National Labor Relations Board and Professional Bargaining Rights in Higher Education

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Organizing of professionals at institutions of higher education presents a number of unique issues. More than 25 years ago, the Supreme Court ruled in the *Yeshiva University* case that faculty members at that school were managers, exempt from the National Labor Relations Act ("NLRA"), because of their authority in the academic governance of the University. Since that time, there have been numerous cases applying the *Yeshiva* decision and further developing the factors used by the National Labor Relations Board ("NLRB") and the courts in determining whether full time faculty are managerial. Recently, as institutions have increased their reliance on adjunct and part-time faculty, there have been growing organizing efforts among those groups, which have presented separate legal issues. Finally, union efforts to organize graduate student teaching and research assistants has led to a series of NLRB decisions in which the NLRB first overruled 25 years of precedent by holding in 2000 that *New York University* graduate assistants were employees under the NLRA, and then reversed that holding four years later in the *Brown University* case.
I. Organizing Faculty – Who are the Managers?

A. Where it All Began – Yeshiva University

1. The Supreme Court addressed the issue of employee status in the context of university faculty in *National Labor Relations Board v. Yeshiva University*, 444 U.S. 672 (1980).

   (a) The Court held that the faculty members at Yeshiva University were managers because their authority in academic matters was absolute. *Id.* at 686. In coming to its decision the Court focused on several factors to determine the faculty’s managerial authority.

   (i) The Court relied on the fact that the faculty decided what courses will be offered, when they will be scheduled, and to whom they will be taught. They determined teaching methods, grading policies, and matriculation standards. They decided which students were admitted, retained, and graduated. *Id.*

   (ii) The Court also noted that the faculty occasionally determined the size of the student body, the tuition to be charged, and the location of the school. *Id.*

   (iii) The Court noted, but did not rely upon, the fact that the faculty members played a role in faculty hiring, firing, tenure, sabbaticals, termination and promotion. *Id.* at 686 n.23.

2. The Supreme Court also stated that the fact that the administration held a veto power did not diminish the faculty’s effective power. The Court noted that the relevant inquiry is whether the individuals can provide effective recommendation. *Id.* at 684 n.17.
(a) Thus, possessing final authority is not required to determine that faculty members are managers. See, e.g., Lewis & Clark Coll., 300 N.L.R.B. 155, 161 (1990) (faculty made effective recommendations with regard to student admission and retention policies, matriculation standards, graduation policies, grading and teaching methods); Univ. of Dubuque, 289 N.L.R.B. 349, 350, 352-53 (1988) (faculty made effective recommendations with respect to course schedules, teaching methods, graduation policies, grading and student admission and retention policies); Am. Int’l Coll., 282 N.L.R.B. 189, 195-96, 201 (1986) (faculty made effective recommendations with respect to course schedules, matriculation standards, graduation policies, grading and student admission policies but not individual student admissions).

3. Since the Supreme Court’s decision in Yeshiva, the Board has applied Yeshiva in a variety of factual settings.

(a) Examples of cases where faculty was found to be managerial:

(i) Lewis & Clark Coll., 300 N.L.R.B. at 161 (holding that faculty authority in non-academic matters are to be given less weight and finding faculty to be managers when the faculty members had authority over the academics of the university).

(ii) Elmira Coll., 309 N.L.R.B. 842 (1992) (holding faculty members were managers where the evidence indicated that the faculty committee on curricular affairs made recommendations that were always approved).

(iii) Livingston Coll., 286 N.L.R.B. 1308 (1987) (denying certification of union where faculty exercised substantial authority with respect to curriculum, degree requirements, course content and selection, graduation requirements, matriculation standards, scholarship recipients even though the faculty had limited input into the budget process, tenure decisions, setting tuition, hiring, firing, promotion and salary increases).

