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The Implications of *NLRB* v. *YESHIVA UNIVERSITY*

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Finding the full-time faculty's authority at Yeshiva University in academic matters is absolute, a divided Supreme Court ruled the full-time faculty members were managerial personnel and thus not employees within the meaning of the National Labor Relations Act (Act).[1]

Joining a growing number of courts, the Court refused to defer to the expertise of the National Labor Relations Board (Board), asserting the absence of factual analysis apparently reflected "the Board's view that the managerial status of particular faculties may be decided on the basis of conclusory rationales rather than examination of the facts of each case."[2]

Yeshiva University is a private university in New York City. In 1974 the Yeshiva University Faculty Association (Union) filed a representation petition with the Board seeking certification as the bargaining agent for the full-time faculty members at 10 of the University's 13 schools.[3] The University opposed the petition on the ground that all of its faculty members were managerial or supervisory personnel and hence not employees within the meaning of the Act.

Evidence at the hearing showed that a central administrative hierarchy served all of the University's schools. Ultimate authority was vested in a Board of Trustees. University-wide policies were formulated by the central administration with the approval of the Board of Trustees, and included general guidelines dealing with teaching loads, salary scales, tenure, sabbaticals, retirement, and fringe benefits.

The hearing officer found that faculty at each school, through meetings and committees, effectively determined its curriculum, grading system, admission and matriculation standards, academic calendars, and course schedules. Faculty power at the schools extended beyond strictly academic concerns. The

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[1] NLRB v. Yeshiva University,—U.S.—, 100 S.Ct. 856 (1980) (Brennan, White, Marshall, and Blackmun, JJ., dissenting); 29 U.S.C. § 151 *et seq.*, as amended 61 Stat. 136, 73 Stat. 519.

[2] *See*, J. Irving & C. Taylor, *The Limits of Judicial Deference to NLRB Expertise*, 103 LRR 204 (1980) and cases cited therein.

[3] The Union did not seek to represent the faculty of the medical school, the graduate school of medical sciences, the University high school or any of the theological programs sponsored by the University. The University law school was not open at the time of the hearings and does not figure in the case.

faculty members at each school made recommendations to the dean or director in every case of faculty hiring, tenure, sabbaticals, termination and promotion. Although the final decision was reached on the advice of the dean or director, it was found the overwhelming majority of faculty recommendations were implemented.

A three-member panel of the Board granted the Union's petition in 1975 and directed an election in a bargaining unit consisting of all full-time faculty members at the affected schools.[4] Deans and directors were excluded from the unit.

The Union won the subsequent election and was certified by the Board. However, the University refused to bargain, reasserting its view that all its faculty members were supervisory or managerial personnel. In the subsequent unfair labor practice proceeding, the Board refused to reconsider its holding in the representation proceeding and ordered the University to bargain with the Union.[5]

When the University still refused to bargain, the Board sought enforcement in the United States Court of Appeals for the Second Circuit. The Court of Appeals denied the Board's petition[6] and the Board sought review by the Supreme Court.

In the ruling that the full-time faculty at Yeshiva University are employees covered by the Act, the Board, without any analysis, simply stated the authority of the faculty members was wielded in their capacity as professionals and invoked three doctrines promulgated by the Board in previous Board rulings.

The Board concluded:

> We find from our examination of the record, however, that the role and authority of the faculty herein with respect to hiring, promotion, salary increases, the granting of tenure, and other areas of governance are not significantly different from what they were in the cited cases, wherein the same arguments were rejected. At Yeshiva University, faculty participation in collegial decision making is on a collective rather than individual basis, it is exercised in the faculty's own interest rather than in the interest of the employer, and final authority rests with the board of trustees. As in the earlier decisions, we find that the faculty members are professional employees under the Act who are entitled to vote for or against collective-bargaining representation.[7]

Since the Board had made limited findings of fact, the Second Circuit examined the record and related the circumstances in considerable detail. It agreed with the Board that the faculty members are professional employees under section 2(12) of the Act. However, the court found that the Board had ignored "the extensive control of Yeshiva's faculty" over academic and personnel decisions as well as the "crucial role of the full-time faculty in determining other central policies of the institution."[8]

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[4] 221 N.L.R.B. 1053 (1975).

