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Labor Law - National Labor Relations Act - Managerial Employees - University Faculty

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LABOR LAW—NATIONAL LABOR RELATIONS ACT—MANAGERIAL EMPLOYEES—UNIVERSITY FACULTY—The United States Supreme Court has held that full-time faculty members at Yeshiva University are managerial employees excluded from the protections of the National Labor Relations Act.

NLRB v. Yeshiva University, 444 U.S. 672 (1980).

On October 30, 1974, the Yeshiva University Faculty Association (Union) filed a representation petition with the National Labor Relations Board (Board)[1] seeking certification as the bargaining agent for the full-time faculty[2] at Yeshiva University.[3] The University opposed the petition, claiming that its faculty members were managerial or supervisory personnel and, thus, not statutory employees within the meaning of the National Labor Relations Act (Act).[4] The Yeshiva faculty participated in university governance through their representatives

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1. The Board overruled the University's challenge that the Yeshiva Faculty Association was not a "labor organization" as defined in the National Labor Relations Act § 2(5), 29 U.S.C. § 152(5) (1976). Yeshiva Univ., 221 N.L.R.B. 1053, 1053 n.2 (1975).

2. Full-time faculty included those professors, associate professors, assistant professors, and instructors who carried a full-time teaching load or the equivalent, but excluded part-time faculty, librarians, research associates, research assistants, and emeritus faculty who were not actively teaching at the University for a fixed one-year period and who were faculty at another academic institution. 221 N.L.R.B. at 1053.

3. *Id.* Yeshiva University is a private university located in New York providing a variety of arts and sciences programs at five under-graduate and six graduate schools. Of the 13 schools operated by Yeshiva, only 10 were involved in these proceedings. N.L.R.B. v. Yeshiva Univ., 444 U.S. 672, 674-75 (1980).

4. 444 U.S. at 675. National Labor Relations Act § 2(3), 29 U.S.C. § 152(3) (1976), provides that "employee" includes "any employee, and shall not be limited to the employees of a particular employer . . . but shall not include . . . any individual employed as a supervisor. . . ." Section 2(11) of the National Labor Relations Act provides that:

> [A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment [shall be deemed a supervisor].

29 U.S.C. § 152(11) (1976). Supervisors do not have any right to organize or any collective bargaining rights which are protected by the Act. Hanna Mining Co. v. Marine Eng'rs, 382 U.S. 181, 188 (1965). Although not expressly excluded from the statutory definition of "employee," managerial employees are denied the organizational protections of the Act by a judicially defined exclusion. Managerial employees are those persons who are in a position to formulate, determine, and effectuate management policies. NLRB v. Bell Aerospace Co., 416 U.S. 267, 276 (1974) (quoting Ford Motor Co., 66 N.L.R.B. 1317, 1322 (1946)).

on university committees.[5] The University contended that the power exercised by the faculty through the committees reached beyond strictly academic concerns. The faculty members at each school met either formally in the faculty committees or informally in meetings called by their deans to decide matters of institutional and professional concern.[6] The University concluded that through such meetings the faculty effectively determined the schools' curriculum, grading system, admission and matriculation standards, academic calendars, and course schedules.[7]

Following five months of evidentiary hearings by a Board-appointed officer, a three-member Board panel granted the Union's representation petition and ordered an election.[8] The Board rejected the University's contention that its faculty members were managerial employees, finding it to be an inappropriate request for reconsideration of previous decisions.[9] In ordering the election, the Board maintained that the faculty members were professional rather than managerial employees because their participation in decision-making was on a collective rather than an individual basis, was exercised in their own interest rather than in the interest of their employer, and because final authority rested with the board of trustees.[10] The Union won the election and was certified by the Board, but the University refused to bargain, adhering to its position that its faculty members were managerial employees.[11] The Union brought unfair labor practice proceedings against the University[12] wherein the Board ordered the University to bargain.[13] The University continued to refuse to negotiate with the Union and the Board sought enforcement of its

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5. 221 N.L.R.B. at 1054.