(b) Examples of cases where faculty found to be employees:

(i) University of Great Falls, 325 N.L.R.B. 83 (1997) (finding faculty members were not managerial employees where the curriculum was not within the faculty’s absolute control and needed to be approved by the administration and there was insufficient evidence of the nature and effectiveness of faculty recommendations).
St. Thomas Univ., 298 N.L.R.B. 280 (1990) (finding faculty to be employees where the administration proposed, drafted and adopted the vast majority of academic policy and curriculum changes, set a mandatory grading schedule for the faculty to follow, set admissions standards, abolished tenure over faculty protest, and eliminated entire degree programs without faculty review or approval).

Bradford Coll., 261 N.L.R.B. 565 (1982) (holding faculty members were non-managerial where the administration canceled academic session without faculty approval, sometimes altered grades, failed to follow faculty recommendations regarding the hiring of new faculty, and generally disregarded the stated procedure for faculty participation in the administration of the college).

B. Recent applications of Yeshiva to faculty employees

1. In LeMoyne-Owen College v. N.L.R.B., 357 F.3d 55 (D.C. Cir. 2004), the Court of Appeals for the District of Columbia, held that the Regional Director failed to adequately explain its decision holding faculty to be employees and not managers, as required by the multi-factor, case-by-case approach used for these inquiries. The court reasoned that with a multi-factored test, it is necessary to understand which factors are significant, which are less significant and why. Id. at 61. The court remanded the case for further analysis.

(a) On remand, the Board found that the faculty were managerial employees. 345 N.L.R.B. No. 93 (2005). The Board emphasized that the faculty handbook gave the faculty primary responsibility for recommending academic policy and that the evidence of actual decision making supported this authority. Id. at 6. Moreover, the faculty effectively controlled curriculum decisions, including courses of study, adding and dropping courses, degree requirements, majors and minors, academic programs, and academic divisions. The evidence indicated that the recommendations that the faculty made in these areas were routinely approved. Id. Further, the individual faculty members had complete discretion over the content of the courses they taught, they determined honors at the College, and they had discretion over grading and syllabus. Id. at 6-7.

2. In Point Park University v. N.L.R.B., No. 05-1060 (D.C. Cir. Aug. 1, 2006), the Court of Appeals for the District of Columbia again remanded to the Board a Regional Director’s decision, where the Director failed to adequately identify which factors were significant to the outcome and why. The Regional Director held that the faculty were non-managerial,
finding that while they had a consultative role, they did not have sufficient control to warrant their exclusion from employees status. The court, however, stated that despite the lengthy opinion by the Regional Director and a discussion of many of the *Yeshiva* factors, there was no analysis as to which of the factors were primarily relied upon and the reasoning for doing so. *Id.* at 15. The Board has remanded this issue to the Regional Director for further review.

3. In *Quinnipiac University*, Case No. 34-UC-130 (March 16, 2006), the Regional Director found that the full-time faculty members, who had been represented for some 30 years by the AFT, were managerial employees because of their effective participation in academic and non-academic matters. According to the Regional Director, the faculty as a whole, through their individual decision making power and through committees, effectively determined and implemented the curricular and academic policies of the University, as well as non-academic matters like faculty hiring, leaves, promotion and tenure.

   (a) The faculty members through a “Senate” that was made up of faculty members controlled curriculum issues, including approving new degrees, new or changed program requirements, and a new core curriculum.

   (b) The faculty members were also responsible for any changes to academic polices such as the minimum required grade point average and requirements for honors and Dean’s List.

   (c) The faculty also effectively determined such non-academic matters as faculty hiring, leaves, promotion and tenure.

II. Adjunct and Part-Time Faculty

   A. The issues of organizing adjunct faculty is significant given the trend toward increased use of adjunct and part-time faculty. As institutions increasingly rely on part-time faculty and as university campuses broaden geographically to include more satellite campuses and extension divisions, the implications for dealing with part-time faculty on a variety of issues take on increased complexity. Recognizing these changing demographics, part-time and adjunct professors are seeking to unionize at both public and private institutions.

   B. A threshold inquiry in analyzing issues with part-time or adjunct faculty is ensuring that the institution defines and consistently applies their terminology.

