

**UNITED STATES OF AMERICA
AMICUS BRIEF
FOR THE NATIONAL LABOR RELATIONS BOARD**

**NATIONAL LABOR
RELATIONS BOARD**

and

Park Point University

and

Case (06-RC-012276).

**Newspaper Guild of Pittsburgh/
Communications Workers of America
Local 38061, AFL-CIO, CLC.**

**AMICUS BRIEF BY THE CENTER FOR THE ANALYSIS OF SMALL BUSINESS
LABOR POLICY, AS AMICUS CURIAE ON INVITATION BY THE NATIONAL
LABOR RELATIONS BOARD**

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Point Park University, Employer

and

**Newspaper Guild Of Pittsburgh/ Communications Workers Of America, Local 38061,
AFL-CIO, CLC, Petitioner**

**NOTICE AND INVITATION TO FILE AMICUS BRIEFS WITH THE
NATIONAL LABOR RELATIONS BOARD**

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INTRODUCTION

The central issue in this case is whether the (Point Park) University faculty members sought to be represented by the Petitioner are statutory employees or rather excluded managerial employees, consistent with the Supreme Court's decision in NLRB v. Yeshiva University, 444 U.S. 672 (1980). In his original decision and direction of election, the Regional Director found that the faculty members were not managerial employees, and, after an election, the Petitioner was certified as their collective-bargaining representative. The underlying issue ultimately was presented to the United States Court of Appeals for the District of Columbia Circuit, which found that the Board had "failed to adequately explain why the faculty's role at the University is not managerial." Point Park University v. NLRB, 457 F.3d 42, 44 (D.C. Cir. 2006).

The court instructed the Board to identify which of the relevant factors set forth in Yeshiva University, supra, are significant and which less significant in its determination that the Employer's faculty are not managerial employees and to explain why the factors are so weighted. Following the court's remand, the Regional Director issued a Supplemental Decision. The Employer sought review of that decision, which the Board granted on November 28, 2007.

To aid the Board in properly addressing the court's remand, the Board invites the parties and amici to file briefs that address the court's instruction that the Board explain the weight of the various factors identified by the Supreme Court in Yeshiva and their application to these factors. Again, the central issue in this case is whether the (Point Park) University faculty members sought to be represented by the Petitioner are statutory employees or rather excluded managerial employees, consistent with the Supreme Court's decision in NLRB v. Yeshiva University, 444 U.S. 672 (1980).

In his original decision and direction of election, the Regional Director found that the faculty members were not managerial employees, and, after an election, the Petitioner was certified as their collective-bargaining representative. The underlying issue ultimately was presented to the United States Court of Appeals for the District of Columbia Circuit, which found that the Board had “failed to adequately explain why the faculty’s role at the University is not managerial.” Point Park University v. NLRB, 457 F.3d 42, 44 (D.C. Cir. 2006).

The underlying issue ultimately was presented to the United States Court of Appeals for the District of Columbia Circuit, which found that the Board had “failed to adequately explain why the faculty’s role at the University is not managerial.” Point Park University v. NLRB, 457 F.3d 42, 44 (D.C. Cir. 2006). The court instructed the Board to identify which of the relevant factors set forth in *Yeshiva University*, supra, are significant and which less significant in its determination concerning whether Point Park’s faculty are, or are not, managerial employees for the purposes of Section 9 of the National Labor Relations Act, and to explain why the factors are so weighted. Following the court’s remand, the Regional Director issued a Supplemental Decision. Point Park sought review of that decision, which the Board granted on November 28, 2007. The Board affirmed the Regional Director’s decision that the Point Park faculty are professionals and not Managers, which are excluded from coverage under the NLRA.

Point Park then appealed the Board’s determination to the D.C. Court of Appeals, arguing that the Point Park faculty should be considered Managers and thus are NOT covered under the Act. The Court of Appeals remanded the case to the Board and asked, considering the factors set forth by the Supreme Court in their Yeshiva decision, how the Board made its decision that the Point Park faculty are not Managers.

In requesting Amicus Briefs, the Board stated the purpose of the Briefs are, to aid the Board in properly addressing the court's remand, the Board invites the parties and amici to file briefs that address the court's instruction that the Board explain the weight of the various factors identified by the Supreme Court in *Yeshiva* and how the Board applied these factors in this case.