[5] 231 N.L.R.B. 597 (1977).

[6] 582 F.2d 686 (2d Cir. 1978).

[7] *Supra*, 221 N.L.R.B. at 1054 (citations omitted).

[8] *Supra*, 582 F.2d at 698.

The court concluded that such power is not an exercise of individual professional expertise. Rather, the faculty members are, "in effect, substantially and pervasively operating the enterprise."[9] Finding the Board had applied "unjustified, arbitrary standards", the court held the faculty are endowed with "managerial status" sufficient to remove them from the coverage of the Act.[10]

The majority, in an opinion written by Mr. Justice Powell, found that the University faculty exercised authority which in any other context unquestionably would be managerial. Declaring the faculty's "authority in academic matters is absolute", the Court noted the faculty "decide what courses will be offered, when they will be scheduled, and to whom they will be taught;" they "debate and determine teaching methods, grading policies, and matriculation standards;" and they "effectively decide which students will be admitted, retained and graduated."[11]

Considering the function of a university, the Court stated it is difficult to imagine decisions more managerial than these. To the extent the industrial analogy applies, it said the faculty determined within each school the product to be produced, the terms upon which it will be offered, and the customers who will be served.

With respect to the Board's contention that the faculty merely exercised independent professional judgment, the Court pointed out that outside the university context the Board had applied the managerial and supervisory exclusions to professionals in executive positions without inquiring whether their decisions were based on management policy rather than professional expertise.

Recognizing faculty members enhance their own standing and fulfill their professional mission by ensuring that the university's objectives are met, the Court declared there can be no doubt that the quest for academic excellence and institutional distinction is a "policy" to which the administration expects the faculty to adhere, whether it be defined as a professional or an institutional goal.

The Court acknowledged the problem of divided loyalty is particularly acute for a university like Yeshiva, which depends on the professional judgment of its faculty to formulate and apply crucial policies constrained only by necessarily general institutional goals. However, it declared that the large measure of independence enjoyed by faculty members can only increase the danger that divided loyalty will lead to those harms that the Board traditionally has sought to prevent.

Pointing out the Board has recognized that employees whose decision-making is limited to the routine discharge of professional duties in projects to which they have been assigned cannot be excluded from coverage even if union membership arguably might involve some divided loyalty,[12] the Court agreed with the Board that only if an employee's activities fall outside the scope of

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[9] *Id.*

[10] *Id.* at 703.

[11] *Supra*, 100 S.Ct. at 864.

[12] *Id.* at 866.

the duties routinely performed by similarly situated professionals will the employee be found aligned with management.

The Court recognized that its decision is a starting point only. It noted that other factors not present here may enter into the analysis in other contexts. According to the Court, it is plain that professors may not be excluded merely because they determine the content of their own courses, evaluate their own students, and supervise their own research. Thus, Mr. Justice Powell wrote, there may be institutions of higher learning unlike Yeshiva University where the faculty are entirely or predominantly nonmanagerial.

Commenting that there also may be faculty members at the University and like universities who properly could be included in a bargaining unit, the Court said it may be that a rational line could be drawn between tenured and untenured faculty members, depending upon how a faculty is structured and operates.

The dissent, authored by Mr. Justice Brennan, first asserted that the judicial role under the Act is limited. According to the dissent, the Board's decision may be reviewed for its rationality and its consistency with the Act, but once these criteria are satisfied, the order must be enforced.