   1. One recent publication reports over 50 different titles for part-time faculty including ad hoc, casual, community-based, contingent, external, instructor, new model, non-remunerated, occasional, peripheral and temporary. See Joe Berry, *Reclaiming the Ivory Tower, XI* (Monthly Review Press 2005).
2. The institution’s terminology, however, is not determinative of the individual’s status. In *George Washington University*, Case 5-RC-15715 (N.L.R.B. March 2005), for example, an NLRB ALJ found that faculty members who signed independent contractor agreements and their compensation was paid into a business, not personal account, were nonetheless employees based on the University’s control over class hours and its requirement that the individuals taught the class personally.

C. Defining the Bargaining Unit

1. The Board will apply the community of interest standard, as it does in other industrial settings, to determine an appropriate bargaining unit in a university. In *Harvard College*, 269 N.L.R.B. 821 (1984), the Board analyzed whether a petitioned-for unit of clerical and technical employee at the Harvard Medical Area Schools was appropriate. The Board stated “in deciding whether a unit that is less than University wide is appropriate” the Board must determine “whether the petitioned-for group of employees share a community of interest sufficiently special to warrant separating them from other employees.” *Id.* at 823. Ultimately, the Board determined that the petitioned-for unit was inappropriate and that an appropriate unit would include employees from Harvard’s entire campus.

2. The Board follows the general rule that part-time faculty members do not share a community of interest with other faculty. *See New York University*, 205 N.L.R.B. 4 (1973) (overruling prior case law in holding that “there is no mutuality of interest between the part-time and full-time faculty because of differences in compensation, participation in University governance, eligibility for tenure, and working conditions”). *See also University of San Francisco*, 265 N.L.R.B. 1221 (1982) (stating that combined unit of part-time and full-time faculty is inappropriate but holding that a unit of part-time faculty members who share a community of interest is appropriate).

D. The organization of part-time faculty at The New School University marks an important development in the organization of adjunct faculty. In *New School University*, Case No. 2-RC-22697 (Dec. 19, 2003), the Regional Director found that the majority of the part-time faculty members who the union sought to include in the bargaining unit should in fact be included. The case provides an illustration of how the *Yeshiva* factors can be applied in the context of part-time faculty, as well as the application of the community of interest test.

1. The union sought to represent a unit of all part-time faculty members and teaching staff employed by the University. The university argued that some of these part-time faculty members should be excluded as managerial personnel under *Yeshiva* and that the part-time employees at some of the locations do not share a community of interest with the employees at the main university campus.
2. The Regional Director found many of the part-time faculty members should be in the bargaining unit.

(a) Part-time faculty/affiliated faculty members at the Robert J. Milano School of Management and Urban Policy were appropriate members of the bargaining unit because their participation in faculty governance committees were not sufficient to demonstrate managerial status. Moreover, the fact that these individuals were paid on a monthly, rather than on a per-course basis, did not overcome the community of interest with other part-time instructors. *Id.* at 64-65.

(b) The part-time faculty at Eugene Lang College, the undergraduate liberal arts college of the University, were included despite the fact that some of these part-time individuals taught for more than four semesters and were therefore considered members of the General Faculty, with voting rights. The Regional Director found that responsibility for curriculum and academic policy still rested with the full-time faculty. *Id.* at 65.

(c) The Regional Director found there was insufficient evidence that curriculum coordinators were managerial or supervisory and therefore they were included in the unit. This was true regardless of the fact that the employer argued that these individuals interviewed and hired part-time faculty members; the Regional Director found the evidence indicated that others had primary responsibility for these duties. Even if there was some participation on committees, the evidence did not show that this minority participation constituted pervasive determinations of academic policy to exclude them from the bargaining unit. *See id.* at 65-68.

(d) The Regional Director held that advisors were to be included in the unit because, even assuming that such individuals had input into the curriculum and faculty hiring, there was insufficient evidence that the extent and level of their participation indicated manager or supervisory status. *Id.* at 68.

(e) Part-time faculty who participated in the divisional Executive Committees at Mannes College of Music were included in the bargaining unit because there was insufficient evidence that the hourly faculty had authority to effectively recommend or promote policies even if the committees themselves were charged with important functions. *Id.* at 70.