Again, the question presented by the D.C. Circuit is whether the full-time faculty of various Private Colleges and Universities fall within the Managerial exclusion the Supreme Court delineated in Yeshiva. This question turns on the decision making authority of the faculty and faculty committees. If the faculty has the authority to autonomously make academic decisions, the faculty should be considered managers. If the faculty does not have the authority to autonomously make academic decisions, and these decisions are made by administrators, the faculty should NOT be considered managers. As stated by the D.C. Circuit, the Board did not state the factual basis why the Point Park faculty members were not Managers, in contrast to the faculty members at Yeshiva University et al.

An investigation of a proposed faculty bargaining unit should answer the following questions, which were set forth in Yeshiva.

- Are the individual schools or Departments within the Private College or University substantially autonomous?
- Is each Department headed by a Department Head faculty member, and do the faculty members at each Department meet formally and informally to discuss and decide matters of institutional and professional concern?

- At the Departmental level, are formal faculty meetings convened regularly pursuant to written bylaws? Does the faculty meet when convened by the Department Head, Dean or Director?
- Do the Departments also have faculty committees concerned with special areas of educational policy? Do faculty welfare committees negotiate with administrators concerning salary and conditions of employment?
- Through these meetings and committees, do the faculty and/or faculty committees at each department effectively determine its curriculum, grading system, admission and matriculation standards, academic calendars, and course schedules?

Managerial Status of Faculty

In determining the Managerial status of University faculty, one must remember that the common description of University governance has long been described as "faculty governance." Therefore any decision by the Board should concern whether the faculty has decision making authority, either by individuals or by committees. The only variance from the Supreme Court's rationale in Yeshiva would be at a small or community college, where administrators make these decisions, and the responsibility of the faculty largely involves teaching. As an example, at most Colleges and Universities, the faculty members teach no more than three (3) or (6) hours per week, while at Community and other Private Colleges (i.e. Phoenix or Kaplan) the faculty members most often teach twelve (12) or more hours per week. In the newer Private Colleges and Universities such as Phoenix, Kaplan, et al., almost all decisions concerning academic topics are made by administrators.

Again, the first question the Board should ask in any determination related to Private College and University faculties is who makes academic decisions. Again, at the small or community college level, the faculty often teach 12 hours per week in classes

assigned by a Dean or other administrator and have few or no decision making responsibilities. At essentially all other Private Colleges and Universities, the faculty makes academic decisions.

Also, it must be understood that many persons have academic rank at a College or University, even though they are not "classically" teaching faculty. These include, among many others, coaches, librarians and administrators, or strictly researchers. Therefore a petition stating that the bargaining unit should include "all faculty" would be inappropriate, since it would include many administrators and other non-academic personnel that are clearly decision makers. Therefore, any coaches and administrators who have faculty rank clearly should not be included in a bargaining unit.

At the most basic level, most Private College and University decisions are made at the Departmental and at the individual faculty member level, with no oversight by any administrators. What specific topics a faculty member covers in a class is entirely at the discretion of the individual faculty member. The individual Departments are then made up by faculty with common teaching and research interests. These can range from the Sociology Department to the Engineering or Mathematics or Psychology Departments.

Many Private Colleges and Universities also have Medical or Law Schools. Among these Departments are Faculty with specific areas of expertise. The faculty members make all decisions based on what they teach, what research they do, and what areas of Service they engage in, as well as what furthers the mission of the university. Because of these diverse academic interests and academic assignments, a "wall to wall" bargaining would not be appropriate.

Hiring is most often done first by a faculty committee and then voted on by all of the faculty in the Department. Terminations, or refusals to grant tenure, are examined first

by a faculty committee and then by the faculty as a whole. Terminations for cause are done rarely, for very egregious behavior, and these are done by the Departmental faculty. Most typically, faculty members have seven (7) years to meet the requirements for tenure, unless they are particularly outstanding in publishing and are granted early tenure by faculty consensus. Also, some faculty members are hired by the faculty at the Associate Professor, or Full Professor level and automatically are granted tenure upon their hire. These decisions are made by the faculty in the Department. Most non-tenured hires are for Assistant Professors, while tenured hires are typically for Associate or full professors.