Examining the decisionmaking structure of "most 'mature' universities," the dissent declared that whatever influence the faculty wields in university decisionmaking is attributable solely to its collective expertise as professional educators, and not to any managerial or supervisory prerogatives. It contended the "faculty offers its recommendations in order to serve its own independent interest in creating the most effective environment for learning, teaching, and scholarship."[13]

While the administration may attempt to defer to the faculty's competence whenever possible, the dissent said "it must and does apply to its own distinct perspective to those recommendations, a perspective that is based on fiscal and other managerial policies which the faculty has no part in developing."[14]

The dissent pointed out that, unlike industrial supervisors and managers, university professors are not hired to "make operative" the policies and decisions of their employer. Rather the professors are hired for their ability to teach. It also pointed out that the university administration has certain economic and fiduciary responsibilities that are not shared by the faculty, whose primary concerns are academic and relate solely to its own professional reputation.

Finally, the dissent accused the majority of basing its decision on an idealized model of collegial decisionmaking that is a vestige of the great medieval university. The dissent asserted that the university of today is "big business" and the task of operating the university enterprise has been transferred from the faculty to an autonomous administration.

The Supreme Court has ruled "the responsibility to adapt the Act to changing patterns of industrial life is entrusted to the Board"[15] The Board's

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[13] *Id.* at 870.

[14] *Id.*

[15] NLRB v. J. Weingarten, Inc., 420 U.S. 251, 266 (1975); *see also*, American Ship Building Co. v. NLRB, 380 U.S. 300, 316 (1965).

"special competence" is the justification for the deference accorded its determinations.

In order for a Board decision to be entitled to deference, the Board must demonstrate it "has reached a fair and reasoned balance upon a question within its special competence," and it must have "adequately explicated the basis of its interpretation" of federal law or policy.[16]

Adequate explication of the basis of the Board's interpretation of federal law or policy is especially important with respect to the bargaining status of university faculty since Congress has not considered whether a university faculty may organize for collective bargaining under the Act.[17] Acting under its responsibility for adapting the broad provisions of the Act to differing workplaces, the Board asserted jurisdiction over a university for the first time in 1970.[18]

Within a year the Board approved the formation of bargaining units composed of faculty members.[19] The Board reasoned that faculty members are "professional employees" within the meaning of section 2(12) of the Act and therefore "entitled to the benefits of collective bargaining."[20]

The Board has offered four justifications for ruling full-time university faculty members are employees covered by the Act.

In *C.W. Post Center*[21], when it considered for the first time whether university faculty members should be classified as "employees" within the Act, the Board conceded it was exploring an "unchartered [sic] area * * * ."[22] Declining to examine the facts and evolve a principled basis for its decision in this new area, the Board merely announced:

> * * * [W]e are of the view that the policy making and quasi-supervisory authority which adheres to fulltime faculty status but is exercised by them only as a group does not make them supervisors within the meaning of section 2(11) of the Act, or managerial employees who must be separately represented. Accordingly, we find that full-time university faculty members qualify in every respect as professional employees under Section 2(12) of the Act, and are therefore entitled to all the benefits of collective bargaining if they so desire.[23]

In *Fordham University*[24] the Board repeated its conclusory approach to the problem. Finally, in *Adelphi University*[25] the Board conceded that its position

[16] NLRB v. J. Weingarten, Inc., *supra*, at 267.

[17] *See* NLRB v. Catholic Bishop, 440 U.S. 490, 504–505 (1979); *see also*, S. Rep. No. 573, 74th Cong., 1st Sess., 7 (1935); H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess., 36 (1947); S. Rep. No. 105, 80th Cong., 1st Sess., 11, 19 (1947). When the Act was amended in 1974 to eliminate the exemption accorded nonprofit hospitals, Congress appears to have agreed that nonprofit institutions "affect commerce" under modern economic conditions. H.R. Rep. No. 93-1051, 93d Cong. 2d Sess., 4 (1974); 120 Cong. Rec. 12938 (1974). However, there is nothing to suggest that Congress considered the status of university faculties.

[18] Cornell Univ., 183 N.L.R.B. 329 (1970).

[19] C. W. Post Center, 189 N.L.R.B. 904 (1971).

[20] *Id.* at 905.

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] Fordham Univ., 193 N.L.R.B. 134, 135 (1971).

