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Is Collective Bargaining With College Athletes in the Future for the NCAA?

The Intriguing Case of Northwestern University and College Athletes Players Association

By Bernard Pellegrino

No one can argue the fact that inter-collegiate athletics, especially college football, is now "big business." Millions of enthusiastic fans fill stadiums across the country almost every day of the week from Labor Day through New Year's Day, each spending hundreds, if not thousands, of dollars on tickets, travel expenses, hotel accommodations, and other entertainment costs to see their favorite teams in person—and that's only the football season. Those who don't travel back to campus can find nearly every one of their alma mater's games on television, with networks paying the NCAA, the individual schools, or their conference affiliates millions of dollars each year for broadcasting rights. At the University of Connecticut, as well as most other schools, the top coaches earn millions of dollars—even more than the university president. Throw in merchandise sales of hats, t-shirts, and other knickknacks emblazoned with the schools' logos, and the total dollars generated by big time college athletics is well into the billions.[1]

So what do the players get? Many would argue that they receive important lifelong lessons, unforgettable memories, and the satisfaction of achieving the epitome of the world of college sports, not to mention a free college education worth about $250,000.00! Others, more cynical, might say "nothing." For years the debate has raged as to whether college athletes, at least football and basketball players whose sports generate millions in income for their respective universities, should receive direct compensation for services rendered for the benefit of their schools. Such arguments are rebuffed by those who point out that their scholarships provide them with a very valuable education from some of the most prestigious universities in the world, which will benefit them for the rest of their young lives. The decision of the National Labor Relations Board, Region 13 in *Northwestern University and College Athletes Players Association*, while still subject to probably years of appellate review, may just be the catalyst for change that ultimately brings the players a share of the economic benefits that their efforts on the field have generated for their institutions.

The Northwestern Decision

On March 26, 2014, Peter Ohr, the Region 13 director of the National Labor Relations Board, issued his decision regarding a petition brought by the College Athletes Players Association attempting to unionize members of Northwestern University's football team. His 24-page decision (hereinafter referred to as the "Ohr Decision") has generated shock waves throughout the world of inter-collegiate athletics. In that ruling, Ohr granted certification as a collective bargaining unit to Northwestern's scholarship football players, entitling them to representation as "employees" under the National Labor Relations Act (the "Act").[2]

Mr. Ohr begins his opinion by reciting, in great detail, the regimen that college football players at Northwestern University undergo as part of their scholarship obligations at that private and prestigious institute of higher education.[3] The university is part of the Big 10 Conference which, until hiring its alumnus and former All-American Pat Fitzgerald as head football coach in 2006, was one of the least competitive programs in the conference. However, since that time, under Mr. Fitzgerald's leadership, Northwestern has not only become competitive in the Big 10 football ranks but has also played five consecutive bowl games since 2008. He is now the winningest coach in the university's history. Mr. Ohr notes that based on reports to the Department of Education, Northwestern generated approximately nine million dollars in net profit from the football program for the 2012-2013 academic year.[4]

Coach Fitzgerald's transformation of the program is directly related to very specific rules that his players must follow. Ohr's decision outlines in detail their time commitment to the program by which they devote 40 to 50 hours per week in season to their football responsibilities, and then contrasts those obligations to the purported limited time commitment to their academic roles.

The ruling points out that 85 players on the team receive scholarships that pay tuition, fees, room and board, and books, valued annually at $61,000.00 per player.[5] Based on changes in the NCAA regulations beginning in the 2012 academic year, all of the Northwestern players awarded scholarships receive four-year grants-in-aid pursuant to the "tender" orders. These tenders are executed by the university and the players at the time the scholarship offer is accepted. Tenders include very specific conditions that a player must meet in order to retain the benefits of the grant-in-aid.

