-Sinai is particularly subject to criticism. The NLRB, as the agency designated to administer the Act, is charged with fulfilling congressional intent. Not only did the opinion not attempt to articulate legislative history to support its conclusion, but there are strong indications of congressional intent to provide coverage for this class of workers. By ignoring the legislative history and making its own policy determination, the NLRB exceeded its delegated authority.

Although the Pennsylvania Supreme Court also engaged in legal fictions, its result can perhaps be justified by the lack of clear legislative intent as well as other policy considerations. However if Einstein Medical Center was decided, sub silentio, on these factors the court failed to fulfill its judicial responsibilities. It should have articulated these considerations. This approach would have put the legislature on notice of its responsibility to clarify any ambiguities in the statutory definition of employee.

There are several reasons why legislative action is needed to allow interns, residents and clinical fellows collective bargaining rights. The contract survey indicates that agreements adequately
preserve educational interests and that the turnover rate does not preclude continuity between contracts. Coverage would provide for orderly resolution of disputes while protecting the public interest in uninterrupted health care. Finally, the quality of health care may be improved by alleviating adverse working conditions and by negotiating improved facilities and services.

**Pennsylvania Recommendations**

Although not articulated by the Pennsylvania Supreme Court, the responsibility for dealing with these problems now lies with the legislature. The General Assembly needs to balance the competing interests. House staff perceive a need for collective bargaining rights, while the public needs low cost and uninterrupted health care. The legislature should consider the present effectiveness of mediation and factfinding as means to avoid public employee strikes. Since the overall purpose of collective bargaining is to equalize bargaining power, it may be that allowing house staff, as essential employees, a right to strike would give them disproportionate bargaining power.

One alternative would be to expand the definition of public employee to cover students working full time in fulfillment of educational requirements, while adding house staff to the section prohibiting strikes at certain institutions.

Where specified classes of employees are deprived of the strike power, alternate means are necessary to promote meaningful bargaining. Voluntary or compulsory binding arbitration has proven effective in resolving bargaining impasses for public employees in other jurisdictions. The Pennsylvania legislature has already recognized compulsory arbitration as appropriate means of resolving impasses with police and fire fighters.

If legislation provides for binding arbitration in lieu of strikes,

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124. *Caveat:* these recommendations are directed solely to the house staff issue. No suggestion is intended as to whether other essential public employees such as teachers should be prohibited from striking as that issue is beyond the scope of this Note.


126. The legislature should consider individual classes of essential employees in deciding whether they should retain the right to strike. For example, removing the strike power from nurses may distort any present equality of bargaining power.


it should give guidance on factors to be considered by the arbitration panel. 30 Final offer arbitration, which requires the panel to choose the entire last offer of one party, may encourage reasonable final offers, thus facilitating voluntary agreement. This approach may deter reliance on the panel's discretion; research indicates that a high percentage of impasses under some final offer schemes were voluntarily settled. 31 This, however, involves an extreme win-lose situation, and precludes the arbitrator from considering the general interests of the state. Another option provides for issue-by-issue determinations, where the panel chooses the best final offer on each unresolved issue. While such an option eliminates the extreme nature of final offer arbitration, there is potential for internal inconsistencies in the resulting contract. The Massachusetts legislature has taken a third approach; specific guidelines are provided for the panel's consideration, including the financial ability of the public employer, public interest and welfare, decision and recommendation of the factfinder, and present wages as compared to cost of living. 32 Although this approach explicitly allows consideration of the public interest, granting broad discretion to the panel may deter voluntary settlement. The author takes no position on the advisability of any particular method. Various possibilities are presented to encourage the legislature to consider the advantages and disadvantages of each. 33

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132. MASS. GEN. LAWS ANN. ch. 150E § 1, (Supp. 1976).

133. EDITOR'S NOTE: While this Note was being prepared for publication, the NLRB expanded upon Cedars-Sinai in denying a motion for reconsideration of the house staff issue. In St. Clare's Hospital and Health Center, 229 NLRB No. 158, 95 LRRM 1180 (May 27, 1977) the Board issued a lengthy opinion which analyzed student-worker precedent by categories, determining that house staff are in the category of students who perform services directly related to the educational program for the educational institution. It maintained that denial of bargaining rights to such workers is not an aberration of national labor policy. In addition, the Board stated that it has exercised its discretionary authority to determine national labor policy on the issue, and that this determination preempts jurisdiction over house staff by state labor agencies. While this opinion is an improvement over Cedars-Sinai by its use of precedent and principled reasoning, the practical implications of the decision as discussed in this Note remain problematic.