[25] Adelphi Univ., 195 N.L.R.B. 639 (1972).

arose not from precedent but from the difficulty of attempting to apply to the unique university governance structure terms which were "designed to cope in the typical organizations of the commercial world."[26] The Board conceded it could not square the Act with the university setting in which "power and authority is [sic] vested in a body composed of all of one's peers or colleagues."[27]

There is no statutory language or history to support the Board's view of supervisory or managerial powers exercised collectively. In *NLRB v. Bell Aerospace Co.*[28], the managerial personnel, found not to be within the collective bargaining unit, exercised their managerial functions as a "team." Similarly, in *Retail Store Employees Union, Local 428*[29] the Board found that two office clerical employees were managerial personnel because they served as officers of the respondent union and in their capacity as officers were members of the union's executive board, which passed upon the hiring and discharging of organizers and made other policy decisions.

Construing the Act to exclude individuals who exercise supervisory or managerial functions as part of a group or committee is a realistic interpretation of the Act since group action is so frequently encountered in modern corporate decision making.[30]

In *Adelphi University*[31] the Board added to its doctrine of collective action a second justification. In support of its view that the university faculty was neither managerial nor supervisory, the Board pointed out "the ultimate authority [did] not rest with the peer group but rather with the board of trustees.[32]

This concept is particularly unconvincing. Normally every corporation is ultimately operated by its board of directors.[33] This has never precluded a finding that there are managerial or supervisory employees in a corporation.

Private universities are usually created under the corporation law of the state where they are located with ultimate authority vested in a board of trustees or directors.[34] If this factor alone precludes full-time faculty members from assuming managerial or supervisory status, no matter what their actual involvement in the governance of an educational institution, then it is difficult to contemplate any situation where the statutory and Board-created exemptions can be applied.

In fact, in a number of cases, the Board has found academic employees to be supervisors or managers although they had only the power to recommend action.[35]

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[26] *Id.* at 648.

[27] *Id.*

[28] 416 U.S. 267 (1974).

[29] 366 F.2d 642 (D.C. Cir. 1966), *cert. denied*, 386 U.S. 1017 (1967).

[30] *See, e.g.*, N. Jacoby, Corporate Power and Social Responsibility 58 (1973).

[31] *Supra.*

[32] *Id.* at 648.

[33] W. Cary, Corporations 153 (4th ed. 1969).

[34] Kahn, *The NLRB and Higher Education: The Failure of Policymaking Through Adjudication*, 21 U.C.L.A. L. Rev. 63, 124 (1973); H. Oleck, Non-Profit Corporations, Organizations and Associations 300, 622 (1965).

[35] *See, e.g.*, Adelphi Univ., *supra*, 195 N.L.R.B. at 642 (department chairmen); C. W. Post

Managerial employees are exempted from the coverage of the Act, not by explicit statutory language, but as a matter of Board policy and unanimous court approval.

"Managerial employees" are those who formulate and effectuate management policies by expressing and making operative the decisions of their employer.[36] Thus, the touchstone of managerial status is an alliance with management. The pivotal inquiry is whether the employee, in performing his or her duties, represents the employee's own interests or those of the employer.

If the actions of the employee are undertaken for the purpose of implementing the employer's policies, then the employee is accountable to management and would be subject to conflicting loyalties if deemed covered by the Act. If the employee is acting only on his or her own behalf and in his or her own interest, the employee is covered under the Act and is entitled to the benefits of collective bargaining.

The idea that university faculty members pursue their own interests and not management's was added to the *C.W. Post* rationale in *Adelphi University*.[37] The Board stated that faculty members had not been advised to advocate management's interests in making their decisions nor are they advised that they are management's representatives in making them.[38]

The Board has never purported to express what it considers is the "own interest" of university faculty members that distinguishes them from "managerial" personnel like buyers, expediters and others characterized as managerial by the Board.[39]

The Supreme Court has rejected the Board's limitation of the managerial exclusion only to those "so closely related to or aligned with management as to place the employee in a position of conflict of interest.[40]

Individuals with the admitted authority to determine such matters as how the university operates (by virtue of the faculty's recognized authority in regard to policy-making and decision-making), what the university's operations are to be (by virtue of their authority regarding curriculum and admissions), who is to operate the university (by virtue of their authority over faculty hiring and tenure), and under what terms and conditions of employment (by virtue of their authority over salary and promotion of faculty), would appear to be acting in the interest of the university as an employer.