With these facts as background, Ohr found that football players met the common law definition of an "employee" as set forth by the U.S. Supreme Court in *NLRB v. Town and County Electric*, 516 US 85, 94 (1995). That definition provides that an employee is a person that 1) performs services for another under a contract for hire; 2) is subject to the other's control or right of control; and 3) in return for payment. More specifically, he concluded that the "players receiving scholarships to perform football-related services for the Employer under a contract for hire in return for compensation are subject to the Employer's control and are therefore employees within the meaning of the Act."[6]

In finding that football players met the first prong of the test, the Regional Director found that the grant-in-aid or scholarship was a contract for hire for a four-year term and that the monetary value of the scholarship totaling as much as $76,000.00 per calendar year was their compensation. Furthermore, and crucial to his analysis, Ohr held that the compensation was specifically tied to, and in exchange for, athletic services performed under the terms of the tender. Significantly, the tenders required very specific obligations of the players and allowed the head football coach to reduce or cancel a player's scholarship for a variety of reasons, including the player's level of performance on the field.[7]

Under the second prong, Mr. Ohr further found that the players were subject to the employer's control in the performance of their duties as football players. This particular aspect of the decision is difficult to refute. It is unquestionable that the university, through its head coach, had significant control "over nearly every aspect of the players' private lives by virtue of the

fact that there were many rules that they must follow under the threat of discipline and/or loss of scholarship."[8] Those factors included their living arrangements; their right to apply for outside employment; and their ability to travel off campus, drive personal vehicles, and speak to the media as well as their use of alcohol, drugs, and even extending to their ability to post items on the Internet. He noted that the university limited control over their academic pursuits in that they were free to enroll in the academic programs of their choice, but were required to meet certain minimum academic requirements to retain their eligibility to play football.

Finally, in assembling the third prong, and in somewhat of a conclusory statement, Mr. Ohr found that the scholarship was tantamount to compensation, qualifying the scholarship players (as opposed to the walk-on players) as employees under the common law definition.[9]

From a legal standpoint, Mr. Ohr spends a considerable amount of his decision distinguishing this case from a prior decision of the board in *Brown University v. NLRB*, 342 NLRB 483 (2004). In that case, the board held that graduate assistants at Brown University who provided teaching and research duties to Brown University as scholarship graduate students did not meet the statutory definition of "employee" entitling them to unionize.

Northwestern argued strenuously that the *Brown* decision controlled the facts presented to Mr. Ohr. That argument was rejected by Mr. Ohr on the basis that the Northwestern football players' role was primarily economic while the Brown graduate assistants were fulfilling academic duties.[10] The key distinction Mr. Ohr noted was that Northwestern's scholarship football players dedicated 50-60 hours a week on their football duties while the Brown graduate assistants spent only a limited number of hours performing their teaching duties and their principal time commitment was focused on obtaining their graduate degree.[11] He further found that the duties of the scholarship athletes did not constitute a "core element" of their educational degree at Northwestern, unlike the graduate assistants at Brown.[12] Additionally, he found that the scholarship football player's athletic duties were not supervised by faculty members attached to their academic pursuits unlike the graduate assistants at Brown.[13]

Finally, and somewhat summarily, he distinguished the fact that the compensation for the graduate assistants was "financial aid,"[14] while the athletic requirements of the football players at Northwestern were the quid pro quo for their scholarship.[15] It will be interesting to see if the full board agrees with Mr. Ohr's distinctions to its holding in the *Brown* case.

The Future Appellate Outcome

Northwestern appealed Ohr's Decision to the full board and on April 24, 2014, the board granted the petition noting that it "raised substantial issues warranting review."[16] Undoubtedly, given the high stakes, the decision of the board will then be appealed to the Federal courts and could end up on the lap of the U.S. Supreme Court. That legal battle will rage on for many years. As a result, there will be no immediate enforceable impact of his decision until those litigation channels are exhausted.[17]