In addition, there simply is no community of interest among most of the various Departments. As stated earlier, the Departments vary from Engineering, to Sociology to Mathematics. There is simply no way to treat these Departments collectively, since the decision making is made at the Departmental or individual faculty member level, with no common base of academic expertise. Who should make more money, engineering, or business faculty, or liberal arts faculty. Thus, the faculty members regularly make numerous academic decisions and have the authority to make these decisions autonomously.

Likewise, salary administration among faculty members is very complex and made by the faculty at the Departmental level; subject only by administrative or budgetary caps. Other compensation is paid directly from Grants, or endowed chairs, with no contribution from the University. It would be impossible for a labor union to negotiate a salary administration schedule for a Private College or University on any reasonable basis; even at the Departmental level. It simply is too complex. There also is little continuity among the faculty, and the faculty would never agree to have salary administration, or any other academic decision, done by a Labor Union. As an example, physicians at Medical Schools

are paid by income derived from their work and also compensation for teaching. Also, faculty regularly receive awards from foundations that often have stipends attached. Also, there are wide ranges of salaries in the various Departments.

Next, one must understand the nature of the Private College and University governance process and the significant decision making authority that faculty members have in the various Departments. Quite simply, the faculty is responsible for almost all academic decisions and have the authority to execute these decisions, which make them Managers, rather than "simply cogs in a wheel" or employees. In liberal arts Departments, there is some salary continuity among faculty members, but most often salary is based on the Department's desire to hire, or to keep, a faculty member who is well known in the field and/or has a significant amount of publishing in peer reviewed journals.

Again, in Private Colleges and Universities, the authority for most decision making is by individual faculty members through intra-Departmental Committees, or the Department as a whole. These committees, or the individual faculty members themselves, are responsible for, and have the authority over, all academic aspects of Departmental governance. When the Departmental faculty make a decision, it is by consensus, with no input from any administrators. The Department heads are most often selected by the Department faculty and are often filled on a rotating basis among the tenured faculty in the Department. Only in such institutions as some community colleges is hierarchical institutional governance found, with College or University Deans making decisions unilaterally. Thus, the first thing to consider in a Representation case is whether or not decision making is done by Departmental Deans or at the faculty level in the Private College or University.

(1) Which of the factors identified in Yeshiva and the relevant cases decided by the Board since Yeshiva are most significant in making a finding of managerial status for university faculty members and why?

The most significant factors are largely grouped around decision making and academic control. If the faculty at the individual or Departmental level have autonomy over deciding academic matters, they are Managers. If such decision making is made at the Administrative level, the faculty would be Professional, but not managerial. **Thus, the first level of investigation should be to ask who makes decisions about academic matters, the faculty, or some other Administrators.**

- **In Yeshiva, the Supreme Court reviews several Board decisions, which sets the groundwork for such consideration. These include:**

In Yeshiva, the Supreme Court found that faculty members at Yeshiva University were managerial employees who were excluded from coverage under the Act. **The Court defined managerial employees as those who "formulate and effectuate management policies by expressing and making operative the decisions of their employers."**

Yeshiva, 444 U.S. at 682. The Court held that managerial employees "must exercise discretion within, or even independently of, established employer policy and must be aligned with management," and that they must represent "management interests by taking or recommending discretionary actions that effectively control or implement employer policy." Id. at 683.

The most basic aspect of a Representational investigation at Private Colleges and Universities is to ask the faculty who decides the content of their courses, or their area of expertise, or are they autonomous in making these decisions.

In Yeshiva, the Court formulated critical areas of inquiry from previous Board decisions. The controlling consideration in this case is that the faculty of Yeshiva University exercises authority which in any other context unquestionably would be managerial. Their authority in academic matters is absolute.

1. They decide what courses will be offered, (Significant)
2. when they will be scheduled, and (Significant, although these are usually determined at the Departmental level.)
3. to whom they will they teach. (Significant, this is typically determined by the faculty at the Departmental level.)
4. They debate and determine teaching methods, (Significant, this is typically determined by the faculty at the individual level)
5. grading policies, (Significant, this is typically determined by the faculty at the individual level)
6. and matriculation standards. (Significant, this is typically determined by the faculty at the Departmental level)
7. They effectively decide which students will be admitted, retained, and graduated. (Significant, this is typically determined by the faculty at the individual level)
8. On occasion their views have determined the size of the student body, (Significant, although this is usually determined at the administrative level.)
9. the tuition to be charged, (Significant, although these are usually determined at the administrative level.)
10. and the location of a school. (Significant, although this is usually determined at the administrative level.)