Faculty members recommend faculty appointments and promotions with a clear view to the maintenance of the university's reputation for excellence, the delivery of educational products of superior quality, and the recruitment and retention of outstanding and respected faculty members.

Center, *supra*, 189 N.L.R.B. at 906 (department chairmen and deans); Syracuse Univ., 204 N.L.R.B. 641 (1973) (department chairmen).

[36] NLRB v. Bell Aerospace Co., *supra*, 416 U.S. at 288.

[37] *Supra*; *see also* Northeastern Univ., 218 N.L.R.B. 247 (1975); Univ. of Miami, 213 N.L.R.B. 634 (1974); New York Univ., 205 N.L.R.B. 4 (1973).

[38] *Supra*, 195 N.L.R.B. at 648.

[39] *See Spicer Mfg. Co.*, 55 N.L.R.B. 1491, 1498 (1944); American Locomotive Co., 92 N.L.R.B. 115, 116-117 (1950; Electronic Controller & Mfg. Co., 69 N.L.R.B. 1242, 1246 (1946).

[40] NLRB v. Bell Aerospace Co., *supra*, 416 U.S. at 273.

Even assuming a faculty's determinations on personnel, curriculum, admissions, grading, graduation requirements and other policy issues were motivated by the faculty's own best interests, the fact that a university's administration and board of trustees rarely interfere in faculty decisions would indicate that the interest of the faculty and of the university are almost coextensive.

Under section 2(12) of the Act, a professional employee is specifically included within the Act's coverage despite the fact that in the performance of his or her work the employee must exercise consistent discretion and judgment.

A professional's exercise of independent judgment and discretion in responsibly directing and coordinating the work of other employees in the delivery of the professional product is a manifestation of professional status rather than supervisory authority under the Act.[41]

In the non-university context, the Board has consistently held that a professional's effective recommendation with respect to employee termination, promotion, or changes in employee status is an exercise of supervisory authority, even if the recommendation is based on the exercise of the "independent professional judgment" of the person making it.[42]

Even in an educational setting, the Board has found certain professional academic personnel to be supervisors and excluded them from bargaining units of other academic employees.[43]

The input of full-time university faculty at many universities is largely responsible for the conduct and direction of the university. It is well-recognized that most university faculties enjoy a state of independence and influence on policy which is "entirely unknown among the professionals in private industry."[44]

Unquestionably, the authority of a faculty member to determine the content of his or her course, the method he or she employs in teaching it, and the evaluation of his or her students' academic performance is insufficient to give the member managerial status.

However, effective control over what courses are taught in the university, who teaches them, the number of teaching hours required of the faculty, and the rank, salary, and tenure status, as well as a crucial role in determining other central policies, such as curriculum, admissions and graduation requirements, and tuition, are no longer simply exercising individual professional expertise—they are substantially and pervasively operating the university.

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[41] *See, e.g.*, General Dynamics Corp., 213 N.L.R.B. 851 (1974); Wurster, Bernardi & Emmons, Inc., 192 N.L.R.B. 1051 (1971); Doctors' Hospital of Modesto, Inc., 183 N.L.R.B. 950 (1970), supplementing 175 N.L.R.B. 354 (1969), *enf'd*, 489 F.2d 772 (9th Cir. 1973); Westinghouse Electric Co., 163 N.L.R.B. 723 (1967), enf'd 424 F.2d 1151 (7th Cir.), *cert. denied*, 400 U.S. 831 (1970); American Oil Co., 155 N.L.R.B. 46 (1965); Puget Sound Power & Light Co., 117 N.L.R.B. 1825 (1957).