While aspects of Mr. Ohr's fact-finding can be questioned, it would not be unreasonable for the Board or a federal appellate court to find that the practical relationship between the university and the players is that of a business relationship. For many college athletes competing at the highest echelon of college basketball, for instance, it could be argued that the academic benefits are certainly secondary to the potential athletic benefits and their future careers as professional athletes. That argument could be augmented by the fact that the NCAA reported that only 68 percent of college basketball players on scholarship from 2002-2005 actually earned a degree from the school prior to their athletic eligibility expiring.[18] However, for those Northwestern scholarship athletes who both play and graduate, the Ohr Decision gives little credit to the fact that they will have received the full value of the scholarship, a benefit that will service them well for the rest of their adult lives. Those who disagree with Mr. Ohr's decision will certainly point to the fact that this benefit may well exceed the "compensation" which they have been provided through the grant in aid, which may turn out to be the soft underbelly of his holding. Or is it?

While it certainly could be argued that it is unlikely an 18-year-old high school graduate might be unable to earn $250,000 in four years in today's deflated job market, does the acknowledgment that they are "earning" the value of the degree in exchange for their athletic skills require the conclusion that they should be afforded the right to collectively bargain for their benefits?

Those looking for legal precedent to predict the ultimate outcome of this battle could look to the cases where college athletes have attempted to collect workers' compensation benefits for injuries sustained while participating in college athletics. In those cases, as in the present dispute, the ultimate determination was whether the players were deemed "employees" under the applicable state workers' compensation statutes. Those decisions have resulted in a conflict of holdings. For instance, in *Rensing v. Indiana State*, 444 N.E. 2d 1170, 1171 (Ind.1983), an Indiana State University football player who was significantly disabled from a football injury was denied workers' compensation benefits by the Indiana Supreme Court because it held that his financial aid did not constitute pay or income that justified a classification as an "employee" under the Indiana Workers Compensation Act.[19] Conversely, in *University of Denver v. Neumeth*, 257 P.2d 423 (Colo. 1953), the Colorado Supreme Court awarded workers' compensation benefits to the school's injured football star, finding that his "job" at the University as a "tennis court manager" was dependent on his football performance and, therefore, compensable as related to his employment.[20]

Other Recent Influential Factors

As the Ohr Decision goes to the full board for review, other recent developments may further influence whether college athletes may eventually receive additional financial compensation for their athletic contributions. On August 7, 2014, the NCAA announced that it was granting autonomy to the five so-called foot-

ball power conferences[21] to allow their member institutions to increase financial stipends to their student-athletes. Many commentators have stated that this dramatic reversal by the NCAA was not coincidental to the Ohr decision—both from its timing and substantive standpoints.[22] The new rule will permit those schools to pay the players an additional stipend, between $2,000-$5,000 per player, to cover the actual "cost of attendance" over and above tuition, room and board, and other fees covered by their grant-in-aid scholarship. Perhaps even more importantly, they would be permitted to fund other benefits for players such as additional health care benefits, meals, insurance as well as adjusted time demands and additional personnel benefits and contact for staff with the players. Sounding more and more like employees?

Additionally, on August 8, 2014 the U.S. District Court for the Northern District of California issued its decision in the case of *O'Bannon, et al. v. NCAA, et al*. (hereinafter referred to as the "*O'Bannon* Decision")[23] In that case, Judge Claudia Wilkin ruled that the NCAA had violated antitrust guidelines by conspiring with certain media outlets, such as video game giant EA Sports, to produce and sell video games and other merchandise using college players' names, images, and likenesses without permitting compensation to the athletes.[24] The court held, in a 99-page decision, that the NCAA was enjoined from preventing payments to the athletes and ordered that the schools would be permitted to hold in trust at least $5,000 per year/per player from its licensing revenues, which sums would be payable to the players at the end of their collegiate careers.[25] Judge Wilken's holding, like Mr. Ohr's decision, while providing a modest return to the individual player, could have a dramatic cumulative economic impact on the NCAA, its licensing partners, and its member institutions and conferences.

