Originally published in the New Jersey Labor and Employment Law Quarterly Vol. 37, No.1/October 2015

Rutgers v. Northwestern: Would Student-Athletes at New Jersey Public Colleges Be Able to Unionize?

by Timothy D. Cedrone and Kerry E. Cahill

One of the most noteworthy labor law cases of 2015 was *Northwestern University & College Athletes Players Association*.[1] In *Northwestern University*, the regional director for Region 13 of the National Labor Relations Board (NLRB) determined that grant-in-aid scholarship football players at Northwestern University are employees under Section 2(3) of the National Labor Relations Act (NLRA) and can, therefore, hold a unionization election. Upon review, the NLRB dismissed the petition and declined to assert jurisdiction in the case. The NLRB reasoned that it would not effectuate the policies of the NLRA to assert jurisdiction and that doing so would not serve to promote stability in labor relations. The regional director's decision was groundbreaking, as it was the first case at the state or federal level to hold that student-athletes were employees under applicable labor law.[2] While the debate about whether student-athletes should be considered employees for purposes of the NLRA continues, there has been less focus on the treatment of student-athletes under state collective bargaining laws. This article seeks to shed light on that issue and specifically address whether student-athletes at New Jersey public colleges, such as football players at Rutgers University, would be able to unionize under the Employer-Employee Relations Act (EERA).

The Definition of 'Employee' under the EERA

The issue of whether New Jersey public school student-athletes can unionize is greatly affected by the definition of employee and case law interpreting that term. In New Jersey, solving the puzzle begins with analysis of the EERA. The EERA defines an employee, in pertinent part, as "any employee, and shall not be limited to the employees of a particular employer unless this act explicitly states otherwise."[3] In addition to several precise exemptions, the definition of employee also includes "any public employee, i.e., any person holding a position, by appointment or contract...except elected officials, members of boards and commissions, managerial executives and confidential employees."[4]

Over the years, the EERA's broad definition of employee has resulted in case law interpreting its meaning and scope. For example, in *New Jersey State Judiciary*,[5] the Communications Workers of America filed a representation petition seeking to add about 50 freelance court interpreters to the negotiations unit of employees of the New Jersey State Judiciary that it represented. The central issue before the Public Employment Relations Commission (PERC) was whether the freelance court interpreters were public employees under the EERA. *New Jersey State Judiciary* also distinguished between employees and public employees, comparing the EERA's definition to that of the NLRA, which states, "the term 'employee' shall include any employee...but shall not include any individual employed…having the status of an independent contractor."[6]

In resolving the issue, PERC adopted the 13-factor test articulated in *Community for Creative Non-Violence v. Reid*.[7] These factors, which arguably would be central to the determination of whether student-athletes could be considered employees, include: the hiring party's right to control the manner and means by which the product is accomplished; the skill

required; the source of the instrumentalities and tools used; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of benefits; and the tax treatment of the hired party.[8]

In another relevant case, *Rutgers University*, the Association of Residence Counselors of Rutgers University sought certification as the exclusive representative of a negotiations unit comprising all residence counselors employed by the Rutgers College dean of students.[9] The issue before PERC was whether the residence counselors were public employees within the meaning of the EERA or students not subject to the law. PERC ruled that the residence counselors were public employees, but "it would not effectuate the purposes of the [EERA] to grant the [r]esidence [c]ounselors...the right to collective negotiations pursuant to the [EERA]." PERC based its conclusion on evaluative factors taken from NLRB decisions, including the continuity of employment, the regularity of work, the hours of work, the relationship of the work performed to the needs of the employer, and whether the counselors' responsibilities as students took preference over their obligations as residence counselors.