(f) The part-time faculty members at the Drama School were also determined to be included in the bargaining unit, rather than
excluded as managerial or supervisory personnel, because they were limited to determining the method of instruction to their own classes, they needed to get approval for new syllabi for their courses, and while they evaluated presentations and auditions of student applicants, they did not have access to the applicants’ files and did not make the final decisions. \(\text{Id. at 72-73.}\)

3. The Regional Director also addressed whether employees who worked away from the University’s main campus should be included in the bargaining unit. The Regional Director applied the community of interest test, looking at geographic proximity, local autonomy, employee interchange and interaction, functional integration and terms and conditions of employment. \(\text{Id. at 73.}\)

(a) The Regional Director agreed with both parties that the part-time faculty members employed at the Milano Ballston Spa failed to share a community of interest with other part-time instructors because this site was about 160 miles from the main campus and it functioned and was staffed autonomously from the University. Moreover, the academic programs and student application process were separate from the rest of the university. \(\text{Id. at 73.}\)

(b) The Regional Director found that the part-time faculty members at the Montefoire Hospital should be included in the unit because the program was administered from the University’s main campus, some faculty was shared with the main campus, and students were able to take courses at both locations. \(\text{Id. at 74.}\)

(c) The part-time faculty members who taught at the Smithsonian program in Washington D.C. were included in the bargaining unit. The Regional Director found that the program was integrated with the other programs offered by the school because of common supervision, movement of students between the programs, and because the students in the Smithsonian program were eligible to participate for graduation in the New York campus. \(\text{Id.}\)

4. After this decision, the ACT/UAW became the bargaining agent for the part-time faculty bargaining unit. In 2005 they signed their first contract with the University.

(a) Some of the provisions of the contract include:

(i) Adjuncts must complete a probation period of four semesters. If an adjunct has taught between five and ten semesters, he or she will receive a 15% fee if the course is cancelled.
(ii) After serving ten semesters, an adjunct earns the presumption of reappointment. If there is no course available, the University must make an effort to find an unassigned course in another department and if no other course is available, the part-time faculty member will receive a 30% fee.

(iii) After ten semesters of teaching credit courses, an adjunct can apply for a three-year appointment. Again, the individual would then have a presumption of reappointment and can get a 50% fee if the University cannot find another course for that individual.

(iv) If the part-time faculty member taught two courses in the prior year, he or she can receive individual medical and dental coverage. The rate will be reduced if the individual has taught three courses.

III. Students as Employees under the National Labor Relations Act

A. For more than 25 years prior to its decisions in Boston Medical Center Corp., 330 N.L.R.B. 152 (1999) and New York University, 332 N.L.R.B. No. 111 (Oct. 31, 2000), the Board’s position was that students who “perform services at their educational institutions are not employees” as defined the National Labor Relations Act (“NLRA”). St. Clare’s Hosp. and Health Ctr., 229 N.L.R.B. 1000, 1002 (1977).

B. The Board in Boston Medical Center, however, held that interns and residents were employees under the NLRA. The Board reasoned that there are no explicit exceptions in the NLRA for students and if house staff qualified as employees, the fact that they were also students did not change their employee status. 330 N.L.R.B. at 160.

1. The Board found that the “essential elements” of the house staff’s relationship with the Medical Center indicated that they were employees because (1) the house staff worked for an employer as defined in the Act, (2) the house staff received compensation and fringe benefits for their services, and (3) the house staff spent 80% of their time engaged in direct patient care for the Medical Center’s patients.

C. The Board followed its holding in Boston Medical Center by ruling in New York University that graduate assistants were employees.