6. 444 U.S. at 676.

7. *Id.*

8. 221 N.L.R.B. at 1057.

9. *Id.* at 1054. *See* Fordham Univ., 193 N.L.R.B. 134 (1971); C.W. Post Center, 189 N.L.R.B. 904 (1971).

10. 221 N.L.R.B. at 1054. Employees are given the right to organize and to engage in collective bargaining. National Labor Relations Act § 7, 29 U.S.C. § 157 (1976). Professionals are, by definition, included in the term "employee." *Id.* at § 2(12), 29 U.S.C. § 152(12) (1976).

11. Yeshiva Univ., 231 N.L.R.B. 597, 597 (1977), *enforcement denied*, 582 F.2d 686 (2d Cir. 1978).

12. *Id.* at 600. The Union charged violations under National Labor Relations Act § 8(a)(5), 29 U.S.C. § 158(a)(5) (1976), which makes an employer's refusal to bargain an unfair labor practice. The Union also alleged violations of National Labor Relations Act § 8(a)(1), 29 U.S.C. § 158(a)(1) (1976), which provides that it is an unfair labor practice for an employer to interfere with, restrain, or coerce its employees in the exercise of their rights guaranteed under the Act.

13. 231 N.L.R.B. at 600.

order in the United States Court of Appeals for the Second Circuit.[14]

Finding that the Board had acted arbitrarily in not reaching sufficient factual determinations,[15] the court of appeals scrutinized the available record and concluded that the Yeshiva faculty members were managerial employees because of their pervasive influence in the operation of the University.[16] The court of appeals did not reject the Board determination that the faculty members were professional employees; instead, the court concluded that the faculty's influence in decision-making procedures was so consistently exercised that the faculty members could not escape the managerial classification despite their professional characteristics.[17] Accordingly, the court of appeals refused to enforce the Board's order,[18] and the Board petitioned to the United States Supreme Court for certiorari. The Supreme Court granted certiorari[19] to determine whether the full-time faculty members of Yeshiva University were managerial employees and thus excluded from the benefits of collective bargaining under the Act.[20]

Justice Powell, writing for the five-member majority,[21] affirmed the decision of the court of appeals precluding faculty organization because the faculty members were managerial personnel.[22] Justice Powell noted that there is no evidence that Congress has considered whether a university faculty may organize for collective bargaining under the Act.[23] The Court recognized, however, that the absence of explicit con-

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14. NLRB v. Yeshiva Univ., 582 F.2d 686 (2d Cir. 1978), *aff'd*, 444 U.S. 686 (1980). The Board is empowered to petition any court of appeals for the enforcement of its orders. National Labor Relations Act § 10(e), 29 U.S.C. § 160(e) (1976).

15. 582 F.2d at 696.

16. *Id.* at 698. The Board's decision was founded on its review of the university-wide system of governance at Yeshiva. 221 N.L.R.B. at 1054. The court of appeals, on the other hand, examined the authority structure in each of the colleges within the university. 582 F.2d at 690.

17. 582 F.2d at 697.

18. *Id.* at 703.

19. NLRB v. Yeshiva Univ., 440 U.S. 906 (1979).

20. 444 U.S. at 674.

21. Chief Justice Burger, and Justices Stewart, Rehnquist, and Stevens joined in Justice Powell's majority opinion. Justice Brennan filed a dissent in which Justices White, Marshall, and Blackmun joined. *Id.* at 673.

22. *Id.* at 679.