When one considers the function of a university, it is difficult to imagine decisions more

managerial than these.

2010 NLRB Reg. Dir. Dec. LEXIS 179, 65-66 (NLRB Reg. Dir.
Dec. 2010)

Managerial Status

In considering the managerial status of a Private College or University faculty such as in NLRB v. Yeshiva University, 444 U.S. 672 (1980), **the Supreme Court defined managerial employees to be those who formulate and effectuate management policies by expressing and making operative the decisions of their employers.** The Court noted that managerial employees must exercise discretion within, or even independently of, established employer policy, must be aligned with management, and must represent management interests by taking or recommending discretionary actions that effectively control or implement employer policy. The Board has held that the party seeking to exclude individuals as managerial has the burden of coming forward with the evidence necessary to establish such an exclusion. Quite simply, Managers are those who formulate and effectuate management policies by expressing and making operative the decisions of their employers. Lemoyne-Owen College, 345 NLRB 1123, 1128 (2005); Montefiore Hospital & Medical Center, 261 NLRB 569, 572 fn. 17 (1982).

Applying its managerial test to the faculty members in Yeshiva, the Supreme Court found them to be managerial employees, based on their extensive authority over academic matters such as the school's curriculum, academic calendar, course schedules, student admission, student retention, matriculation standards, teaching methods and grading policies. The Court noted that, on occasion, faculty views had determined the size of the student body, the tuition to be charged, and the location of a school. While the Court also

noted the faculty's predominant authority in nonacademic matters, such as hiring, tenure, sabbaticals, termination and promotion, which it found to have both managerial and supervisory characteristics, the Court did not rely primarily on these features of faculty authority but rather on their authority over academic affairs.

The Board has applied the Yeshiva decision in numerous cases in Private College and University settings, most of which involved the managerial status of rank-and-file faculty members rather than Department chairs or their equivalents. The Board has emphasized the importance of faculty control or effective control over academic areas as opposed to nonacademic areas, LeMoyne-Owen College, Id. at 1128 (2005)(emphasis in original).

The Board has generally found rank-and-file faculty to be managerial when they exercise substantial control over academic matters. This is almost universal in Private Colleges and Universities. Administrators should not have any input into academic matters. For example, administrators have little knowledge relative to the Physics. Department and should not have input in such academic matters.

The Board Has Made the Following Determinations in applying Yeshiva.

In Livingston College, 286 NLRB 1308, 39-40 (1987), the Board found faculty members to be managerial employees where they exercised substantial authority over curriculum, degree requirements, course content and selection, graduation requirements, matriculation standards and scholarship recipients. The faculty members participated in academic governance through membership on various standing committees and by virtue of a faculty-wide vote on recommendations proposed by these committees. The Board placed only limited significance on the fact that the faculty had virtually no input into nonacademic matters such as the budget process, tenure decisions and selection of

administrators, and no authority in the hiring and firing of faculty.

In Elmira College, 309 NLRB 842 (1992), the Board found faculty members to be managerial where committees comprised predominately of faculty members established the curriculum, had final authority to add new courses, to make changes in course content and level, to determine whether a particular course satisfied the College's requirements, and to approve student petitions to waive academic requirements. The faculty, through individual faculty members, divisions, or committees, approved degree candidates, student grading, course scheduling, class size, number of course sections, student advising, transfer course credits, and student retention and discipline related to academic performance. The Board held that, without more, the nature of faculty involvement in academic matters conclusively established their managerial status. In addition, however, they exercised considerable authority concerning the hiring of faculty and tenure decisions, although they had no authority over salaries. Faculty recommendations concerning both academic and nonacademic matters were generally followed by the college president.