1. Like in Boston Medical Center, the Board focused on the fact that there was no explicit exception in the NLRA for students who are also employees. The Board found that the teaching assistants, research assistants and graduate assistants performed services as teachers or researchers for which they were compensated under the direction and control of the University.
2. The University argued that the graduate assistants did not receive compensation for their work, but instead they received financial aid, pointing to departments where graduate students who were fully funded would receive the same “compensation” per year, regardless of their assistantship activities. The Board disagreed, stating that graduate assistants, unlike other students, provided services controlled by the employer. Moreover, the exchange for money, rather than academic credit, supported a finding of an employment relationship. The University also argued that the nature of the graduate assistantship was primarily educational. The Board agreed that there was an educational benefit to the students, but that there was a similar benefit to the house staff positions in Boston Medical Center.

3. Further, the Board was unpersuaded by the University’s argument that extending collective-bargaining rights to graduate assistants would infringe on the academic freedom. The Board reasoned that private universities had been bargaining with faculty unions for 30 years and were able to handle any issues of academic freedom that arose.

4. The NYU Board did, however, exclude certain research assistants in science departments whose work was funded by external grants because they were not providing a “service” to the University.

D. Following the Board’s decision in NYU, the United Auto Workers (“UAW”) became the exclusive bargaining representative for the graduate assistants at NYU by a vote of 619 to 551. NYU recognized the UAW in March of 2001 and contract negotiations began. They reached an agreement and a collective bargaining agreement was effective from September 1, 2001 though August 31, 2005.

E. Union success with graduate students after NYU was brief; the Board reversed the NYU decision in Brown University, 342 N.L.R.B. 483 (2004). In Brown, the Board held that graduate students working as teaching assistants or research assistants were not employees covered by the Act.

1. The Board emphasized the fact that all the individuals at issue needed to be enrolled at Brown to get the teaching assistant or research assistant positions. Id. at 488. Even if a student had finished his coursework but was still writing his dissertation, that individual still must be enrolled at Brown to receive these positions.

2. The Board also emphasized that the nature of the money they received was not “consideration for their work,” but financial aid. The Board noted that the money that the assistants received was the same as that received by fellows who did not perform these duties. Id. The Board also indicated that the funds for students generally came from Brown’s financial aid budget, rather than an economic one. Id. at 489.
3. According to the majority opinion, the evidence demonstrated that the relationship between Brown and the graduate students was primarily educational. For a majority of graduate students teaching was considered a prerequisite to getting their degree. Because graduate student assistants were directly related to the core elements of the Ph.D. degree, the relationship between being a graduate student assistant and the pursuit of the Ph.D. are inextricably linked and thus the relationship was clearly educational. *Id.* at 488-89.

F. The most visible impact of the *Brown* decision is on the graduate student union at NYU, where the first graduate student union at a private institution was organized after they received its favorable NLRB ruling and before the Board’s change of opinion in *Brown*. After the *Brown* decision, NYU refused to bargain with the union for a second contract.

1. The University’s refusal to bargain was met with a strike by the graduate students. From the expiration of their first contract in August of 2005 through September of 2006, graduate students took to the street in protest of the University’s actions. Throughout the course of the strike, the numbers dwindled and by the end of the spring semester in 2006, the strike was barely visible. The strike ended without a new contract between the union and the University. *See* Scott Jaschik, “End of the Picket Line” *Inside Higher Ed*, Sept. 8, 2006 *available at* http://insidehighered.com/news/2006/09/08/nyu; Scott Jaschik, “NYU Strike is Over – Without Contract” *Inside Higher Ed*, Sept. 8, 2006 *available at* http://insidehighered.com/news/2006/09/07/nyu.

2. The Board’s decisions in *NYU* and *Brown* addressed unionization at private universities. Public universities are not governed by the NLRA, but rather by the state public sector labor laws. These decisions, however, could be concerning to those graduate student unions at public universities. One graduate student at City University of New York, for example, expressed concerns that the situation at NYU could impact public institutions as well. Andera Morrell, “What Does the Fate of NYU’s Graduate Student Union Hold for CUNY?” *available at* http://web.gc.cuny.edu/advocate/SEP05ISSUE/html/Sep05_nyu_morrell.htm (expressing concern that if the conditions for graduate students erode in the private universities, it will hurt the graduate students at public colleges and universities where funding is already of grave concern).