Conclusion

Mr. Ohr's decision may forever change the landscape of inter-collegiate athletics. If upheld after the exhaustion of what will inevitably be a long and litigious appellate process, football players at other private institutions at least, and perhaps a much broader subset of NCAA student athletes, may also obtain the ability to exercise the right to vote to bargain over the terms and conditions of their employment, which theoretically could include both wages and benefits. Notwithstanding the outcome of the case, the recent NCAA rule change, which would also cover Northwestern's football team as a member of the Big 10, may render the ultimate decision in the unionization case moot if the players are able to obtain similar benefits without its intersession, and the fees and costs related to being a member of the union. However, it appears clear that the Ohr decision was a substantial catalyst of the NCAA about-face regarding offer stipends to its scholarship athletes.

The significance of the *O'Bannon* decision can also not be understated. While it will also be headed for appellate review, the NCAA and its member institutions and conferences also appear destined to work in a more collaborative manner with its recently empowered student athletes to redistribute the economic benefits that it has long enjoyed to their preclusion, without fear of reprisal.

Given the importance of the outcome, as is the case for all litigants, might some compromise be in the offing? Should college athletes be entitled to lifetime medical benefits for injuries incurred as part of the services they provide on behalf of their schools? Might some direct monetary stipend to the players be justifiable for the schools given the income derived from sports like football and basketball? As both the Ohr Decision and the *O'Bannon* case weave their path of uncertainty through the court system, both sides of this epic battle might be well-advised to find an acceptable middle ground where both the winners and the losers seem to have so much at stake. **CL**

Notes

1. Marc Edelman of U.S. News and World Report, reported on January 6, 2014 that the NCAA generated 11 billion dollars in annual revenues.
2. It is important to note at the outset that the Act has jurisdiction over only private institutions so that the director's ruling would directly affect only 17 of the approximately 125 college institutions playing FBS Division 1 football. As such, public institutions like the University of Connecticut are not directly affected by the ruling.
3. Ohr Decision, p.3-8, in which he details items such as their living arrangements, social media restrictions, drug testing requirements, football itineraries, including practice schedules and team meetings, and lastly their academic duties.
4. Ohr Decision, p.13.
5. There are 112 players on the Northwestern football team. The remaining 27 players are "walk-ons," who do not receive grant-in-aid scholarships.
6. Ohr, Decision, p. 13.
7. Ohr Decision, p. 15.
8. Ohr Decision, p.16.
9. Ohr Decision, p.17.
10. Ohr Decision, p.19.
11. Ohr Decision, p.18.
12. Ohr Decision, p. 19.
13. Ohr Decision, p. 19. This argument seems to ignore the importance of Mr. Fitzgerald's role as coach and mentor of the undergraduate student football players when compared to the faculty who oversaw the graduate assistants at Brown.
14. Ohr Decision, p. 20, noting (1) the graduate assistants received the same compensation as graduate fellows who did not have teaching duties and (2) their compensation was not tied to the quality of their work.
15. *Id.*
16. NLRB Order, Case 13-RC-121359, Northwestern University and College Athletics Players Association, April 24, 2014.
17. Even if the union prevails in the appellate courts a vote of the players, which is far from a certainty, would still be required to certify the union as their bargaining agent.
18. NCAA Research Staff Report, "Trends in Graduation-success rates and federal graduation rates at NCAA Division 1 Institutions" October, 2013.
19. *See also, Coleman v. Western Michigan University*, 336 N.W. 2d 224 (Mich. App. 1983).
20. *See also, VanHorn v. Industrial Accident Commission*, 33 Cal. Reporter 169 (Cal. App. 1963), a similar case concerning a California State Polytechnic University football player.
21. The power conferences include the Big 10, SEC, ACC, Big 12 and Pac-12.
22. Chip Alexander and Joe Giglio, *NCAA to vote on autonomy for ACC, other "Power Five" conference schools*, Newsobserver.com, August 6, 2014.
23. Case No. C 09-3329. This noteworthy case, with former UCLA basketball star Ed O'Bannon as the lead plaintiff, has been pending since 2009 and its progress has been highly publicized.
24. *O'Bannon* Decision, p.94.
25. *O'Bannon* Decision, p.96.