23. *Id.* When the National Labor Relations (Wagner) Act, Pub. L. No. 74-198, 49 Stat. 449 (1935) and the Labor Management Relations (Taft-Hartley) Act, Pub. L. No. 80-101, 61 Stat. 136 (codified at 29 U.S.C. §§ 141-197 (1976 & Supp. II 1978 & Supp. III 1979)), were passed, the Board concluded that nonprofit institutions were not covered because they did not effect commerce. Trustees of Columbia Univ., 97 N.L.R.B. 424 (1951). The *Yeshiva* Court rejected the Board's argument that because Congress did not exclude university faculty when the Act was amended in 1974, the Board's extension of coverage to faculty was tacitly approved by Congress. 444 U.S. at 681 n.11.

gressional direction would not preclude the Board from exercising jurisdiction over any particular type of employment.[24]

The Court next addressed the applicability of the managerial exclusion to the faculty members.[25] Closely aligned with the statutory exclusion for supervisory personnel, the exclusion for managerial employees is founded upon the belief that the employer is entitled to the undivided loyalty of his employees when those employees represent management interests or implement management policies.[26] In applying this standard to Yeshiva's faculty, the Board argued that the faculty members exercised independent professional judgment and were not aligned with the University's management.[27] Because of this independence, the Board concluded that there was no danger of divided loyalty and hence no need to apply the managerial exclusion.[28] The Court noted, however, that the Board had not applied this reasoning in reaching its decision, but had relied upon previous Board decisions involving faculties. In its previous decisions, the Board had concluded that faculty members were not managerial because their authority was collective, exercised in their own interest, and subject to the final authority of the board of trustees.[29] The Court stated that these previous Board decisions had only dimly foreshadowed the independent professional judgment analysis now espoused by the Board.[30]

In rejecting the Board's independent professional judgment argument, the Court determined that the faculty's unquestionable managerial authority in academic matters was absolute.[31] The Court

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24. 444 U.S. at 681. *See* NLRB v. Hearst Publications, Inc., 322 U.S. 111 (1944). The Board had previously approved bargaining units composed of faculty members. *See, e.g.*, Adelphi Univ., 195 N.L.R.B 639 (1972); Fordham Univ., 193 N.L.R.B. 134 (1971).

25. 444 U.S. at 682, 686 n.23. The majority never reached the issue of whether the Yeshiva faculty members were supervisory personnel, and rested its decision solely upon the finding that the faculty members were managerial employees. *Id.* at 682.

26. *Id.* at 682. *See* note 4 *supra*. The exclusion of managerial personnel from coverage under the Act is further justified because managers are higher in the company hierarchy than their supervisory counterparts who are explicitly excluded. Hence the rationale for excluding supervisors applies with even greater force to managerial employees. 444 U.S. at 682.

27. 444 U.S. at 684. The Board contended that professional employees often appear to be exercising managerial authority when they are merely performing routine job duties, and, therefore, their status must be determined by examining their alignment with management. *Id.* at 683-84.

28. *Id.* at 684.

29. *Id. See, e.g.*, University of Miami, 213 N.L.R.B. 634 (1974).

30. 444 U.S. at 684. *See* Fordham Univ., 193 N.L.R.B. 134 (1971); C.W. Post Center, 189 N.L.R.B. 904 (1971).

31. 444 U.S. at 686. *See* Northeastern Univ., 218 N.L.R.B. 247 (1975); University of Miami, 213 N.L.R.B. 634 (1974); Tusculum College, 199 N.L.R.B. 28 (1972). In its argument in *Yeshiva*, the Board abandoned the collective authority branch of the three-part test as well as the argument that final authority rested in the board of trustees. 444 U.S. at 685.

observed that the application of the independent professional judgment test was inconsistent with prior Board decisions which had applied the managerial and supervisory exclusions to professionals without inquiring whether their decisions were based on management policy rather than professional expertise.[32] Thus, because the Board did not suggest that the test be limited to university faculty, the Court reasoned that the suggested approach would result in the implicit overruling of Board precedent and the potential, indiscriminate recharacterization of professionals as nonmanagerial.[33] Moreover, the Court determined that the application of the independent professional judgment standard was based upon an unfounded belief that the faculty's professional interests could be separated from the institutional interests of the University. The business of a university is education, and an interest in that business is as much a concern of the faculty as it is a concern of the university.[34]