[42] *See, e.g.*, Doctors' Hospital of Modesto, Inc., *supra*, 183 N.L.R.B. at 951-952.

[43] *See* Univ. of Chicago Library, 205 N.L.R.B. 220 (1973), *enf'd*, 506 F.2d 1402 (7th Cir. 1974); *Claremont Colleges*, 198 N.L.R.B. 811 (1972); *see also*, cases cited at n. 37.

[44] Kahn, *supra*, at 68; accord, Sands, *The Role of Collective Bargaining in Higher Education*, 1971 Wis. L. Rev. 150, 157; *see also* opinion of Mr. Justice Cardoza in Hamburger v. Cornell Univ., 240 N.Y. 328, 336-37, 148 N.E. 2d 539, 541 (1925); American Association for Higher Education, Faculty Participation in Academic Governance 27 (1967); M. Ross, The University, The Anatomy of Academe 99 (1976).

Because the Board, in its *Yeshiva* decision, made no factual findings which would preclude supervisory or managerial status nor advanced any persuasive rationale for refusing to so categorize the University's faculty, both the Second Circuit and the Supreme Court reviewed the record and made their own respective findings.

Accordingly, in understanding the Supreme Court's decision, one must look to its factual foundation. The majority found the faculty's authority in academic matters was "absolute",[45] while the dissent found numerous instances in which the faculty's recommendations had been rejected by the administration.[46]

Thus, one of the fundamental differences between the majority opinion and the dissent is factual. If one accepts the finding that the faculty members at the University have "absolute" authority in academic matters, it readily follows that the faculty members are managerial employees outside the coverage of the Act.

There is a great temptation to attempt to generalize with respect to the governance of "mature" universities. Many institutions of higher education have adopted forms of collegial decision-making in which the faculty members play a major role in the development of institutional policy. However, given the great diversity in governance structures and allocations of power at such universities, it is necessary to examine the facts of each case in determining whether university faculty are covered by the Act.

In determining whether a university faculty is covered by the Act, the following criteria should be considered:

1. What is the structure for university governance? If a university has a formalized structure for faculty decision-making, this would be one indication of the managerial status of the faculty.

2. What consideration does the administration give faculty recommendations? If faculty recommendations are only one of several factors considered by the administration or the administration frequently rejects faculty recommendations, the faculty should be able to organize under the Act.

3. On what issues may the faculty effectively act or recommend action? If the faculty has "absolute" authority or the authority to effectively recommend action in such areas as student admissions, size of the student body, tuition to be charged, academic calendars, course schedules, faculty hiring, tenure, termination, promotion and salaries, the faculty will probably come within the *Yeshiva* rule. However, where faculty members only have authority to determine the content of their courses, the method employed in teaching their respective courses, and the evaluation of their students' academic performance, they will be outside the *Yeshiva* rule.

The *Yeshiva* decision is limited to the question of whether full-time faculty at Yeshiva University are covered by the Act. It does not answer the question of whether university faculty members *should* be covered by the Act. This question may now have to be answered by Congress.

In 1971 the Board was requested to institute a rule-making proceeding to

[45] *Supra*, 100 S.Ct. at 864.

[46] *Supra*, 100 S.Ct. at 872.

guide the determination of issues in representation cases involving faculty members of colleges and universities. The Board denied the request on the ground that the adoption of the inflexible rules for units of teaching employees might introduce too great an element of rigidity. However, in its adjudicative process the Board has consistently applied rigid criteria. This adjudicative approach to this rule-making has been thwarted by the Supreme Court's decision.

Absent legislation on the subject, it may be appropriate, as the Second Circuit has suggested, for the Board to fully explore the special problems created by the Board's assumption of jurisdiction over university faculties by rule-making rather than adjudication.[47]

The decision will have little impact on public universities in those states that have public employee bargaining statutes expressly including university faculty members. However, it may provide ammunition for anti-collective bargaining forces in states where the legislatures are considering whether to extend collective bargaining to university faculties.

[47] *Supra*, 582 F.2d at 703.