In LeMoyne-Owen College, 345 NLRB 1123 (2005), the Board found the faculty to be managerial where, through individual faculty members, a curriculum committee, an academic standards committee, and a faculty assembly composed entirely of faculty members except for two administrators, the faculty made or effectively controlled decisions with regard to curriculum, courses of study and course content, degrees and degree requirements, major and minors, academic programs and academic divisions, the addition and deletion of courses, teaching methods, grading, academic retention, lists of graduates, selection of honors, admission standards, syllabi and textbooks. The faculty also made effective decisions in some nonacademic areas, including tenure standards, tenure selection, and the faculty evaluation process.

However, the Board has found rank-and-file faculty to be non-managerial in circumstances where they do not have substantial control over academic matters.

In Carroll College, Inc., 350 NLRB No. 30 (2007) vacated on other grounds 585 F.3rd 568 (D.C. Cir. 2009), the Board found faculty to be non-managerial where proposals made by a faculty committee regarding degree requirements, curriculum, and the addition and deletion of majors and courses are independently reviewed by the college administration and have been rejected by the administration.

In Florida Memorial College, 263 NLRB 1248 (1982), the Board found faculty to be non-managerial where the curriculum was not within the faculty's absolute control and all curricular proposals had to be approved by the administration. Accord, University of Great Falls, 325 NLRB 83 (1997); St. Thomas University, 298 NLRB 280 (1990).

The Employer bases its contention that the Department heads are managerial largely on their role as members of the School Committee. I find that the Employer has failed to establish that the Department heads are managerial employees. I base this conclusion on the lack of control by Department heads over academic matters as members of the School Committee. The issue, then, is whether, by their role on that committee, the Department heads effectively recommend or determine academic policy or action as described in Yeshiva.

2010 NLRB Reg. Dir. Dec. LEXIS 139, 36-42 (NLRB Reg. Dir. Dec. 2010)

In determining the appropriateness of a unit in a college or university environment, the Board applies the rules traditionally used to determine the appropriateness of a unit, as set forth above. Livingstone College, 290 NLRB 304 (1988); Harvard College, 269 NLRB 821 (1984); Cornell University, 183 NLRB 329, 336 (1970).

In this regard, a campus or college-wide unit, like a plant-wide unit, is viewed by

the Board as presumptively appropriate under the Act. Livingston College, supra; Western Electric Co., 98 NLRB 1018 (1952). (This is NOT appropriate in a College or University setting, where there is a wide range of expertise from one Department to another.) See also § 9(b) of the Act.

The burden of proving that the interests of a given classification of employees are so disparate from those of others that they cannot be represented in the same unit rests with the party challenging the unit's appropriateness. Greenhorne & O'Mara, Inc., 326 NLRB 514 (1998). In the instant case, the Employer has not met its burden of showing that the petitioned-for unit is inappropriate.

Applying Yeshiva and its progeny to the facts in this case, we find that the faculty at LeMoyne-Owen College are managerial employees. Whether acting as individual faculty members, through committees, or in the faculty assembly, n15 we find that the faculty make or effectively recommend decisions in the majority of critical areas identified in Yeshiva and subsequent decisions interpreting and applying it. See e.g., Elmira College, 309 NLRB 842 (1992); Lewis & Clark College, 300 NLRB 155 (1990); American International College, 282 NLRB 189 (1986); University of Dubuque, 289 NLRB 349 (1988); and Livingstone College, 286 NLRB 1308 (1987).
Lemoyne-Owen College & Faculty Org., 345 N.L.R.B. 1123, 1128-1129 (N.L.R.B. 2005)

An election by secret ballot shall be conducted among the employees in the unit found appropriate, as early as possible, but not later than 30 days from the date below. The Regional Director for Region 1 shall direct and supervise the election, subject to the National Labor Relations Board Rules and Regulations, Series 8, as amended. Eligible to vote are those in the unit who were employed during the payroll period ending immediately

before the date below, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period; employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date; and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective-bargaining purposes by Milk Wagon Drivers and Creamery Workers Union, Local 380, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. 261 N.L.R.B. 565, 568 (N.L.R.B. 1982)