After determining that the interests of the university and the faculty were the same, the Court concluded that unionization of the Yeshiva faculty would result in divided loyalties. Because the faculty strives for academic excellence and because the university depends to a great extent upon the participation of the faculty to determine and implement academic policies, unionization would place the faculty members in a tenuous position whenever their interests as employees differed from the interests of the university as an academic institution.[35]

Stating that it did not intend to exclude all professionals from the Act's coverage, the Supreme Court declared that it would limit coverage to professionals whose activities were the same as those routinely exercised by other professionals similarly situated. The Court cited with approval cases wherein the Board upheld the employee status of nonacademic professionals whose decision-making was a routine discharge of professional duties in projects to which they had been assigned even if union membership could involve some divided loyalty.[36] These decisions, the Court concluded, should serve as a guide when the Board must determine whether an employee's activities align him with management. The Court pointed out that these guidelines are merely a

32. 444 U.S. at 687. Using the industrial analogy to the extent applicable, the Court concluded that the faculty determined the product to be produced, the terms upon which it would be offered, and the customers which it would serve. *Id.* at 686.

33. *Id.* at 688. *See* NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974); University of Vermont, 223 N.L.R.B. 423 (1976); Presbyterian Medical Center, 218 N.L.R.B. 1266 (1975); University of Chicago Library, 205 N.L.R.B. 220 (1973), *enforced*, 506 F.2d 1402 (7th Cir. 1974).

34. 444 U.S. at 688.

35. *Id.*

36. *Id.* at 690 n.30. *See* General Dynamics Corp., 213 N.L.R.B. 851 (1974); Wurster, Bernardi & Emmons, Inc., 192 N.L.R.B. 1049 (1971); Skidmore, Owings & Merrill, 192 N.L.R.B. 920 (1971).

starting point and that each case must be determined upon its particular facts.[37]

Finally, the Court rejected the Board's contention that because of the deference to be accorded to its expertise, the decision of the court of appeals should be overturned. Finding the Board's decison to be without a rational basis and inconsistent with the Act, the Court concluded that it was not worthy of such deference.[38] Accordingly, the Supreme Court affirmed the court of appeal's rejection of the Board's petition and determined that full-time faculty members at Yeshiva were managerial employees and not within the coverage of the Act.[39]

Justice Brennan, writing in dissent,[40] believed that the Board's decision was neither irrational nor inconsistent with the Act.[41] He contended that because the Act itself did not address the issue of faculty status, the Board had the discretion to determine the applicable standards.[42]

Even if the deference accorded to Board decisions was insufficient to preclude the Court from reviewing its determination, Justice Brennan argued, the Board's conclusion was the correct one. Agreeing with the majority's conclusion that the faculty's authority, if exercised in another context, would necessarily be managerial in nature, the dissenter argued that the university setting was not the equivalent of "another context."[43] Maintaining that managerial status is determined by whether the employee's duties represent his own interests or those of his employer, Justice Brennan noted that the Board had compiled a lengthy record before deciding that the faculty members acted in their own interest.[44]

Instead of focusing on the power exercised by the faculty and analogizing it to an industrial context, Justice Brennan examined the structure of the modern university and concluded that the faculty exercised collective expertise as professional educators to serve its own independent interest in creating the most effective environment for learning, teaching, and scholarship.[45] He noted that although the

37. 444 U.S. at 690 n.31.

38. *Id.* at 691. *See* Beth Israel Hosp. v. NLRB, 437 U.S. 483 (1978).

39. 444 U.S. at 691.

40. *Id.* (Brennan, J., dissenting). Justices White, Marshall, and Blackmun joined in Justice Brennan's dissenting opinion.

41. *Id.* at 692 (Brennan, J., dissenting).

42. *Id.*

43. *Id.* at 694 (Brennan, J., dissenting). Recognizing the difficulties of applying a statute designed for the industrial workplace to the academic community, the dissenter maintained that Congress committed to the Board the responsibility of balancing interests to effectuate national labor policy. *Id. See* NLRB v. Truck Drivers Local 449, 353 U.S. 87 (1957).

44. 444 U.S. at 696 & n.5 (Brennan, J., dissenting).