In applying these factors, PERC agreed with the director of representation that "the totality of the circumstances indicates that the [r]esidence [c]ounselors do not possess sufficient interest in their employment relationship with Rutgers to warrant the right to collective negotiations under the [EERA]."[10] Despite this conclusion, PERC declined to adopt a *per se* rule that student-employees are ineligible for collective negotiations under the EERA and further noted the residence counselors, while not entitled to negotiating rights, were still "entitled to limited protections under the [EERA]."[11]

Examining the statute and these cases, it appears there is a plausible argument for student-athletes being deemed employees. Regarding the statutory definition, scholarship student-athletes could argue they hold the position of athlete pursuant to a contract in the form of a national letter of intent and a scholarship offer. This is what the players did in *Northwestern University*, and the regional director agreed, finding these two documents "serve[d] as an employment contract." Moreover, the residence counselors were recognized as public employees in *Rutgers University*, and so that case could support a similar result for student-athletes.

Nevertheless, the argument in favor of the student-athletes begins to deteriorate when considering the case law. Applying *New Jersey State Judiciary*, scholarship student-athletes arguably are compensated by their university in the form of scholarship money; must abide by the coach's rules and regulations concerning training and practice times; utilize school property for practice; and have a relationship akin to a term position for the duration of their time while they are studying at the university. However, the issue in *New Jersey State Judiciary* was whether the freelance court interpreters were employees or independent contractors. The case thus has limited, if any, applicability to student-athletes, for whom the issue would be whether they are employees or students. Applying *Rutgers University*, the responsibilities and characteristics of student-athletes may be more akin to students in general and not to university employees. Indeed, one could argue the relationship of the athletic services performed to the needs of a public college as an educational and research institution should be viewed as secondary to the school's concern for the academic obligations of the athletes as students. Similarly, many athletes participate in a single season for their sport, and using the rationale of *San Francisco Arts Institute*,[12] can be differentiated from university employees by the reduced

time they are in season as employees. Finally, it seems likely that if the evidence were to show the student-athletes' responsibilities as students took preference over their obligations as athletes, a public college would have a strong public policy argument that the student-athletes should not be given the right to collective negotiations under the EERA, even if they are considered public employees.

The Influence of *Northwestern University*

In addition to the foregoing case law, the NLRB's decision in *Northwestern University* may be the most significant factor weighing against student-athletes at New Jersey public colleges if they attempt secure collective negotiations rights under the EERA. Adjudications under the NLRA frequently serve as a guide for interpretation of the EERA.[13] If student-athletes ever seek rights under the EERA, *Northwestern University* will be front and center in the parties' arguments. The NLRB's decision to not assert jurisdiction in *Northwestern University* very closely parallels PERC's decision in *Rutgers University* to dismiss the petition of the residence counselors. Indeed, in both cases, the NLRB and PERC determined that it would not effectuate the purposes of the respective statutes to rule in favor of the petitioner. Since PERC is often guided by the NLRB,[14] the *Northwestern University* ruling, when combined with PERC's previous decision in *Rutgers University*, strongly suggests that PERC would follow the NLRB's lead and dismiss the petition if student-athletes at New Jersey public colleges seeks rights under the EERA.

Could There Be a Legislative Solution?

At first glance, it may seem like the issue of student-athlete unionization under the EERA is an issue best left to PERC and the courts to decide. However, it is not outside the realm of possibility that the New Jersey Legislature could resolve the issue. In fact, in the time between the decisions of the regional director and the NLRB in *Northwestern University*, two states enacted legislation prohibiting student-athletes at public colleges from unionizing. In April 2014, the Ohio Legislature included a provision in state budgetary legislation that effectively prohibits student-athletes from being recognized as employees. Ohio Revised Code Section 3345.56 states, "Notwithstanding any provision of the Revised Code to the contrary, a student attending a state university...is not an employee of the state university based upon the student's participation in an athletic program offered by the state university." Accordingly, student-athletes at Ohio's 14 public colleges and universities cannot unionize under the Ohio Public Employees' Collective Bargaining Act.[15]

Similarly, on Dec. 30, 2014, Michigan Governor Rick Snyder signed Public Act 414 into law. That law amended the Michigan Public Employment Relations Act to specifically exclude from the definition of public employee any "student participating in intercollegiate athletics on behalf of a public university in this state." The obvious effect of the amendment is to prohibit student-athletes from engaging in activities permitted by the statute, such as forming labor organizations; engaging in concerted activities for the purpose of collective negotiation or bargaining or other mutual aid and protection; and negotiating or bargaining collectively with their public employers through representatives of their own choosing. Thus, student-athletes at Michigan's 15 public colleges may not unionize.