The Board has been criticized for its lack of a consistent approach to the faculty managerial issue. n6 The **18 (?) Yeshiva** criteria provide a valid and valuable starting point for Board analysis. The Supreme Court highlighted the 18 criteria for a reason, the reason being to examine the entire gamut of faculty authority. The Yeshiva faculty possesses authority over 100 percent of this range, while the Dubuque faculty possesses authority over 44 percent of this range. The Yeshiva faculty were managerial employees, the Dubuque faculty are not. *Accordingly, I would dismiss the unit clarification petition as to the faculty members.* Dubuque University 289 N.L.R.B. 349 (N.L.R.B. 1988)

DIRECTION OF ELECTION

An election by secret ballot shall be held among the employees in the unit found appropriate, as early as possible but not later than 30 days from this date. The Regional Director shall direct and supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those employed during the payroll period ending immediately before this date, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that began less than 12 months before the election date and who retained their employee status during the eligibility period and their replacements. Those in the military services may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the payroll period, striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining by St. Thomas University Faculty Association, a Chapter of the United Faculty of Florida/NEA.

To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. Excelsior Underwear, 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the names and addresses of all the eligible voters must be filed by the

Employer with the Regional Director within 7 days of the date of this Decision On Review, Order and Direction of Election. The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election if proper objections are filed.

St. Thomas University, Incorporated, Employer and St. Thomas University Faculty Association, a Chapter Of The United Faculty Of Florida/NEA Petitioner 298 N.L.R.B. 280, 287 (N.L.R.B. 1990)

IV. CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction in this case.
3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act and claims to represent certain employees of the Employer.
4. No question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

V. ORDER

IT IS HEREBY ORDERED that the petition herein be, and it hereby is, dismissed.

2008 NLRB Reg. Dir. Dec. LEXIS 12, 25-26 (NLRB Reg. Dir. Dec. 2008)

There is no specific evidence concerning whether the Thiel College teachers are involved in decisions regarding academic calendars, student absence policies, enrollment levels, tuition, and the location of a school. However, art. II, B, of the faculty constitution, set forth in full supra, would appear to empower the faculty to make decisions in these areas. In addition, the Court clearly indicated that the faculties of only some of the 10 schools of Yeshiva covered by the petition effectively determined questions in these areas. 444 U.S. at 677. Last, we do not regard faculty involvement or lack of involvement in these areas as vitally significant.

Like the teachers in Yeshiva University, the faculty herein controls the College's curriculum; each department makes recommendations regarding course offerings (and course content) which are reviewed by the faculty curriculum study committee, and which are ultimately approved or disapproved by the faculty through the faculty council. It also implements the curriculum in setting up course schedules and dividing the teaching load among the various departments' professors. Through the faculty council and its academic standing committee it supervises the overall academic performance of the College, including grade levels and academic standards. The faculty also determines who will be admitted and readmitted to the college; it establishes the academic requirements for obtaining degrees; and it certifies to the board of trustees, for its approval, those students eligible for graduation. In addition, each department prepares its own annual budget, which apparently is normally accepted by the College. The faculty is also involved in long-range financial and economic planning for the College. The faculty participates in setting its own salary and benefit levels, and adjusts faculty and student grievances. Finally, the Thiel College faculty makes effective decisions on hiring, tenure, sabbaticals, terminations, and promotions.

Although, as in Yeshiva, ultimate authority is vested in the board of trustees, we conclude that the faculty of Thiel College, like that of Yeshiva University, does not have professional interests separate from those of its employer, and that it necessarily plays a large role in operating the College. Thiel College, like Yeshiva University, "requires faculty participation in governance because professional expertise is indispensable to the formulation and implementation of academic policy," and therefore must depend upon its teaching staff "to participate in the making and implementation" of its policies. n35

Thiel College 261 N.L.R.B. 580, 586 (N.L.R.B. 1982)

Again, almost all Private Colleges or Universities, the Departments are too distinct to fit under a "plant-wide rule." In most Departments, the academic duties are quite distinct among each other. There simply is not a sufficient community of interest between the Engineering Department and the Sociology Department to make a plant-wide rule practical. They have distinct and significantly different products to present to the students. In addition, Business or Engineering School faculties have distinct salary requirements, that would be impossible to collectively bargain.

(2) In the areas identified as “significant,” what evidence should be required to establish that faculty make or “effectively control” decisions?

The Board asked, in its request for Amicus Briefs, whether or not the decisions of the Departments, or individual faculty members, can be effectively vetoed by the Deans or other University personnel, or whether the individual faculty members or Faculty Committees make, in essence, final decisions by the consensus of the faculty committees.