45. *Id.* at 697 (Brennan, J., dissenting).

university often defers to the expertise of the faculty in formulating academic policy, the administration is governed by its own interests in fiscal and other management policies.[46] The dissenter pointed out that in order to conclude that faculty members are managerial, the Board must find that they are answerable to some higher authority.[47] Because faculty members are free to voice their concerns without fear of repercussion, they are distinguishable from managers in an industrial context who are subject to higher authority. Faculty members are not hired to enforce policies, nor are they retained because of their loyalty to those policies.[48] Instead, consistent with academic freedom, faculty members are hired and retained because of their abilities in the classroom.[49] Justice Brennan concluded that a mere coincidence of interests on many issues does not preclude the faculty's right to collective bargaining on issues of disagreement.[50]

Finally, Justice Brennan criticized the majority's perception of the modern university as a vestige of the great medieval university,[51] and contended instead that universities are big businesses faced with the same financial concerns as other businesses.[52] Based upon this picture of contemporary collegiality, Justice Brennan concluded that the collective bargaining process could lead to peaceful resolution of those areas over which the university and the faculty disagree, and criticized the majority's decision as interfering with peaceful resolution.[53]

The National Labor Relations Board first exercised jurisdiction over private colleges and universities in *Cornell University*[54] wherein the bargaining rights of nonacademic personnel were recognized. *Cornell University* overruled a long-standing Board policy of noninterference in the administration of private colleges and universities.[55] One year

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46. *Id.* at 697-98 (Brennan, J., dissenting).

47. *Id.* at 698 (Brennan, J., dissenting).

48. *Id.*

49. *Id.* at 700 (Brennan, J., dissenting). Justice Brennan pointed out that the Board had at times excluded certain faculty members from collective bargaining because they represented the university's interest rather than that of the faculty. *Id.* at 699 n.10 (Brennan, J., dissenting). *See, e.g.*, University of Vermont, 223 N.L.R.B. 423, 425 (1976) (department chairmen excluded); University of Miami, 213 N.L.R.B. 634 (1974) (deans excluded).

50. 444 U.S. at 700-01 (Brennan, J., dissenting). *See* Northeastern Univ., 218 N.L.R.B. 247, 256 (1975) (Kennedy, Board member, concurring).

51. 444 U.S. at 702 (Brennan, J., dissenting).

52. *Id.* at 702-03 (Brennan, J., dissenting).

53. *Id.* at 704-05 (Brennan, J., dissenting). Examples of conflicting economic concerns include declining enrollments and budgetary cutbacks which force the university to act as efficiently as possible. This interest of the university runs counter to the interest of the faculty in compensation, job security, and working conditions. *Id.*

54. 183 N.L.R.B. 329 (1970).

55. *Id.* at 334.

later in *C.W. Post Center*,[56] the Board was faced with the question of faculty unionization. The Board concluded that although the authority and policy-making exercised by the faculty was quasi-supervisory, the faculty members were not supervisors within the meaning of the Act because their authority was exercised as a group after discussion and consensus.[57] The Board also concluded that because the resolutions passed by the faculty were reviewable by the university's board of trustees, the faculty members were not managerial employees who act in the interest of management.[58]

The issue of faculty unionization presented the Board with the difficulty of squaring the university system of authority with the industrial model upon which the Act was based.[59] The clear and distinct lines of authority present in industry are neither clear nor distinct in a university where, under a shared-authority system of governance, faculty members participate in the administration of the university.[60] Thus, the principles developed by the Board for use in the industrial world were not acceptable when applied to the academic community.[61] Because the Board recognized the inherent differences between the academic and commercial worlds, it restricted the use of the industrial model and attempted to balance the competing organizational policies of the Act with the need to develop a consistent standard to be applied to the university setting.[62] Applying these criteria to university faculties, the Board sought to reconcile the degree of faculty control with the faculty's need for academic freedom.[63]

In determining faculty bargaining units, the Board was confronted with whether faculty members were employees under the Act. While colleges and universities consistently opposed faculty unionization on the ground that faculty members were managers or supervisors, the faculty argued that their status as professionals protected them from the supervisory exclusion.[64]

The Board has excluded managerial employees from the coverage of the Act because their inclusion could lead to conflicts of interest and divided loyalties.[65] In the Board's analysis, the controlling factor is the

56. 189 N.L.R.B. 904 (1971).