At the time of publication, there was no bill pending in the New Jersey Legislature that would amend the EERA to include or exclude student-athletes from the definition of employee.

Nonetheless, the Ohio and Michigan statutes provide two examples the New Jersey Legislature could follow or ignore if it wants to settle this issue instead of leaving it to PERC and the courts.

Conclusion

While the proofs presented in any case will necessarily dictate the analysis of the issues, it appears that current PERC case law militates against a finding that student-athletes at public colleges in New Jersey would be afforded the right to collective negotiations under the EERA. The key to victory for a public college would be whether it could present sufficient evidence to convince PERC that the student-athletes are just that: students first and athletes second. Rutgers University found success on this front once before, having convinced PERC that its residence counselors were students first and employees second, and thus not entitled to collective negotiations rights under the EERA.[16] With the NLRB having ruled against the student-athletes in *Northwestern University*, Rutgers appears poised to win again if its student-athletes were to follow in the unsuccessful footsteps of their Big Ten brethren.

Timothy D. Cedrone *practices labor and employment law with Apruzzese, McDermott, Mastro & Murphy and is an adjunct professor at Seton Hall University, where he teaches sports law.* ***Kerry E. Cahill*** *is an attorney with Florio, Perrucci, Steinhardt, & Fader and a former Division I student-athlete.*

Endnotes

1. *Northwestern Univ. & Coll. Athletes Players Ass'n*, 362 N.L.R.B. 167 (2015).
2. *See* College Athletes as Employees: An Overflowing Quiver, 69 *U. Miami L. Rev*. 65, 89 (2014) (noting that, as of Fall 2014, "no state has yet held that college athletes can organize under [state collective bargaining] laws").
3. N.J.S.A. 34:13A-3(d).
4. *Id.*
5. P.E.R.C. No. 2003-88, 29 N.J.P.E.R. 254 (¶ 76 2003).
6. 29 U.S.C. § 152(3).
7. 490 U.S. 730 (1989).
8. *New Jersey State Judiciary*, P.E.R.C. No. 2003-88, 29 N.J.P.E.R. 254 (¶ 76 2003).
9. P.E.R.C. No. 82-55, 8 N.J.P.E.R. 28 (¶ 13012 1981).
10. The director of representation further noted that the "relationship of the work performed to the needs of the employer is secondary to the employer's concern for the academic obligations of the employees as students." *Rutgers Univ.*, No. RO-79-187, 7 N.J.P.E.R. 546, 549 (¶ 12243 1981).
11. *Rutgers Univ.*, *supra* note 9.
12. *San Francisco Art Institute*, 226 N.L.R.B. 1251 (1976).
13. *Rutgers Univ.*, *supra* note 9; *Matter of Hunterdon County Bd. of Chosen Freeholders*, 116 N.J. 322, 337 (1989).
14. *See, e.g., Univ. of Med. & Dentistry of N.J.*, P.E.R.C. No. 2010-12, 35 N.J.P.E.R. 330, 333 n.6 (¶ 113 2009) (noting that PERC looks to the "experience, policies, and adjudications of the National Labor Relations Board as a guide to interpretation of the New Jersey statutory scheme").
15. Ohio Revised Code Section 3345.56 is a statute of general application and is not limited to only the Ohio Public Employees' Collective Bargaining Act.

16. *Rutgers Univ.*, *supra* note 9.