To designate whether or not decisions are significant, what evidence is required.?

As stated above, any documents or interviews of faculty and administration members relating to decision making authority should be considered. In this regard,

first, a faculty committee most often makes hiring decisions. This can be confirmed through interviews with faculty members and administrators. In the typical hiring process, the faculty reviews any resumes the Department receives, selects the applicants to bring onto campus, sets up interviews and invites the other members of the Departmental faculty to interview the applicant, and, make what is in essence, the final decision. Also, the faculty decides who meets the criteria for tenure in the Department. They effectively control these areas of decision making, because, unless outlandish, the decisions are never vetoed by the administration.

(3) Are the factors identified in the Board case law to date sufficient to correctly determine whether faculty are managerial?

YES - As laid out in Yeshiva. First, it is necessary to understand the governance process at a University before one can decide whether or not the individual faculty members have a managerial role. Decisions at Private Colleges and Universities are made by individual faculty members or by consensus by the Departmental faculty and/or faculty committees. Once a decision has been made, the Department Head transmits the decision for information only, typically to a Dean, who has no authority to veto any faculty decisions. As stated earlier, in Yeshiva, the Supreme Court listed the following factors that faculty must have to be considered Managers:

- (1) control over curriculum and course schedules;**
- (2) control over teaching methods;**
- (3) control over grading policies; and**
- (4) control over which students will be admitted, retained, and graduated.**

In addition, the Regional Director referred to various non-academic factors that the Supreme Court listed in Yeshiva, but which the Supreme Court described as "features of faculty authority" upon which it did not need to "rely primarily," 444 U.S. at 686 n.23:

- (1) control over hiring;
- (2) control over tenure;
- (3) control over sabbaticals;
- (4) control over terminations;
- and (5) control over promotions.

Finally, in Yeshiva, the Regional Director touched upon several factors relied upon in previous Board decisions:

- (1) control over salary and benefits;
- (2) statements made by the Administration; and
- (3) the size of the University's administrative component.

These are not relevant to this determination.

(4) If the Yeshiva factors are not sufficient, what additional factors would aid the Board in making a determination of managerial status for faculty?

None. These are sufficient.

(5) Is the Board's application of the Yeshiva factors to faculty, consistent with its determination of the managerial status of other categories of employees and, if not,

They are consistent, however in most other businesses, individual employees are not give autonomous decision making authority.

(a) may the Board adopt a distinct approach for such determinations in an academic context or

Yes - It is necessary, as described above. The Board must first verify and recognize the nature of University Governance, including the autonomous decision making authority

of individual faculty members and the Committees they serve on.

(b) can the Board more closely align its determinations in an academic context with its determinations in non-academic contexts in a manner that remains consistent with the decision in Yeshiva?

NO - Autonomous individual and Departmental authority to make all academic related decisions is unique to Colleges and Universities. As long as the Board recognizes the autonomous decision making authority of individual faculty members and the Committees they serve on, they must use different criteria.

(6) Do the factors employed by the Board in determining the status of university faculty members properly distinguish between indicia of managerial status and indicia of professional status under the Act?

Yes - As long as the Board recognizes the autonomous decision making authority of individual faculty members and the Committees they serve on.

(7) Have there been developments in models of decision making in private universities since the issuance of Yeshiva that are relevant to the factors the Board should consider in making a determination of faculty managerial status?

NO

If so, what are those developments and how should they influence the Board's analysis?

NONE

(8) As suggested in footnote 31 of the Yeshiva decision, are there useful distinctions to be drawn between and among different job classifications within a faculty--such as between professors, associate professors, assistant professors, and lecturers or between tenured and untenured faculty--depending on the faculty's structure and practices?

No - Typically, in performing an analysis of the factors described above, all faculty have the same decision making authority, regardless of their rank. The only difference is when tenured faculty decide whether Assistant Professors are granted tenure.

Conclusion

The Supreme Court was correct in the Yeshiva case. When the Region receives a Petition concerning a Private College or University, their investigation of the bargaining unit should be for a single academic Department and the major aspect of the Investigation should be whether or the faculty or faculty have the right to make academic decisions without further Administrative Review.

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