57. *Id.* at 905.

58. *Id.*

59. *See* Adelphi Univ., 195 N.L.R.B. 639, 648 (1972).

60. 54 WASH. L. REV. 843 (1979). In the Medievel period, universities were run solely by faculty members. McHugh, *Collective Bargaining with Professionals in Higher Education: Problems in Unit Determinations*, 1971 WISC. L. REV. 55, 65.

61. Syracuse Univ., 204 N.L.R.B. 641, 643 (1973).

62. Adelphi Univ., 195 N.L.R.B. at 648.

63. *Id.*

64. *See* C.W. Post Center, 189 N.L.R.B. at 904; Adelphi Univ., 195 N.L.R.B. at 639; Syracuse Univ., 204 N.L.R.B. at 642.

65. NLRB v. Bell Aerospace Co., 416 U.S. 267, 283 (1974). *See also* note 4 *supra*.

employee's alignment with management, because without such an allegiance there would be no danger of divided loyalties.[66] Concluding that a mere involvement with policy-making is not the equivalent of an alignment with management,[67] the Board fashioned a test for managerial status requiring an ability to formulate or effectuate employer policies,[68] and an accountability to higher authority.[69]

Because of the skill and expertise possessed by professionals, their judgments are often implemented by management, resulting in a camouflage of the differences between managerial and professional personnel.[70] Professional employees have been protected from exclusion where the exercise of their professional judgment was limited by standards formulated by the employer,[71] or where the exercise of their judgment affected merely the quality of work at particular job sites.[72] Because such authority was exercised routinely or in a rigid and technical manner, it was not considered to be managerial.[73] Professionalism could not, however, shield an employee from managerial status where he possessed the ability to formulate and effectuate management policy, or exercised discretion independent of his employer's established policy.[74]

Although the Board had determined the status of professionals in an industrial context, the academic community presented it with the additional problem of dealing with faculties who did not fall exclusively into either the managerial or professional category, but who tended to exhibit characteristics of both categories.[75] Thus, the Board was faced

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66. NLRB v. Bell Aerospace Co., 416 U.S. at 286.

67. Adelphi Univ., 195 N.L.R.B. at 648.

68. NLRB v. Bell Aerospace Co., 416 U.S. at 267.

69. C.W. Post Center, 189 N.L.R.B. at 905; Finkin, *The NLRB in Higher Education*, 5 U. TOL. L. REV. 608, 618 (1974) [hereinafter cited as *NLRB in Higher Education*].

70. General Dynamics Corp., 213 N.L.R.B. 851, 858 (1974).

71. National Broadcasting Co., 160 N.L.R.B. 1440, 1441-42 (1966). In *National Broadcasting* newsroom "deskmen" who edited and determined broadcast material and assigned other newsmen to certain stories were found not be managerial because their responsibility was limited by standards set by the employer for the broadcast. *Id.*

72. Skidmore, Owings & Merrill, 192 N.L.R.B. 920, 921 (1971). Although the architects assigned to job sites as project managers could recommend assignments of overtime, benefits, or discipline of other employees, they had no final authority. Their responsibility was for the quality of work at the job site. *Id.*

73. General Dynamics Corp., 213 N.L.R.B. at 858. In *General Dynamics* engineers were found not to be managers because their judgment was exercised routinely while practicing their profession. *Id.*

74. NLRB v. Bell Aerospace Co., 416 U.S. at 276.

75. Faculty members influence the hiring, transfer, discipline, and tenure of their fellow employees, thereby exhibiting characteristics of a supervisor. *See* National Labor Relations Act § 2(11), 29 U.S.C. § 152(11) (1976). At the same time they are highly trained individuals whose work is predominantly intellectual and as such meet the requirements of the Act for characterization as professionals. *See id.* § 2(12), 29 U.S.C. § 152(12) (1976).

with the task of developing a unique standard. The test had to be broad enough to be applicable to the different systems which have developed in universities throughout the country, yet narrow enough to serve as a realistic guide so that Board intervention would not be necessary in every case.

In response to this need, the Board developed a three-part analysis. In formulating the first part of its analysis, the Board concluded that faculty authority, exercised collectively, did not place faculty members in the supervisory or managerial categories.[76] Because the supervisory exclusion enunciated in the Act refers to authority exercised by individuals,[77] the Board reasoned that faculty activities are distinguishable from those of supervisors or managerial employees because faculty members exercise their authority on a collective basis.[78] Those faculty members who serve on university committees were deemed to be acting as representatives of the collective faculty rather than in their individual interest. This representative capacity shielded the individuals who by virtue of their tenure or position were able to influence university policy.[79] Second, the Board concluded that because a university's board of trustees generally reserves the right to review and reject faculty proposals, the faculty's power is not exercised independently of the university.[80] Finally, the Board declared that faculty interests often differ from those of the university management, negating an alignment between the faculty and university.[81] The presence of these three factors led the Board to conclude that university faculty members were professional and not managerial employees.[82] The three-part test became the foundation for all faculty unit determination cases,[83] and was the basis for the Board's ruling in *Yeshiva*.[84]

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76. C.W. Post Center, 189 N.L.R.B. at 905.

77. National Labor Relations Act § 2(11), 29 U.S.C. § 152(11) (1976), refers to a supervisory employee as "an individual" who exercises any one of the enumerated powers.

78. Fordham Univ., 193 N.L.R.B. at 135. *Compare* Seton Hill College, 201 N.L.R.B. 1026, 1027 & n.4. *Seton Hill* overruled *Fordham* to the extent that members of the Society of Jesus at Fordham who were included in the bargaining unit with lay faculty members could no longer be included. In *Seton Hill* the Board excluded the members of the Sisters of Charity from the bargaining unit because the Board feared their inclusion would create conflicts of interest. *Id.*

79. Fordham Univ., 193 N.L.R.B. at 135.

80. C.W. Post Center, 189 N.L.R.B. at 905. *See also* Adelphi Univ., 204 N.L.R.B. at 648. The Board in *Adelphi* concluded that it was the right to review faculty proposals rather than the exercise of that right which was determinative of faculty nonsupervisory status. *Id.*

81. Adelphi Univ., 195 N.L.R.B. at 648.

82. *See, e.g.*, University of Miami, 213 N.L.R.B. at 634.

83. *See, e.g.*, Wentworth Inst., 210 N.L.R.B. 345 (1974), *enforced*, 515 F.2d 550 (1st Cir. 1975); New York Univ., 205 N.L.R.B. 4 (1973).

84. 444 U.S. at 685. The Board abandoned two prongs of its three pronged analysis in its brief and oral argument before the Supreme Court. *Id.* at 685 n.20.

In addition to this three-part analysis, the Board in *Yeshiva* proferred a faculty status test based on the exercise of their independent professional judgment.[85] Because faculties exercise their influence by drawing upon their skill and expertise as educators rather than out of concern for compliance with university policy, the Board in *Yeshiva* concluded that such an exercise of authority would not result in a division of loyalties.[86]

The Supreme Court in *Yeshiva* declared that the three-part analysis as well as the independent judgment test proferred by the Board had no basis in the Act.[87] Rather than granting the findings of the Board the deference which they are normally accorded,[88] the Court criticized the Board's use of the three-part analysis as a substitute for fact-finding.[89] The Court did not state the extent to which the Board is forced to articulate its findings of facts. In *Yeshiva*, the Board-appointed hearing officer conducted five months of evidentiary hearings resulting in a voluminous record adopted by the Board.[90] It is clear that the Court has rejected the Board's use of the three-part analysis either as a standard which the Board may apply to the particular facts before it or as a substitute for fact finding in faculty unit determination cases.[91] It is unclear, however, whether the Court rejected the analysis because it is not supportable under the Act or because the Board consistently used the test without developed factual determinations.[92]

Because the Supreme Court rejected the Board's three-part analysis and independent professional judgment test, the Board is faced with again developing criteria to determine faculty status. The Court pointed to prior Board determinations[93] of the status of non-academic professional employees as a starting point for this analysis.[94] The professionals in the cases cited by the Court exercised a limited amount of authority over non-unit personnel.[95] In these cases the Board had deter-

85. *Id.* at 684. The Board contended that a university requires the constant professional input of the faculty and deemed this input to be an exercise of independent professional judgment. The Board cited no precedent in support of the independent professional judgment test. *See* Brief of the Petitioner at 30.

86. 444 U.S. at 684.

87. *Id.* at 691.

88. *See* Beth Israel Hosp. v. NLRB, 437 U.S. at 501; NLRB v. Truck Drivers Local 449, 353 U.S. at 96.

89. 444 U.S. at 685.

90. 231 N.L.R.B. at 597 n.1.

91. *See* 444 U.S. at 691.

92. *Id.*

93. *See* Wurster, Bernardi & Emmons, Inc., 192 N.L.R.B. 1049 (1971); Skidmore, Owings & Merrill, 192 N.L.R.B. 920 (1971); National Broadcasting Co., 160 N.L.R.B. 1440 (1966).

94. 444 U.S. at 690 n.30.

95. *Id. See also* text accompanying notes 71-73 *supra.*

mined that the sporadic exercise of supervisory authority did not result in conflicts of interest,[96] nor did infrequent exercises of supervisory authority so ally the employee with management as to place him within the managerial exclusion.[97] The Supreme Court in *Yeshiva* has directed the Board to make faculty determinations by using the rationale of these non-faculty cases as a starting point for its analysis.[98] The result of this directive is to cause faculty members to be treated not as a unique group entitled to unique standards, but as typical professional employees. This implication is contradictory to the recognized distinction between the industrial and educational contexts with which the Court itself has indicated agreement.[99] The majority accurately pointed out that the Act was designed to accomodate management-employee relations in private industry where the chain of command is pyramidal.[100] However, most universities are governed by a shared-authority system under which faculties participate in the administration of the institution through committees with ultimate authority resting in the board of trustees.[101] Because the two systems are inherently different, the distinctions which apply to the industrial context have little validity in the university setting.[102] Yet, by establishing as guidelines for the academic community standards developed for non-academic professionals working in industrial settings,[103] the Court has directed the Board to follow a procedure which it has recognized as unsound.[104]

The court's directive will ultimately limit the Act's coverage to those faculty members whose authority is not consistently exercised in the daily operation of the institution.[105] Most faculty members, however, do not confine their involvement in the institution to their performance in the classroom. Rather, their influence permeates the university system of governance under the shared-authority system.[106] It follows that after *Yeshiva*, few faculty members will be afforded coverage under the Act.

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96. *See* National Broadcasting Co., 160 N.L.R.B. at 1442.

97. *See* General Dynamics Corp., 213 N.L.R.B. at 859; Doctor's Hosp. of Modesto, 183 N.L.R.B. 950 (1970), *enforced*, 489 F.2d 772 (9th Cir. 1973).

98. 444 U.S. at 690 n.31.

99. *Id.* at 680.

100. *Id.* at 681.

101. Adelphi Univ., 195 N.L.R.B. at 648.

102. *See* Syracuse Univ., 204 N.L.R.B. at 643.

103. 444 U.S. at 690 n.30.

104. *See id.* at 680-81.

105. *See id.* at 690 n.31. The Court indicated that faculty members will not be excluded where their judgment is exercised in determining course content, student evaluation, or research projects. *Id.*

106. *NLRB in Higher Education*, *supra* note 69, at 616.